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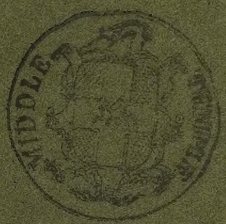

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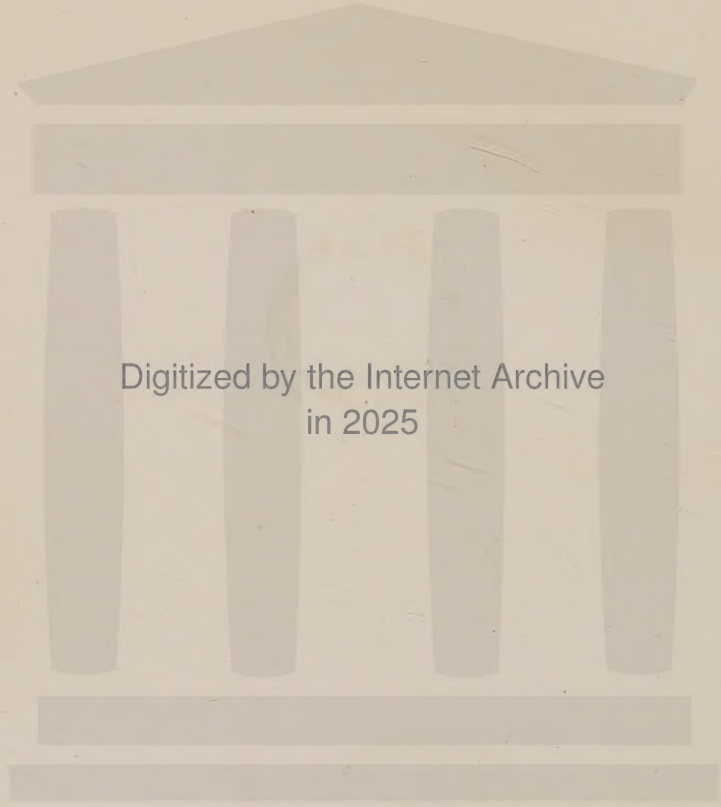
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Vol. III.

LEASES—MORTGAGES.

BYTHEWOOD & JARMAN'S

SYSTEM OF CONVEYANCING.

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WITH

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BARRISTERS-AT-LAW.

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PREFACE

TO THE

THIRD VOLUME OF THE FOURTH EDITION.

—•—

The text of the Preliminary Dissertations on Leases and Mortgages has been as far as possible preserved in this Volume. But changes in the law and recent decisions have rendered it necessary that considerable alterations should be introduced in many places, and that some parts should be altogether re-written.

The Editor desires to express his acknowledgments to Mr. S. L. B. Druce, of Lincoln's Inn, for much valuable aid in revising the Precedents of Agricultural Leases and Agreements of Leases, and for the observations on the effect and operation of the Agricultural Holdings (England) Act, 1883, which will be found in Chapter X. of the Preliminary Dissertation on Leases; and to Mr. R. Booth, of Lincoln's Inn, for the Preliminary Remarks on Licences contributed by him. His thanks are also due to Mr. Booth and to Mr. A. Turnour Murray, of Lincoln's Inn, for their assistance in revising the sheets for the press; and to numerous members of both branches of the legal profession for the loan of precedents and for valuable suggestions and other assistance.

L. G. GORDON ROBBINS.

March, 1886.

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ADDENDA ET CORRIGENDA.

Page 81, note (*i*). *For* "in this Act," *substitute* "in the Settled Land Act, 1882."

,, 84, note (*kk*). *Mortgagor's power of distress.*—As to the power of a mortgagor in possession to distrain in his own name for rent due in respect of mortgaged premises: see *Reece* v. *Strousberg*, 54 L. T. 133.

,, 164, line 10. *For* "But, since the passing of the Judicature Acts," *substitute* "But, as regards *actions* by joint owners for the recovery of rent, since the passing," &c.

,, 172, line 18. *Protection from distress of agisted Cattle.*—The "fair price" mentioned in sect. 45 of the Agricultural Holdings Act, 1883, means any fair equivalent, not necessarily in money; where cows were agisted on the terms that the agister should take their milk in return for their keep, it was held that they were protected by the Act from distress: *London and Yorkshire Bank* v. *Belton*, 15 Q. B. D. 457.

,, 181, line 36. *Declaration by Lodger.*—There is nothing in the stat. 34 & 35 Vict. c. 79, to render insufficient a declaration by a lodger under that Act, which omits to state that the declarant is a lodger, or that no rent is due: *Ex parte Harris*, 16 Q. B. D. 130.

,, 186, two lines from foot. *For* "36 & 37 Vict." *substitute* "38 & 39 Vict."

, 243, line 28. *Covenant for quiet enjoyment.*—The decision in *Dawson* v. *Dyer*, 5 B. & Ad. 586, was followed in the recent case of *Edge* v. *Boileau*, 16 Q. B. D. 117, in which it was held that a covenant for quiet enjoyment and lessee's covenants to pay rent and repair were independent covenants.

,, 287, line 12. *Yearly tenancy; Notice to quit.*—The decision in *Barlow* v. *Teal* has been affirmed by the Court of Appeal: see 15 Q. B. D. 501.

,, 311, line 20. *For* "Cleves" *substitute* "Elwes."

,, 559, marginal note. *For* "mortgagee" *substitute* "mortgagor," *and for* "lessee's powers" *substitute* "lessor's powers."

,, 646, line 35. *Solicitor's lien.*—A solicitor's lien does not extend to general debts, *e.g.*, costs incurred in relation to promotion of a company before incorporation: *Re Gallande*, 31 Ch. D. 296.

,, 795, line 11. *Agreements for Sale on Hire System.*—In the case of the *North Central Wagon Co.* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (W. N. 1886, p. 61; *S. C.*, 34 W. R. 430), a hiring agreement of wagons to a company was held, under the circumstances, to be a loan transaction, and therefore void as not being in accordance with the form of bill of sale prescribed by the Act of 1882.

Page 795, line 27. *License to take possession of Chattels.*—A document giving a license to take immediate possession of chattels as security for a debt is a bill of sale within sect. 4 of the Bills of Sale Act, 1878, and therefore will be void, unless registered, and made "in accordance with" the form prescribed by the Act of 1882: *Ex parte Parsons, Re Townsend*, 16 Q. B. D. 532.

,, 803, line 42. *Apparent possession.*—As to what will amount to taking actual possession by the grantee of a bill of sale so as to prevent chattels from being in the "apparent possession" of the grantor within sect. 4 of the Bills of Sale Act, 1878: see *Gibbons* v. *Hickson*, 53 L. T. 910.

,, 957, line 22. *Priority by possession of deeds.*—See *Graham* v. *Skipper*, 53 L. T. 940, as to how far the omission of a legal mortgagee to obtain possession of, or make inquiries with regard to the title deeds will affect his priority. In that case it was also held that an undertaking in a memorandum of deposit to execute a legal mortgage will not give an equitable mortgagee any priority over a mortgagee having the legal estate without notice of the equitable incumbrance.

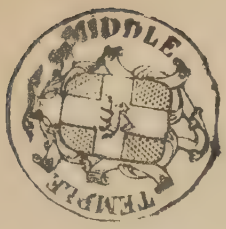
,, 1114, end of note (*m*). *Conveyance "as beneficial owner" in Bill of Sale.*—The question whether a bill of sale whereby the grantor assigns chattels "as beneficial owner" is void, as not being in accordance with the form prescribed by the Bills of Sale Act, 1882, has occasioned much conflict of judicial opinion. In the case of *Ex parte Stanford, Re Barber*, such a bill of sale was upheld by *Hawkins* and *Cave*, JJ., and on the first hearing of the appeal, this decision was upheld by Lord *Esher*, M.R., and *Lindley* and *Lopes*, L.JJ.: see W. N. 1886, p. 14; but subsequently their lordships caused the point which arose on the Conveyancing, &c., Act, 1881, to be re-argued before them, and after such re-argument reversed their previous decision, and pronounced the bill of sale void: see W. N. 1886, p. 23. It appearing however that by sect. 2 of the Bankruptcy Appeals (County Courts) Act, 1884, the decision of the Court of Appeal, on an appeal from a Divisional Court, is final, and that consequently no appeal to the House of Lords could be allowed, it was directed that the point should be re-argued again before the full Court of Appeal: see W. N. 1886, p. 45. This has been recently done, but judgment has been reserved, and not as yet delivered.

,, 1114, note (*p*). *Add*: "See also *Consolidated Credit and Mortgage Corporation* v. *Gosney*, 16 Q. B. D. 24."

,, 1114, note (*q*). See also as to bills of sale in which the advance is made repayable "on demand:" *Mackay* v. *Merritt*, 34 W. R. 433.

,, 1116, note (*t*). *Form of Bill of Sale.* In the case of *Myers* v. *Elliott*, 16 Q. B. D. 526, a bill of sale to secure an advance of 115*l.* contained a covenant by the grantor to pay that sum together with 15*l.* for agreed amount of interest and bonus, making an aggregate sum of 130*l.* by twelve equal monthly instalments; the bill further provided that on default the grantee might seize and sell, and it appeared that, upon the construction of the document, it empowered the grantee to exercise such power on default in payment of any one instalment, and to retain out of the proceeds of sale the whole 130*l.*, and the bill of sale

was accordingly held to be void. It is submitted that the form in the text (Precedent XLVII.) is not open to objection in this respect, as it only renders payable on default in payment of an instalment the principal moneys together with interest *up to the default.* The form of bill of sale prescribed by the Act of 1882 is far from complete or satisfactory, and in many cases additions or variations may appear convenient, and, indeed, absolutely necessary, if the security is to be worth anything. Any addition to or variation from the prescribed form can, however, only be suggested with diffidence, and should be introduced with caution, and only after reference to the latest reported of the numerous and somewhat conflicting decisions on the subject.



Jarman and Bythewood's

PRECEDENTS IN CONVEYANCING

LEASES.

PRELIMINARY DISSERTATION.

CHAPTER I.

WHO MAY BE LESSORS AND LESSEES.

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1. Who may be Lessors, Generally.

Who may be Lessors generally.

Persons absolutely entitled.

Every person (*a*) absolutely entitled in possession to any interest in land, and not being under any legal disability, may dispose of such land either to the full extent of his interest or for any less estate or interest therein. Thus, a tenant in fee simple of freehold lands may either convey the land in fee simple, or may create thereout an estate for life, or in tail, or several estates for life, or in tail successively; or he may demise the land for any number of lives or years at such rents, and generally upon such terms, and subject to such conditions in all respects as he may think proper: Com. Dig. *Estates by Grant* (G. 2).

Tenants in tail or for life.

So, a tenant in tail, or for life, may grant leases which will be valid during his life, though in the former case the lease would at Common Law be voidable by the issue in tail after the death of the tenant in tail, inasmuch as such issue claim under the original grantor, and consequently by title paramount to any disposition of the property by the limited owner; the issue in tail might, however, affirm the lease by acceptance of rent after the death of the tenant in tail, and thereupon the lease would become valid and indefeasible. See *Pennant's Case*, 3 Rep. 64; *Machell* v. *Clarke*, 2 Ld. Raym. 778;

Corporations, &c.

(*a*) As to leases by corporations, ecclesiastical and civil, see *post*, p. 45.

Doe d. *Southouse* v. *Jenkins*, 5. Bing. 469. Such leases are (independently of statutory enactment,) absolutely void as against the remainderman or reversioner: Com. Dig. *Estates by Grant* (G. 2); Bac. Ab. *Leases* (D.); see also *Doe* d. *Phillips* v. *Rollings*, 4 C. B. 188 (*b*). **Who may be Lessors generally.**

A tenant for life, except so far as authorised by express powers of leasing in the instrument from which he derives his title, or by the statutory powers hereafter considered, can only grant leases determinable on his death; or, in the case of an agricultural tenancy, at the end of the then current year thereof (see *post*, p. 7), and such leases are incapable of confirmation by the remainderman: *Doe* d. *Potter* v. *Archer*, 1 B. & P. 531; *Doe* d. *Simpson* v. *Butcher*, 1 Doug. 50; see also *Smith* v. *Widlake*, 3 C. P. D. 10; but, of course, the remainderman may immediately grant to the tenant a fresh lease on the same terms as the lease which has determined; and acceptance of rent by the remainderman may be evidence of a new tenancy from year to year: *Doe* d. *Martin* v. *Watts*, 7 T. R. 83; *Cornish* v. *Stubbs*, L. R. 3 C. P. 334; *Doe* d. *Pennington* v. *Tannière*, 12 Q. B. 998. The liability of the lessee ceases with the determination of the tenancy by the death of the tenant for life, or at the end of the current year of the tenancy, as the case may be, and the lessee is not estopped from showing that his lease has so determined: *Neave* v. *Moss*, 1 Bing. 360; and see *post*, p. 7. Leases by tenant for life incapable of confirmation.

A lease by a tenant *pur autre vie* will determine on the death of the *cestui qui vie* (*c*), or in the case of an agricultural tenancy at the end of the current year thereof (*post*, p. 7), but not on the death of Tenant *pur autre vie.*

(*b*) The powers of leasing conferred by statute on limited owners will be considered, *infra*, p. 24 *et seq.* Statutory powers.

(*c*) As to the presumption of the death of a *cestui qui vie* after seven years' absence, see stat. 19 Car. 2, c. 11. Any person interested may, upon affidavit that he has cause to believe that the death of a *cestui qui vie* is being concealed, obtain an order for his production, and in case of non-compliance with the order, may enter him as actually dead: see stat. 6 Ann. c. 72. These references are to the Revised Edition of the Statutes.

Who may be Lessors generally.

the lessor: 2 Bl. Com. 136; indeed, a lease may be granted by a tenant *pur autre vie* to commence at his own death: *Dale's Case*, Cro. Eliz. 182.

Tenants by the curtesy and in dower.

Leases by tenants by the curtesy and in dower, independently of the statutory powers hereinafter stated (see *post*, p. 24 *et seq.*), become absolutely void at the lessor's death, or at the end of the current year of the tenancy (see *post*, p. 7), so that no acceptance of rent by the heir can make it good: *Miller* v. *Mainwaring*, Cro. Car. 398; see Bac. Ab. tit. *Leases* (I.).

Leases by tenant for life and remainderman.

It may be here observed, that where a tenant for life and a reversioner or remainderman in fee join in a lease, it is construed as the several lease of each party, according to his estate, with the confirmation of the other, *i.e.* as the lease of the tenant for life during his life, with the confirmation of the reversioner or remainderman, and after the decease of the tenant for life, as the lease of the reversioner, with the confirmation of the tenant for life: Co. Litt. 45 a; *Treport's Case*, 6 Rep. 14. The proper form of the covenants in such a case is, with "[*tenant for life*] and his assigns during his life, and, after his decease, with [*reversioner in fee*], his heirs and assigns." The proviso for re-entry should be framed in a similar manner (*d*).

Leases in excess of lessor's interest.

If a lease be granted for a longer term than is warranted by the lessor's estate or interest, it will generally operate as a valid demise for so long a term as it is within his power to grant; so, "if a tenant for life make a lease for twenty years, and covenant that the defendant shall enjoy it during the term, that shall be during his life; for the term endeth by his death." See *Bragg* v. *Wiseman*, Br. & G. at p. 22.

(*d*) In the Precedents contained in this volume the form of the covenants and provisoes is generally controlled by definitions of the parties in the Interpretation Clause. The concurrence of the remainderman is now necessary only where it is desired to grant leases for exceptionally long terms, or under special conditions without an application to the Court; under ordinary circumstances leases of settled lands are granted by limited owners without any such concurrence under their statutory powers, as to which see *post*, p. 24 *et seq.*

Who may be Lessors generally.

Where a person seised in fee of certain lands, and seised for life, with power of leasing, of other lands, demised the whole at one entire rent by deed, which was not well executed according to the power, the demise was held to be valid with respect to the lands of which the lessor was seised in fee, but not with respect to the other lands: *Doe* d. *Vaughan* v. *Meyler*, 2 Mau. & S. 276. And where a tenant for life with a power of leasing, granted a lease for a term absolute, without reference to the power, it was held that the lease nevertheless operated as an execution of the power, and did not determine on his death: *Campbell* v. *Leach*, Amb. 740.

Leases by estoppel.

If a lease be granted by deed by a person, who has at the time of the demise no estate in the land demised, to a person who enters and takes possession under the lease, a tenancy and reversion by estoppel are at once constituted; that is to say, during the continuance of the lease, the lessee is not allowed to dispute his lessor's title (*e*); nor is the lessor allowed to disclaim his interest in the land; and if the lessor during the term acquires the land, by purchase or otherwise, the lease will thereupon become as absolutely valid and unavoidable as if the lessor had been actually seised of the land at the time of the demise: Bac. Ab. tit. *Leases* (O.); see also Co. Lit. 476, and *Sturgeon* v. *Wingfield*, 15 M. & W. 224; *Doe* d. *Marriott* v. *Edwards*, 5 B. & Ad. 1065. The estoppel ceases on the expiration of the lease: *Bayley* v. *Bradley*, 5 C. B. 396; or of a renewal thereof: *London and North Western Rail. Co.* v. *West*, L. R. 2 C. P. 553. Where a demise operates by estoppel, the lessor and his heirs, devisees, or assigns, may sue on the covenants contained in the lease: *Cuthbertson* v. *Irving*, 6 H. & N. 135. A tenant is not, however, estopped from showing that his landlord's title has expired: *Neave* v. *Moss*, 1 Bing. 360;

(*e*) It was formerly thought that where the fact that the lessor had no estate appeared by the lease itself, there would be no estoppel, but this doctrine must now be taken to be altogether overruled: *Jolly* v. *Arbuthnot*, 4 De G. & J. 224; *Morton* v. *Woods*, L. R. 4 Q. B. 493.

Who may be Lessors generally.

Delaney v. *Fox*, 2 C. B. N. S. 768; *Claridge* v. *Mackenzie*, 4 M. & Gr. 143; *Doe* d. *Leeming* v. *Skirrow*, 7 A. & E. 157; *Weld* v. *Baxter*, 11 Exch. 816. Nor will a description in a lease of land as "meadow" estop the tenant from showing that it had in fact been converted into arable land before the lease was granted, and so used ever since: *Skipworth* v. *Green*, 8 Mod. 311. The doctrine of estoppel applies to underleases: *Doe* d. *Prior* v. *Ongley*, 10 C. B. 25. See further as to estoppel *sub* tit. PURCHASES, in a subsequent Volume of this Work.

Demise of right of entry. Stat. 8 & 9 Vict. c. 106, s. 6.

Formerly a mere right of entry could not be demised, and accordingly to constitute a valid lease, it was necessary that the lessor should be in actual possession of the lands intended to be demised. But by the Stat. 8 & 9 Vict. c. 106, sect. 6, it is enacted:

Contingent, &c., interests and rights of entry to be alienable by deed.

"That, after the first day of October, 1845, a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may be disposed of by deed (*f*); but so that no such disposition shall, by force only of this Act, defeat or enlarge an estate tail."

Dispositions by married women under the Act require acknowledgment conformably to the Stat. 3 & 4 Will. 4, c. 74, or (in Ireland) the Stat. 3 & 4 Will. 4, c. 92.

It is to be observed that this Statute "does not relate to a right to repossess or re-enter for a condition broken, but only to an original right to recover lands where there has been a disseisin, or where the party has a right to recover lands and his right of entry and nothing but that remains:" *per Pollock*, C.B. in *Hunt* v. *Bishop*, 8 Exch., at p. 680; see also *Bennett* v. *Herring*, 3 C. B. N. S. 370.

(*f*) The precise effect of this section as regards the creation of a freehold estate *in futuro* appears to be not altogether free from doubt: see *Boddington* v. *Robinson*, L. R. 10 Ex. at p. 274.

Who may be Lessors generally.

The old law as to the termination of tenancies of farms, &c., on the death of a landlord who is a limited owner, is altered by the Stat. 14 & 15 Vict. c. 25, which enacts:

Stat. 14 & 15 Vict. c. 25.

On determination of leases or tenancies under tenant for life, &c., instead of emblements, tenant to hold until expiration of current year, &c.

Sect. 1. "That where the lease or tenancy of any farm or lands held by a tenant at rack rent shall determine by the death or cesser of the estate of any landlord entitled for his life, or for any other uncertain interest, instead of claims to emblements (*g*), the tenant shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy, and shall then quit, upon the terms of his lease or holding, in the same manner as if such lease or tenancy were then determined by effluxion of time or other lawful means during the continuance of his landlord's estate; and the succeeding landlord or owner shall be entitled to recover and receive of the tenant, in the same manner as his predecessor or such tenant's lessor could have done if he had been living or had continued the landlord or lessor, a fair proportion of the rent for the period which may have elapsed from the day of the death or cesser of the estate of such predecessor or lessor to the time of the tenant so quitting, and the succeeding landlord or owner and the tenant respectively shall, as between themselves and as against each other, be entitled to all the benefits and advantages, and be subject to the terms, conditions, and restrictions to which the preceding landlord or lessor and such tenant respectively would have been entitled and subject in case the lease or tenancy had determined in manner aforesaid at the expiration of such current year: Provided always, that no notice to quit shall be necessary or required by or from either party to determine any such holding and occupation as aforesaid."

2. Leases under Express and Statutory Powers.

Powers of leasing.

Powers of Leasing.]—It has been seen that at Common Law, a limited owner of land cannot grant leases which will be valid beyond the extent of his own estate or interest: *vide supra.* As this rule was often productive of great inconvenience, it became the practice to insert in settlements by deed or will express powers, enabling limited owners and trustees of lands comprised in such instruments to grant leases

(*g*) As to emblements, *vide infra*, Chap. X.

Leases under Powers in Settlements, &c.

for specified terms of years, which would not be liable to be determined by the termination of the limited estates. And various statutory enactments have been passed from time to time authorising such leases of settled lands.

Leases under powers in settlements and wills.

Leases under Powers in Settlements and Wills.]—In modern times it has been, till recently, the usual practice that settlements and wills creating trusts or successive limitations of lands, should contain powers of granting occupation leases for twenty-one years (or, in Ireland, for thirty-five years), and also building, repairing, and mining leases for longer terms, where required by the nature of the property. These powers were generally given to the tenant for life if of full age, and to the trustees during the minority of any person entitled to the rents and profits of the property. As a general rule leases under such powers control and overreach all the powers and estates of the settlement or will: Sugd. Pow. 483; and see *Whitelock's Case*, 8 Rep. 71; *Doe* v. *Thomas*, 9 B. & C. 288; *Doe* v. *Rogers*, 5 B. & Ad. 764. Such powers may be exercised *toties quoties*: Bridg. 97.

Restrictions imposed by leasing powers.

The restrictions which are usually annexed to powers of leasing relate (i.) to the lands to be demised; (ii.) to the term for which the demise may be made; (iii.) to the rent to be reserved; (iv.) to the covenants and conditions to be inserted in the leases. It is proposed here briefly to consider under these headings what demises may be made under different leasing powers (*h*).

As to the lands to be demised.

(i.) As to the lands to be demised. Powers of leasing are sometimes restricted to lands which have been usually let or demised (*i*), so as to prevent the

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(*h*) For a fuller discussion of the subject of leasing powers than is here possible, reference may be made to Lord St. Leonards' Treatise on Powers, chap. xviii. p. 711 *et seq.*; Farwell on Powers, p. 472 *et seq.*; Woodfall Land. and Ten., p. 183 *et seq.*

(*i*) The words "usually demised" include every species of demise by deed or other instrument, or by parol, at will, from year to year, for years or for lives: *Bangor* v. *Haynes*, Cro. Jac. 76; *S.C.* sub nom. *Dean and Chapter of Worcester's Case*, 6 Rep. 37; *Right* v. *Thomas*, 3 Burr. 1441; *S. C.* 1 W. Bl. 446.

Leases under Powers in Settlements, &c.

tenant for life from leasing the principal mansion-house, park, and demesne, and other lands usually occupied by the owners of the estate (as to which see *post*, p. 37.) To answer this description it must be shown by production of old leases, or other evidence, that the lands have been let more than once, and the last demise must have been within twenty years of the time at which it is proposed to grant a lease under the power: *Tristram* v. *Baltinglass*, Vaugh. 31. See also *Foot* v. *Marriot*, 3 Vin. Ab. 429, pl. 9; *Earl of Cardigan* v. *Montague*, Sugd. Pow. App. 918; *Pomery* v. *Partington*, 3 T. R. 665; in which cases the power was to demise *all* the lands, reserving the *actual or ancient rents*. But where there appears an intention of the settlor, upon the construction of the power, that the tenant for life may demise all the lands whether previously let or not, such intention will prevail, although there be a direction that the ancient rents are to be reserved; and the restriction will be held to apply only to such lands as have been previously let: see *Comberford's Case*, 2 Roll. Ab. 262, where the power was to lease the lands or any part thereof "so that as much rent, or more, was reserved upon each lease, as was reserved in respect of it within the two years immediately preceding"; see also *Walker* v. *Wakeman*, 1 Vent. 294; *S. C.* 2 Lev. 150; *Winter* v. *Loveden*, 1 Ld. Raym. 267; *S. C.* Carth. 427; *Goodtitle* v. *Finucan*, 2 Doug. 565.

Mines.

When by a settlement certain lands together with the mines, &c., thereunder were vested in trustees, but the power of leasing did not mention the mines, it was held that the trustees had no authority to grant leases of unopened mines: *Clegg* v. *Rowland*, L. R. 2 Eq. 160.

Sporting rights.

A general power to lease lands, or any of them, authorises the lessor to reserve to himself sporting rights over the lands demised: *Goodtitle* v. *Finucan*, Doug. 566; but not to grant a lease of part of the lands, with right of sporting over the rest: *Dayrell* v. *Hoare*, 12 A. & E. 356.

Inclusion in lease of lands not within power.

The donee of a power of leasing framed in the usual form, cannot grant a valid lease at an entire rent of premises under the power, together with other lands

Leases under Powers in Settlements, &c.

to which the power does not extend: *Doe* d. *Earl of Egremont* v. *Stephens*, 6 A & E. 208. So where trustees with power of leasing of two separate mining properties, held by them on distinct trusts, agreed to lease them together at one rent, it was held that the agreement was *ultra vires*, and that specific performance could not be enforced: *Tolson* v. *Sheard*, 5 Ch. D. 19.

Improvements.

Recent improvements by erection of new buildings, &c., will not be deemed such an alteration of the property, as to vitiate the lease by making the rent issue out of hereditaments not within the power: *Read* v. *Neale*, 1 Leon. 147.

For what terms and interests leases under powers may be granted.

(ii.) As to the term for which the demise may be made. A power to lease for lives or years will authorise a lease for a certain number of years, or for a certain number of lives, or for a specified number of years determinable upon a life or lives: *Commons* v. *Marshall*, 6 B. P. C. 168. But where such a power was given, "but so as no greater estate than for three lives should be at any one time in being on any part of the premises," it was held that a lease could not be granted under the power for years determinable on lives: *Roe* d. *Brune* v. *Prideaux*, 10 East, 158. So also, a power to lease for lives will not authorise a lease for years determinable on lives: *Whitelock's Case*, 8 Rep. 696; but under a power to grant leases for several lives, a lease may be granted to several persons for their lives and the survivors of them: *Alsop* v. *Pine*, 3 Keb. 44, pl. 16; *Doe* v. *Hardwicke*, 10 East, 549; see also *Baugh* v. *Haynes*, Cro. Jac. 76.

Where power authorises leases for lives.

Where power authorises leases for years.

Where a power is given to grant leases for any number of years not exceeding a specified number, or simply for a specified number of years, a lease may be made for any term within the limit: *Isherwood* v. *Oldknow*, 3 Mau. & S. 382; *Euston* v. *Pratt*, 2 H. & C. 676. So, a power to lease for any term not exceeding twenty-one years was held to warrant a lease for twenty-one years, determinable at the end of seven or fourteen years at the lessor's option: *Edwards* v. *Milbank*, 4 Drew. 606. A power to grant leases for any term not exceeding three lives and forty-one years was held to authorise a lease for

three lives and forty-one years from a specified day preceding the death of the survivor of the *cestuis qui vie*: *Re Crommelin Estate*, 1 Ir. C. L. Rep. 182. A power to lease for three lives will authorise a lease for two lives, or one life: Bridg. 91. Where a power to lease mines, &c., following a gift of a life estate in the real property of which they form part, is expressed in general terms, but without saying for what terms the leases may be granted, the tenant for life is not necessarily thereby empowered to grant leases for a term absolute to continue after his death: *Vivian* v. *Jegon*, L. R. 3 H. L. 285. In such a case a tenant for life would now have recourse to his statutory powers of leasing, as to which see *post*, p. 28.

Leases under Powers in Settlements, &c.

If the donee of a power of leasing wishes to grant a lease in reversion (*j*), he must be careful to see that such a lease is warranted by the terms of the power. "In all well-drawn powers of leasing, when it is intended that a lease in reversion may be granted, it is expressly declared so; and if a reversionary lease is not to be granted, it is expressly declared that the lease shall be made to take effect

Leases in possession, reversion, and *in futuro*.

(*j*) Lord Holt has thus explained the nature of a lease in reversion: "In the most ample sense, that is said to be a lease in reversion which hath its commencement at a future day, and then it is opposed to a lease in possession; for every lease that is not a lease in possession is said to be a lease in reversion:" 1 Com. 39. But in the more usual sense, (in which the term is used in the observations in the text), a lease in reversion signifies a lease to begin from the determination of a lease in being. A lease, granted under a power, to commence from a future date where there is no prior lease subsisting, or, if there is such lease, then not dependent thereon, is said to be a lease *in futuro*. It may be observed that whether a lease be made to commence a single day or a hundred years after the date of the instrument creating it, makes no difference; the lease will in either case be a lease *in futuro*, and void unless authorised by the power. *Bowes* v. *East London Waterworks*, Jac. 374. It has been settled after much difference of judicial opinion that a lease to commence from the day of the date of execution is a lease in possession: *Pugh* v. *Duke of Leeds*, Cowp. 714. A lease apparently invalid as commencing *in futuro* may be upheld as a lease in possession if in fact executed at or after the time at which it was to commence: *Campbell* v. *Leach*, Amb. 740; and extrinsic evidence may be adduced to show the actual time of execution: *Doe* d. *Reece* v. *Robson*, 15 East, 32.

Leases in reversion and *in futuro*.

Leases under Powers in Settlements, &c.

in possession, and not in reversion, or by way of future interest : " Sugd. Pow. 747.

Where power does not state if leases are to be in possession or not.

Where a power is given generally to make leases of lands in possession at the date of the settlement, without mentioning at what time they are to commence, it will be construed so as only to authorise leases in possession and not leases in reversion or *in futuro : Countess of Sussex* v. *Wroth*, Cro. Eliz. 5 ; see also *Doe* v. *Cavan*, 5 T. R. 567. But where the estate is in lease at the time of the settlement the donee of a *general* power to lease may grant reversionary leases to commence upon the determination of the subsisting leases : *Marquis of Northampton's Case*, Dyer, 357a ; 2 Ro. Abr. 261, pl. 8. The general rule is stated in *Coventry* v. *Coventry*, 1 Com. 312, to be that a general power must be restrained to leases in possession, yet if there is anything to explain the intention of the parties to extend it to make leases in reversion, it may be extended thereto : see Sugd. Pow. 753, and see MS. report of the case in Lincoln's Inn Library (27 April, 1719). This rule is apparently founded on the consideration that where the estate is in lease, the tenant for life, unless permitted to grant reversionary leases, might never have an opportunity of exercising his power. But even in this case he cannot apparently grant leases *in futuro : Shecomb* v. *Hawkins*, Cro. Jac. 318. So also, in order to carry out the intention of the settlor, a power which does not expressly authorise reversionary leases or leases *in futuro* may, upon its construction, be held to have that effect by implication : so, a power to grant leases for any number of years not exceeding ninety-nine years " from the time of making the demise," was held to authorise a lease for sixty years, to commence twenty years after the date thereof : *Doe* v. *Hiern*, 5 Mau. & S. 40.

Where power authorises leases in possession.

But where in a settlement of an estate in lease the power is expressly to make " leases in possession," a lease in reversion will not be valid : *Opey* v. *Thomasius*, Ld. Raym. 132. It has been said by Mr. Powell, in commenting on the case of *Fox* v. *Prickwood*, Cro. Jac. 347, that " if there be a power

Leases under Powers in Settlements, &c.

to make leases in possession expressly, which attaches upon an estate, part of which is in possession and other part thereof in reversion at the creation of the power, the donee of the power may immediately make leases in possession of the estate in reversion, as well as of that in possession:" see Powell on Powers, 425. But that case (which is also reported in 2 Bulstr. 216, and 2 Ro. Abr. 260, pl. 5) only decided that a power to grant leases in possession authorised the granting of leases of land in lease at the time of the settlement (which was by time), on the expiration of the former leases, by a tenant for life whose own estate was reversionary: and the principle sought to be extracted does not appear to be involved in this case: see Sugd. Pow. 755.

Concurrent leases.

When the power is to grant leases in possession only, the donee may make a concurrent lease to commence immediately, although the lands are then held under an existing lease: *Berry* v. *Riche*, Hard. 412. So where a tenancy from year to year has expired, a valid lease in possession may be granted though the tenant has a right to depasture &c., till a future day: *Doe* v. *Calvert*, 2 East, 376. And a lease to take effect in possession will be good, although the land is in the occupation of tenants from year to year, or at will, if, at the time the lease is granted, notice is given to the tenants to pay their rent to the lessee: *Goodtitle* v. *Finucan*, Dougl. 565. See *post*, as to surrender of leases and grant of new leases, the underleases being unexpired.

Custom.

An unauthorised lease *in futuro* or in reversion will not be rendered valid by showing that the settlor was in the habit of granting such leases, or that it is in accordance with the custom of the country. So where, under a power to lease in possession and not in reversion, a lease was granted to a tenant in possession, as to the arable land, from the 13th of February then past, and as to the pasture from the 5th of April next ensuing, it was held that the lease was void as to all the lands: *Doe* d. *Allan* v. *Calvert*, 2 East, 376.

As to the rents to be reserved.

(iii.) As to the rents reserved. Where lands have been usually leased for lives, with fines as the lives

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or leases drop, the tenant for life, unless forbidden by the terms of his power of leasing, will not be obliged to let the lands at a rack rent, but may demise them, reserving the usual fines and rent: *Right* v. *Thomas*, 3 Burr. 1441. And where a power was given to a tenant for life to grant leases with or without fine, rendering such rents and services as he should think fit, it was held that a lease whereby no rent was reserved was good: *Talbot* v. *Skipper*, Skin. 427. Fines payable under leases for lives have hitherto been considered among the annual profits, and to belong to the tenant for life: *Taylor* v. *Horde*, 1 Burr. 121; and this rule has been recently reaffirmed by the Court of Appeal (reversing the decision of *Bacon*, V.-C.) in the case of *Brigstocke* v. *Brigstocke*, 8 Ch. D. 357; see also *Earl Cowley* v. *Wellesley*, L. R. 1 Eq. 656; *Simpson* v. *Bathurst*, L. R. 5 Ch. A. 193. But by the Settled Land Act, 1884 (47 & 48 Vict. c. 18), sect. 4, it is provided that fines taken on leases granted under the Act of 1882 are to be deemed capital money under that Act.

Fines whether capital or income.

Leases for lives reserving fines as well as rent were formerly very general in Ireland, and are even now not uncommon. But in England it has been the usual practice in framing leasing powers to require the best rent to be reserved, and expressly to prohibit the taking of fines. Whether the best rent is reserved is a question of fact to be decided by the jury. The question as to what stipulations are compatible with a reservation of the best rent is very fully discussed by Lord St. Leonards: see Sugd. Pow. 778 *et seq.* The following points may here be briefly noticed:—Where a power of leasing requires the best rent to be reserved, no fine must be taken for granting or renewing a lease, even though the taking of such fines be not expressly forbidden: *Doe* v. *Rogers*, 5 B. & Ad. 755; see *Clarke* v. *Smith*, 9 Cl. & F. 126. A power to lease at the best rent *simpliciter* does not authorise a lease at an undervalue in consideration of improvements by the tenant (*k*), however valuable: *Roe* v. *Archbishop of*

What is the "best rent."

(*k*) A tenant for life who has not assigned his interest by way

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York, 6 East, 86; but in leases of buildings a covenant by the lessee to keep the premises in repair may be taken into consideration in estimating what is the best rent: *Doe* v. *Bettison*, 12 East, at p. 308 (*a*). The "best rent" is not necessarily the highest that can be obtained, but other matters besides the mere amount of rent may fairly be taken into account in the choice of a tenant, such as the ability and good management of the tenant: *Doe* v. *Radcliffe*, 10 East, 278; the test has been stated to be "whether the man who makes the lease has got as much for others as he has for himself; for if he has got more for himself, that is decisive evidence against him; the Court must see that there is reasonable care and diligence exerted to get such rent as, care and diligence being exerted, circumstances mark out as the rent likely to be obtained:" *per* Lord *Eldon*, C., in the *Queensberry Case*, cit. Sugd. Pow. 785. The rent must be the "best rent" which can be obtained at the time when the lease is made: *Doe* d. *Griffith* v. *Lloyd*, 3 Esp. 78; and it must be reserved throughout the term, so as not to prejudice the tenant for life or the remainderman: *Mountjoy's Case*, 5 Rep. 6, a, b; *Doe* d. *Sutton* v. *Harvey*, 1 B. & C. 426. The word "rent" in leasing powers does not necessarily mean money. So where in a settlement a power was given to grant mining leases, which required that every demise should reserve the "best rent," and contain a condition for re-entry on rent not being "*paid*," it was held that a reservation of a proportion of the ore in lieu of rent was good: *Campbell* v. *Leach*, Amb. 740.

How the rent is to be reserved.

Where the power requires the rent to be reserved at particular times, it must be made payable at the times and in manner prescribed; but when merely the best yearly rent is required to be reserved, it may be made payable quarterly or half-yearly: *Campbell* v. *Leach*, Amb. 740; *Earl of Cardigan* v. *Montague*,

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of mortgage or otherwise may now, in granting leases under his statutory power, take into account in fixing the rent the amount laid out or to be laid out by the tenant for the benefit of the property. See Settled Land Act, 1882, sec. 7 (2), *post*, p. 31.

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Sugd. Pow. App. 918. If, however, a power prescribes the reservation of "the usual and accustomed yearly rents," the former times and modes of payment must be adhered to: *Doe* v. *Wilson*, 5 B. & Al. 363. Where a lease prescribes reservation of rent by half-yearly payments, the year must be divided for that purpose as near as may be into two equal periods: *Doe* v. *Morse*, 4 Tyr. 185. A reservation of the half-year's rent before the expiration of the last half-year of the term is valid and proper: *Rutland* v. *Doe*, 10 Cl. & F. 419. The rent must be reserved in such a manner that all persons in remainder claiming under the settlement whereby the leasing power was created, may be able to compel payment of the rent: Cru. Dig. tit. xxxii., c. xv., s. 61.

To whom the rent should be reserved.

Powers of leasing usually require the rent reserved to be incident to the reversion; and accordingly, in leases made thereunder, the rent is often reserved either to the lessor and his heirs, or else to the lessor and, after his decease, to the person or persons who shall for the time being be entitled to the reversion and inheritance of the premises under the settlement or will creating the power. Both these modes of expression have the same legal meaning, and are equally good and effectual in law. But as is laid down in *Whitelock's Case*, 8 Rep. 69 b, "the most clear and sure way is to reserve rent yearly during the term, and leave the law to make the distribution without an express reservation to any person." The rule that the rent, if reserved generally during the term, will follow the reversion, was first laid down in *Whitelock's Case*, *supra*, where the lessor was the settlor, and has since been extended to leases made by a donee of a power who is not the settlor: *Berry* v. *White*, Bridg. 82; see also *Isherwood* v. *Oldknow*, 3 Mau. & S. 382; *Greenaway* v. *Hart*, 14 C. B. 340. In a more recent case, however, where an estate was conveyed to the use of trustees for a term of five hundred years, and subject thereto to the settlor for life, with remainders in strict settlement, and with power for the tenant for life to grant leases by deed either referring or not referring to

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the power, reserving the best rent to be incident to the immediate reversion; and the tenant for life granted a lease not referring to the power, reserving the rent to the lessor, his heirs, and assigns; it was held that the lease was not a valid execution of the power. It was admitted by the Court that if the lessor had been legal tenant for life in possession the general rule must have prevailed, but it was laid down that where the donee of such a power has no legal estate in possession, there can be no legal estate in reversion, and that in this case there was merely a legal estate in remainder expectant on the determination of the term; and consequently that the reservation of the rent was not incident to the immediate reversion, so as to be according to the power; it was also said that if the lease had referred to the power, it would have shown on the face of it that it was meant to be an execution of the power, and in that case the reservation of the rent to the lessor, his heirs, and assigns, might have been rejected as surplusage; the condition that the rent should be reserved so as to be incident to the reversion, would then have been fulfilled, and the lease might have been upheld: *Yellowly* v. *Gower*, 11 Exch. 274. This decision has been much criticised as narrow and inconsistent with established doctrines as to aiding the execution of powers: see Sugd. Pow. 814; Dav. Conv., Vol. III., p. 404. This question is, however, now of no practical importance as regards leases made after the 31st December, 1881, for by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sect. 10, rent reserved by a lease, and the benefit of the lessee's covenants are annexed to the legal reversion, notwithstanding that the lessor has no legal estate: see *post*, p. 233.

As to covenants, &c., to be inserted in leases under powers.

(iv.) As to the covenants and provisions proper to be inserted in leases under powers. Where a power does not require any particular covenants to be contained in the lease, the question is not whether a particular covenant is omitted, but whether on the whole the lease is a fraudulent or unfair execution of the power; for leases with very different covenants,

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although under similar powers, if fairly made, have at all times been supported: Sugd. Pow. 827. Where a power required the best rent to be reserved, it was held that the lease ought to have contained a covenant for payment of the rent, and a power of re-entry on non-payment, and also that a counterpart ought to have been executed: *Taylor* v. *Horde*, 1 Burr. 125; and see the notes thereon in 2 Sm. L. C. 606.

"Usual covenants."

It is sometimes prescribed in leasing powers that the leases granted thereunder shall contain the "ancient and accustomed covenants," or "usual covenants," or "usual and reasonable covenants." Where ancient and accustomed covenants are required to be inserted, the new leases must contain all the covenants contained in former leases: *Earl of Cardigan* v. *Montague*, Sugd. Pow. App. 918. Where usual covenants are required, the omission of a covenant answering that description will be fatal, and introduction of an unusual covenant will have the same effect: *Doe* v. *Sandham*, 1 T. R. 705. As to what are "usual covenants," see *post*, p. 118. Where the power prescribes the insertion of "usual and reasonable" covenants, the lease in existence at the time of the creation of the power should be taken as a guide as to what covenants the settlor regarded as such, and other covenants in former leases may be omitted: *Boardman* v. *Mostyn*, 6 Ves. 467; *Doe* d. *Earl of Egremont* v. *Stephens*, 6 A. & E. 208; *Doe* d. *Biddulph* v. *Hole*, 15 Q. B. 848.

Power of re-entry.

A reasonable qualification may be inserted in the power or proviso for re-entry, such as that it shall not be exerciseable unless the rent shall be in arrear for a specified time, *e.g.*, fifteen days and no distress: *Smith* v. *Lord Jersey*, 2 Br. & B. 473; or even forty-two days: *Doe* v. *Rutland*, 2 M. & W. 661. So, also, that the rent shall be in arrear, having been lawfully demanded: *Cox* v. *Day*, 13 East, 118; see also *Lord Tankerville* v. *Wingfield*, 2 Br. & B. 498; *Hotley* v. *Scot*, Lofft, 316; and Sugd. Pow. 822.

Where a period for re-entry is prescribed by the power it must not be exceeded; so where a power required that leases granted thereunder should con-

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tain a power of re-entry on non-payment of rent or non-performance of covenants within twenty-one days, a lease containing a power of re-entry in case the lessee should not repair in pursuance of his covenant in that behalf after six months' notice, was held to be void: *Doe* v. *Burrough*, 6 Q. B. 229. But the period for re-entry fixed by the lease may be more restricted than the power requires: *Cox* v. *Day*, 13 East, 118; *Doe* v. *Lock*, 2 A. & E. 705.

Repairing lease not a building lease (*l*).

A power to grant a building lease was held not to be well executed by a lease merely containing a covenant to keep in repair buildings already built or to be built on the land; "a reasonable covenant in a building lease must certainly be meant of a covenant to build; but there was none such in this lease:" *per Willes*, C. J., in *Jones* v. *Verney*, Willes, 169; see also *Doe* d. *Dymoke* v. *Withers*, 2 B. & Ad. 896; *Hallett to Martin*, 24 Ch. D. 624.

Waste.

Where the power requires that the leases shall not contain any words which shall render the lessee dispunishable for waste, a lease which authorises the lessee to do any act which amounts to waste will be void. Thus he must not be empowered to work unopened mines, nor to fell timber: Co. Lit. 54, b; see *Campbell* v. *Leach*, Amb. 740. And where in a lease granted under a power containing the requirement as to waste, the lessor covenanted to execute the repairs, it was held that the lease was not a valid execution of the power as containing an implied permission to the lessee to commit waste: *Yellowly* v. *Gower*, 11 Exch. 274; but where in a similar case, the lease contained a covenant by the lessor to repair, but provided that if he should fail to do so after notice the tenant might do so, and deduct the cost from the rent, it was considered that the amount of the rent (which was required to be the best rent) must be taken to have been fixed with reference to the arrangement, and that the lease was good: *Doe* d. *Bromley* v. *Bettison*, 12 East, 304 (*m*).

(*l*) As to what is a repairing lease, see *Euston* v. *Pratt*, 2 H. & C. 676; *Truscott* v. *Diamond Rock Boring Co.*, 20 Ch. D. 251.

(*m*) See further as to what amounts to waste as between landlord and tenant, *post*, p. 137, n.

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Exception where general rule would defeat object of power.

An exception is made to the general rule where a strict enforcement of it would defeat the object of the power itself. So a clause in a building lease under a power authorising the lessee to pull down old buildings, and to use the materials in erecting new buildings, is not deemed to authorise the commission of waste within the meaning of the power: *Jones* v. *Verney*, Willes, 169; *Doe* v. *Stephens*, 6 Q. B. 208. So where a settlement contained several powers of leasing, including a power to grant leases of mines opened or unopened, together with all such powers and privileges, &c., as should be necessary, or were usually contained in leases of collieries or mines in the county, and provided that lessees should not be made dispunishable for waste, leases by adjoining owners of mines were received as evidence of what provisions were usual; and it was held that a lease authorising the lessees to take from the land materials, and to make bricks for building cottages for miners, was not in excess of the power: *Morris* v. *Rhydydefed Coll. Co.*, 7 W. R. 95; *S. C.* 3 H. & N. 473, 885. In *Daly* v. *Beckett*, 24 Beav. 114, it was considered that the restriction as to waste was utterly repugnant to a power to grant leases of mines, opened and unopened, and must be disregarded. And in *Clegg* v. *Rowland*, L. R. 2 Eq. 160, where the power to lease was in general terms without mentioning mines, and contained the clause as to waste, *Kindersley*, V.-C., in commenting on *Daly* v. *Beckett*, observed: "That case is a strong authority for this proposition, that such a clause is inconsistent with a power to work unopened mines; and therefore, the existence of that clause in the present case appears to me to afford a strong argument that this power was not intended to authorise the granting of a lease of any unopened mines." It is to be observed that opened mines may be leased under the ordinary power to grant leases for twenty-one years, or any other number of years permitted by the terms of the power: *Campbell* v. *Leach*, Amb. 740.

Relief against defects in

From what has been said it will appear that care should be taken to observe all restrictions and con-

ditions which may be prescribed by powers of leasing. But it has long been the established rule that equity would relieve against formal defects in the mode of exercising a power : see *Campbell* v. *Leach*, Amb. 740. And by the stat. 12 & 13 Vict. c. 26, intituled "An Act for granting relief against defects in leases made under powers of leasing in certain cases," it is enacted :

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execution of leasing powers.

Sect. 2. "That where, in the intended exercise of any power of leasing as aforesaid, whether derived under an Act of Parliament or under any instrument lawfully creating such power, a lease has been or shall hereafter be granted, which is, by reason of the non-observance or omission of some condition or restriction, or by reason of any other deviation from the terms of such power, invalid as against the person entitled, after the determination of the interest of the person granting such lease, to the reversion, or against other the person who, subject to any lease lawfully granted under such power, would have been entitled to the hereditaments comprised in such lease, such lease, in case the same have been made *bonâ fide*, and the lessee named therein, his heirs executors administrators or assigns (as the case may require) have entered thereunder, shall be considered in equity as a contract for a grant, at the request of the lessee his heirs executors administrators or assigns (as the case may require) of a valid lease under such power, to the like purport and effect as such invalid lease as aforesaid, save so far as any variation may be necessary in order to comply with the terms of such power ; and all persons who would be bound by a lease lawfully granted under such power shall be bound in equity by such contract : Provided always, that no lessee under any such invalid lease as aforesaid, his heirs executors administrators or assigns, shall be entitled by virtue of any such equitable contract as aforesaid to obtain any variation of such lease, where the persons who would have been bound by such contract are willing to confirm such lease without variation."

Leases invalid owing to deviation from terms of the power to be deemed contracts in equity for such leases as might have been granted under the power.

And by sect. 4 it is enacted :—

"That where a lease granted in the intended exercise of any such power of leasing as aforesaid, is invalid by reason that, at the time of the granting thereof, the person granting the same could not lawfully grant such lease, but the estate of such person in the hereditaments comprised in such lease shall have continued after the time when such or the like lease might have been granted by

Leases invalid at the granting thereof may become valid if the grantor continue in the ownership.

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him in the lawful exercise of such power, then and in every such case such lease shall take effect, and be as valid as if the same had been granted at such last-mentioned time, and all the provisions herein contained shall apply to every such lease."

Other provisions of the Act.

This Act also contains provisions that when the grantor of a lease has a valid power of leasing, and the lease cannot take effect except under the power, it shall be deemed to be granted in exercise of the power although the power is not referred to in the lease (sect. 5); that nothing in the Act shall prejudice the rights of lessees under covenants for title, or quiet enjoyment, or lessor's rights for breach of the covenants, conditions or provisoes contained in the lease (sect. 6); and that the Act shall not extend to leases by ecclesiastical corporations, or to the possessions of colleges, hospitals, and charitable foundations, or to leases which are the subject of litigation (sect. 7). There was also originally a provision in the Act that the acceptance of rent under any such invalid lease should, as against the person so accepting the same, be deemed a confirmation of such lease (sect. 3); but this provision was repealed by the Amendment Act of 1850 (13 & 14 Vict. c. 17), which enacts :—

When acceptance of rent to be deemed a confirmation.

Sect. 2. "That where, upon or before the acceptance of rent under any such invalid lease, as in the [principal] Act mentioned, any receipt, memorandum, or note in writing, confirming such lease, is signed by the person accepting such rent, or some other person by him thereunto lawfully authorised, such acceptance shall, as against the person so accepting such rent, be deemed a confirmation of such lease."

When reversioner is able and willing to confirm, the lessee to accept confirmation.

Sect. 3. "That where, during the continuance of the possession taken under any such invalid lease, as in the [principal] Act mentioned, the person for the time being entitled (subject to such possession as aforesaid) to the hereditaments comprised in such lease, or to the possession or receipt of the rents and profits thereof, is able to confirm such lease without variation, the lessee, his heirs executors or administrators (as the case may require), or any person who would have been bound by the lease if the same had been valid, shall, upon the request of the person so able to confirm the same, be bound to accept a confirmation accordingly; and such confirmation may be by memorandum or note in writing, signed by the persons confirming and accepting respectively, or by

some other persons by them respectively thereunto lawfully authorised; and after confirmation and acceptance of confirmation such lease shall be valid, and shall be deemed to have had from the granting thereof the same effect as if the same had been originally valid."

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Effect of these statutes.

The effect of these two Acts is that where a lessee has entered under a lease which is invalid as an exercise of an express or statutory power, he will nevertheless have a valid contract or agreement for a lease, by virtue whereof he may at any time call upon the grantor or his successors in title to grant him a lease to the same effect as the invalid lease, with only such variations as may be necessary to comply with the terms of the power. But the person so called upon may, in lieu of granting such fresh lease, confirm the invalid lease without variations, and compel the lessee to accept such confirmation as a sufficient performance of the contract. The confirmation may be by a mere memorandum or note in writing, coupled with acceptance of rent; but acceptance of rent will not of itself amount to a confirmation. Mere acceptance of rent by a remainderman may, however, create a new implied tenancy from year to year: *Doe* d. *Martin* v. *Watts*, 7 T. R. 83; and see *ante*, p. 3. Such tenancy will be deemed to have commenced on the same day in the year as the original term, and notice to quit must be given accordingly: *Doe* d. *Collins* v. *Weller*, 7 T. R. 478; and the terms of the lease will apply to the tenancy, so far as consistent with a yearly tenancy: *Beale* v. *Sanders*, 3 Bing. N. C. 850; *Richardson* v. *Giffard*, 1 A. & E. 52.

Attestation of leases granted in exercise of powers.

By the stat. 22 & 23 Vict. c. 35, sect. 12 (stated *ante*, Vol. I., p. 740), any deed or other instrument *inter vivos* executed in the presence of, and attested by, two or more credible witnesses is to be deemed a due execution of a power as regards execution and attestation. The effect of this provision is that if the power prescribes less than the statute, compliance with the requirements of the power will be sufficient; but if the power prescribes more than the statute, compliance with the statute will be sufficient: see Woodf. L. & T. 195.

Leases under Statutory Powers.

Statutory Powers of Leasing.]—Various statutory enactments have from time to time been passed to enable limited owners and trustees of settled lands to grant leases for absolute terms of years.

32 Hen. 8, c. 28.

The enabling statute, 32 Hen. 8, c. 28, empowered tenants in tail to make leases binding on the issue in tail, but not on the reversioner or remainderman; such leases were required to be by indenture (*n*), and to take effect immediately on execution; the term was not to exceed three lives, or twenty-one years, and other conditions were also necessary to the validity of the leases. This statute was repealed by sect. 35 of the Settled Estates Act, 1856 (19 & 20 Vict. c. 120), except as regards leases made by ecclesiastical persons, as to which *vide infra*, p. 52.

Fines and Recoveries Act.

The Fines and Recoveries Act (3 & 4 Wm. 4, c. 74), sect. 15, empowers every actual tenant in tail in possession, remainder, contingency, or otherwise, to dispose of the entailed lands in fee simple absolute, *or for any less estate*, as against not only the issue in tail, but also the remainderman or reversioner (*o*).

By sect. 34, where there is a "protector," his consent is requisite to enable an actual tenant in tail to make a disposition which shall bind not merely the issue in tail, but also persons who are to take on the determination or in defeazance of the estate tail. By sect. 40, it is provided that such dispositions by tenants in tail may be made by deed, but not by will or contract not under seal; and if the tenant in tail is a married woman her husband's concurrence is required, and the deed will require acknowledgment, as to which see *ante*, tit. ACKNOWLEDGMENT, Vol. I., p. 208 *et seq.*

Enrolment.

By sect. 41, every assurance made by a tenant in tail by virtue of this Act, "except a lease for any

(*n*) The lease was required to be by indenture and not by deed poll, in order that action on the covenants might lie against the tenant in case of breach of the stipulations: Bac. Ab., *Leases* [E].

(*o*) This and other sections of the Fines and Recoveries Act which treat of disentailing assurances will be stated and discussed more fully in a subsequent volume of this work, tit. SETTLEMENTS.

term not exceeding twenty-one years, to commence from the date of such lease or from any time not exceeding twelve calendar months from the date of such lease, where a rent shall be thereby reserved, which, at the time of granting such lease, shall be a rack rent," is required to be enrolled within six calendar months after execution. This enactment may be thus briefly noticed, inasmuch as a tenant in tail desiring to grant leases of the settled lands now usually has recourse to the statutory powers conferred on limited owners by the Settled Land Acts, as to which see *post*, p. 28 *et seq.*

Leases under Statutory Powers.

Formerly, where a settlement or will did not contain an express power of leasing, no valid leases of the settled lands could be granted for absolute terms of years, except under the authority of a private Act of Parliament obtained for the purpose; but the necessity for applying for such Acts was in great measure done away with by the Settled Estates Act, 1856 (19 & 20 Vict. c. 120), which conferred comprehensive powers of leasing on tenants for life.

Settled Estates and Settled Land Acts.

This Act and several amending Acts have been repealed by the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), which re-enacts the provisions contained in them in a consolidated form. By sect. 2 of the last-mentioned Act, "for the purposes of this Act a tenant in tail, after possibility of issue extinct, shall be deemed to be a tenant for life." Sects. 4—15 inclusive contain provisions empowering the Court (*p*) to authorise leases of settled estates, and prescribing the mode in which such power is to be exercised. The leases thus authorised may involve waste or not, but must take effect in possession at or within one year after the making thereof; the term must not exceed, for an agricultural or occupation lease,

Settled Estates Act, 1877.

(*p*) All causes and matters arising under this Act are assigned, as regards estates in England, to the Chancery Division of the High Court of Justice (sect. 3). The Court of Chancery of the County Palatine of Lancaster has concurrent jurisdiction so far as relates to estates in that county (sect. 44). As to estates in Ireland, the jurisdiction is now vested in the Chancery Division of the High Court of Justice in Ireland, by the combined operation of sect. 45 of this Act, and of stat. 40 & 41 Vict. c. 57, sect. 36.

Leases under Statutory Powers.

Settled Estates Act, 1877.

21 years in England, or 35 years in Ireland; for a mining lease, or lease of watermills, way-leaves, water-leaves, or other rights or easements, 40 years; for a repairing lease, 60 years, and for a building lease 99 years; but the Court may direct any such leases (except agricultural leases) to be for longer terms under special circumstances. The leases must be at the best rent without fine, but the Court may direct a peppercorn rent to be made payable during the first five years under a mining, repairing, or building lease. In the case of a lease of minerals, &c., part of the rent is to be set apart and invested. No lease is to authorise felling of trees, except for clearing the land. Every lease is to be by deed, and to contain a proviso for re-entry on nonpayment of rent within 28 days after it becomes due; and the lessee must execute a counterpart (sect. 4). Leases authorised by the Court under this Act may contain special covenants (sect. 5), and may be surrendered and renewed (sect. 7); the Court may either approve particular leases or confer general powers of leasing on the trustees (sects. 11, 13).

By sect. 38 the Court may exercise its powers repeatedly, but may not exercise them if expressly negatived by the settlement, nor (sect. 39) so as to authorise any act which would not have been authorised by the settlor.

These provisions have been thus shortly noticed because, though not repealed, they have been rendered in practice almost obsolete by reason of the powers conferred on limited owners of settled lands by the Settled Land Act, 1882, which are exercisable, for the most part, without any application to the Court: *vide infra*, p. 28.

The 46th and subsequent sections of the Settled Estates Act, 1877, however, contain the following enactments, which appear to be still of sufficient practical importance to be here stated at length:—

Tenants for life, &c., may

Sect. 46. "It shall be lawful for any person entitled to the possession or to the receipt of the rents and profits (*q*) of any settled

(*q*) A tenant in tail after possibility of issue extinct may exercise this power: see sect. 2. Tenants for life, &c., are to be deemed

Leases under Statutory Powers.

estates for an estate for any life, or for a term of years determinable with any life or lives, or for any greater estate, either in his own right or in right of his wife, unless the settlement shall contain an express declaration that it shall not be lawful for such person to make such demise; and also for any person entitled to the possession or to the receipt of the rents and profits of any unsettled estates as tenant by the courtesy, or in dower, or in right of a wife who is seised in fee, without any application to the Court, to demise the same or any part thereof, except the principal mansion house and the demesnes thereof, and other lands usually occupied therewith, from time to time, for any term not exceeding twenty-one years so far as relates to estates in England, and thirty-five years so far as relates to estates in Ireland, to take effect in possession at or within one year next after the making thereof; provided that every such demise be made by deed, and the best rent that can reasonably be obtained be thereby reserved, without any fine or other benefit in the nature of a fine, which rent shall be incident to the immediate reversion; and provided that such demise be not made without impeachment of waste, and do contain a covenant for payment of the rent, and such other usual (*r*) and proper covenants as the lessor shall think fit, and also a condition of re-entry on nonpayment of the rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf; and provided a counterpart of every deed of lease be executed by the lessee."

grant leases for 21 years.

Sect. 47. "Every demise authorised by the last preceding section shall be valid against the person granting the same, and all other persons entitled to estates subsequent to the estate of such person under or by virtue of the same settlement if the estates be settled, and in the case of unsettled estates against the wife of any husband granting such demise of estates to which he is entitled in right of such wife, and against all persons claiming through or under the wife or husband (as the case may be) of the person granting the same."

Against whom such leases shall be valid.

"entitled" notwithstanding incumbrances: see sect. 54, *infra*, p. 28. Where land was devised to trustees upon trust to receive the rents and profits thereof, and after defraying thereout all ground and landlord's rent, if any, and all taxes, &c., and other necessary outlay, to pay the net annual rents, interest, and income to M. for her separate use, it was held that this section did not apply: *Taylor* v. *Taylor*, L. R. 20 Eq. 297. In such a case the tenant for life is not even entitled to present a petition under this Act: *S. C.* 1 Ch. D. 426.

(*r*) As to what are usual covenants, *vide supra*, p. 18, and *infra*, p. 118.

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Evidence of execution of counterpart lease by lessee.

Sect. 48. "The execution of any lease by the lessor or lessors shall be deemed sufficient evidence that a counterpart of such lease has been duly executed by the lessee as required by this Act."

The powers and provisions contained in the foregoing sections not being taken away or prejudicially affected by the Settled Land Act, 1882 (see sect. 56 (1) of that Act), are still exerciseable by tenants for life and other limited owners, and may in some cases be found convenient, *e.g.*, where there are no trustees of the settlement within the meaning of the later Act, or only one such trustee, or where the tenant for life, owing to differences between himself and the trustees, or for any other reason, wishes to grant leases without giving the prescribed notices, as to which *vide infra*, p. 40.

Sect. 54 provides that :—

Tenants for life, &c., to be deemed entitled notwithstanding incumbrances (*s*).

"For the purposes of this Act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and profits of estates, although his estate may be charged or incumbered either by himself or by the settlor, or otherwise howsoever, to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and profits as aforesaid unless they shall concur therein."

Saving rights of lords of manors (*t*).

Sect. 56. "Nothing in this Act shall authorise the granting of a lease of any copyhold or customary hereditaments not warranted by the custom of the manor without the consent of the lord, nor otherwise prejudice or affect the rights of any lord of a manor."

Settled Land Act, 1882.

The Settled Land Act, 1882 (45 & 46 Vict. c. 38), contains the following provisions with the view of enabling tenants for life and other limited owners of settled lands to grant leases thereof :—

Power for

Sect. 6. "A tenant for life (*u*) may lease the settled land, or

(*s*) As to leases by mortgagors, *vide infra*, p. 78.

(*t*) Sect. 9 of the Act provides that the powers of leasing shall include powers to lords of settled manors to give licences to their copyhold or customary tenants to grant leases. As to leases by copyholders, *vide infra*, p. 85.

(*u*) This Act came into operation on the 1st of January, 1883, and does not extend to Scotland. The provisions of the Act will be further considered in a later volume of this work, *sub* tit.

SETTLEMENTS, but it will be convenient to state here the definitions thereby given of terms used in the sections set out in the text. The Act defines the terms: "settlement," "settled land," "tenant for life," and "trustees," as follows:— Definitions.

"(1.) Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement." "Settlement."

"(3.) Land, and any estate or interest therein, which is the subject of a settlement, is for the purposes of this Act settled land." "Settled land."

"(5.) The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for the purposes of this Act the tenant for life of that land, and the tenant for life under that settlement." "Tenant for life."

"(6.) If in any case there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for purposes of this Act."

"(7.) A person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent."

"(8.) The persons, if any, who are for the time being under a settlement, trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act, are for purposes of this Act trustees of the settlement." "Trustees of the settlement."

"(10.) In this Act—

"(ii.) Rent includes yearly or other rent, and toll, duty, royalty, or other reservation, by the acre, or the ton, or otherwise; and in relation to rent, payment includes delivery; and fine includes premium or foregift, and any payment, consideration, or benefit in the nature of a fine, premium, or foregift: "Rent."

"(iii.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for any building purposes or purposes connected therewith: "Building purposes." "Building lease."

"(iv.) Mines and minerals mean mines and minerals whether already opened or in work, or not, and include all minerals and substances in, on, or under the land, obtainable by underground or by surface working; and mining purposes include the sinking and searching for, winning, working, getting, making merchantable, smelt- "Mines." "Mining purposes."

ing or otherwise converting or working for the purposes of any manufacture, carrying away, and disposing of mines or minerals, in or under the settled land, or any other land, and the erection of buildings, and the execution of engineering and other works, suitable for those purposes; and a mining lease is a lease for any mining purposes or purposes connected therewith, and includes a grant or licence for any mining purposes."

"Mining lease."

The term "settlement" in this Act includes instruments merely binding equitable interests, as well as those whereby the legal estate is conveyed. By sect. 63, this definition is in effect extended so as to comprise all settlements made before or after the commencement of the Act, whereby any land, or estate, or interest in land, is subject to a trust or direction for sale, and for the application or disposal of the money to arise from the sale, or the income of that money, or the income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction; and "settled land" and "tenant for life" have a corresponding signification, but, by sect. 6 of the Settled Land Act, 1884, which applies to dealings before as well as after the passing of the Act, in the case of a settlement within the meaning of sect. 63 of the Act of 1882, any consent not required by the terms of the settlement is not by force of anything contained in that Act to be deemed necessary to enable the trustees of the settlement, or any other person, to execute any of the trusts or powers created by the settlement; and by sect. 7 of the Act of 1884 it is also provided that the powers conferred by sect. 63 of the Act of 1882 are not to be exercised without the consent of the Court. The term "land" in this Act, as generally in Acts of Parliament, means hereditaments "of any tenure" (see 13 & 14 Vict. c. 21, s. 4), and therefore includes copyholds and leaseholds, as well as freeholds. But inasmuch as this Act extends only to the estate or interest "which is the subject of a settlement," it does not empower a tenant for life to grant leases not warranted by that estate or interest, so a tenant for life of leaseholds cannot grant an underlease extending beyond the settled term, nor can a tenant for life of copyholds grant leases except in conformity with the custom of the manor: see Wolst. S. L. Acts, p. 20.

Sect. 58 of the Settled Land Act, 1882, enumerates nine classes of persons, besides tenants for life strictly so called, on whom are conferred the powers of a tenant for life under the Act, viz.:— (i.) A tenant in tail; (ii.) a tenant in fee with executory gift over on failure of issue, or in any other event; (iii.) an owner of a base fee; (iv.) a tenant for years determinable on life, not holding merely under a lease at a rent; (v.) a tenant *pur autre vie*; (vi.) a tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease on a certain event, or to be defeated by an executory gift over, or is subject to a trust for

Leases under Statutory Powers.

any part thereof (*x*), or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste (*y*) or not, for any term not exceeding—

"(i.) In case of a building lease, ninety-nine years:

"(ii.) In case of a mining lease, sixty years:

"(iii.) In case of any other lease (*z*), twenty-one years."

tenant for life to lease for ordinary or building or mining purposes.

Sect. 7.—"(1.) Every lease shall be by deed, and be made to take effect in possession (*a*) not later than twelve months after its date" (*b*).

Regulations respecting leases generally.

"(2.) Every lease shall reserve the best rent (*c*) that can reasonably be obtained, regard being had to any fine taken (*d*), and

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accumulation of income; (vii.) a tenant in tail after possibility of issue extinct; (viii.) a tenant by the curtesy; and (ix.) "a person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event."

(*x*) Under the Settled Estates Act, 1856, the Court refused to sanction the demise by a single lease of contiguous land held under two distinct settlements: *Tolson* v. *Sheard*, 5 Ch. D. 19. And it is conceived that to adopt such a course would be an improper exercise of the powers of leasing under the Settled Land Act, 1882.

(*y*) As to waste, see *ante*, Vol. II., p. 115, note.

(*z*) Under this category are included agricultural leases, and leases of water-mills, way-leaves, water-leaves, rights of shooting or fishing, easements, &c. In Ireland a lease other than a building or mining lease may be granted under this Act for any term not exceeding thirty-five years: see sect. 65, sub-sect. 10.

(*a*) In *Re Ford*, L. R. 8 Eq. 309, it was held that a new lease granted upon surrender of an existing lease took "effect in possession," notwithstanding that an underlease granted by the lessee was unexpired.

(*b*) In Acts of Parliament the word month is to be deemed "to mean calendar month, unless words be added showing lunar month to be intended:" see 13 & 14 Vict. c. 21, s. 4. Month.

(*c*) By sect. 50, (3), a tenant for life may grant leases at the best rent without fine without the consent of an assignee by way of mortgage or otherwise, unless such assignee is actually in possession. Best rent.

(*d*) The provision authorising limited owners to take fines is novel, and contrary to the principles hitherto regulating statutory enactments, and to the general practice of conveyancers with regard to leasing powers. In the case of existing leases for lives or years containing covenants for renewal, the fines payable as the lives on leases drop are considered as annual profits and are receivable by the tenant for life for his own benefit: see *ante*, p. 14. Where, however, a tenant for life grants an original lease under this Act, any fine received is to be deemed capital money arising under the Act: see s. 4 of the Settled Land Act, Fines.

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to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case."

"(3.) Every lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry (*e*) on the rent not being paid within a time therein specified not exceeding thirty days."

"(4.) A counterpart (*f*) of every lease shall be executed by the lessee and delivered to the tenant for life; of which execution and delivery the execution of the lease by the tenant for life shall be sufficient evidence."

"(5.) A statement, contained in a lease or in an indorsement thereon, signed by the tenant for life, respecting any matter of fact or of calculation under this Act in relation to the lease, shall, in favour of the lessee and of those claiming under him, be sufficient evidence of the matter stated."

Building and mining leases.

Regulations respecting building leases.

Sect. 8.—"(1.) Every building lease shall be made partly in consideration of the lessee, or some person by whose direction the lease is granted, or some other person, having erected, or agreeing to erect, buildings, new or additional, or having improved or repaired, or agreeing to improve or repair (*g*), buildings, or having executed, or agreeing to execute, on the land leased, an improvement authorised by this Act (*h*), for or in connection with building purposes."

1884 (47 & 48 Vict. c. 18). Of course, however, by the terms of the settlement, the tenant for life may be authorised to receive for his own use all fines received by him on leases granted by him under his powers of leasing: *Earl Cowley* v. *Wellesley*, L. R. 1 Eq. 656; *Simpson* v. *Bathurst*, L. R. 5 Ch. A. 193. Settlements of real property should contain express provisions as to whether fines are to be treated as capital or income.

Re-entry.

(*e*) A reasonable qualification may be introduced into a power of re-entry: see *ante*, p. 18.

Counterparts.

(*f*) The execution of the counterpart need not be contemporaneous with the lease: *Fryer* v. *Combs*, 11 A. & E. 403.

Repairs.

(*g*) Where in a settlement trustees were empowered to demise house property to any person who should improve or repair, or covenant to improve or repair the same, it was held by the Court of Appeal (reversing the decision of *Chitty*, J.) that a demise to a tenant who covenanted to "do the necessary repairs" was within the requirements of the power: *Truscott* v. *Diamond Boring Co.*, 20 Ch. D. 251. As to what is a "repairing lease" within the meaning of a power to grant repairing leases, see *Euston* v. *Pratt*, 2 H. & C. 676.

Improvements.

(*h*) Sect. 25 enumerates, among other "improvements authorised by this Act":—

"(xvii.) Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public,

"(2.) A peppercorn rent or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years or any less part of the term. **Leases under Statutory Powers.**

"(3.) Where the land is contracted to be leased in lots, the entire amount of rent to be ultimately payable may be apportioned among the lots in any manner; save that—

"(i.) The annual rent reserved by any lease shall not be less than ten shillings; and

"(ii.) The total amount of the rents reserved on all leases for the time being granted shall not be less than the total amount of the rents which, in order that the leases may be in conformity with this Act, ought to be reserved in respect of the whole land for the time being leased; and

"(iii.) The rent reserved by any lease shall not exceed one-fifth part of the full annual value of the land comprised in that lease with the buildings thereon when completed."

Sect. 9.—"(1.) In a mining lease— Regulations respecting mining leases.

"(i.) The rent (*i*) may be made to be ascertainable by or to vary according to the acreage worked, or by or according to the quantities of any mineral (*k*) or substance gotten, made merchantable, converted, carried away, or disposed of, in or from the settled land, or any other land, or by or according to any facilities given in that behalf; and

"(ii.) A fixed or minimum rent may be made payable, with or without power for the lessee, in case the rent, according to acreage or quantity, in any specified period does not produce an amount equal to the fixed or minimum rent, to make up the deficiency in any subsequent specified period, free of rent other than the fixed or minimum rent.

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the same being necessary or proper in connexion with the conversion of land into building land.

(xviii.) Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connexion with any of the objects aforesaid.

(xx.) Reconstruction, enlargement or improvement of any of those works."

(*i*) This clause authorizes generally with regard to settled land what has long been a usual arrangement in large building agreements, namely, that the best rent obtainable shall be reserved on the property as a whole, but that the builder, upon taking leases of the several plots, shall have a limited option as to the apportionment of the rent. Apportionment of rent.

(*k*) A proportion of the ore may be reserved in a mining lease Mining leases.

Leases under Statutory Powers.

"(2.) A lease may be made partly in consideration of the lessee having executed, or his agreeing to execute, on the land leased, an improvement authorized by this Act, for or in connexion with mining purposes" (*l*).

Variation of building or mining lease according to circumstances of district (*m*).

Sect. 10.—"(1.) Where it is shewn to the Court with respect to the district in which any settled land is situate, either—

"(i.) That it is the custom for land therein to be leased or granted for building or mining purposes for a longer term or on other conditions than the term or conditions specified in that behalf in this Act, or in perpetuity; or

"(ii.) That it is difficult to make leases or grants for building or mining purposes of land therein, except for a longer term or on other conditions than the term and conditions specified in that behalf in this Act, or except in perpetuity;

"the Court may, if it thinks fit, authorize generally the tenant for life to make from time to time leases or grants of or affecting the settled land in that district, or parts thereof, for any term or in perpetuity, at fee-farm or other rents, secured by condition of

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by way of rent, *Campbell* v. *Leach*, Amb. 740; see *ante*, p. 15. A mining lease granted under a power may include in the demise as much surface land as is necessary for convenient and efficient working of the mines: *Morris* v. *Rhydydefed Colliery Co.*, 7 W. R. 95; *S. C.*, 3 H. & N. 473, 885; *Re Revely*, 11 W. R. 774.

Improvements for mining purposes.

(*l*) Sect. 25 of this Act enumerates the following improvements for or in connexion with mining purposes:—

"(xiv.) Tramways, railways, canals, docks.

(xv.) Jetties, piers, and landing-places on rivers, lakes, the sea or tidal waters, for facilitating transport . . . . of minerals and of things required for mining purposes.

(xviii.) Sewers, drains, &c., *vide supra*, n. (*h*).

(xix.) Trial pits for mines, and other preliminary works necessary or proper in connexion with the development of mines.

(xx.) Reconstruction," &c., *vide supra*, note (*h*).

Variation of leases.

(*m*) In and near London building leases are generally granted for terms of ninety-nine years, but in the North of England leases in perpetuity, or for very long terms of years, are not unusual. A building lease of lands at St. Helens, in Lancashire, for 600 years was authorized under the Leases and Sales of Settled Estates Act, 1856: see *Re Crosse's Charity*, 27 Beav. 592; and leases of lands near Leeds were authorized for 999 years, and also in perpetuity at fee-farm rents: see *Re Carr's Trusts*, 6 W. R. 776; but the Court in this case required evidence that the land could not be beneficially let for a shorter period. A fee-farm rent has been defined as a rent-charge reserved on a grant of lands in fee secured by a power of distress, and amounting to at least one-fourth of the annual value of the lands at the time of the reservation: see 1 Bl. Com. ii. p. 37.

Fee-farm rent.

re-entry, or otherwise, as in the order of the Court expressed, or may, if it thinks fit, authorize the tenant for life to make any such lease or grant in any particular case. **Leases under Statutory Powers.**

"(2.) Thereupon the tenant for life, and, subject to any direction in the order of the Court to the contrary, each of his successors in title being a tenant for life, or having the powers of a tenant for life under this Act, may make in any case, or in the particular case, a lease or grant of or affecting the settled land, or part thereof, in conformity with the order."

Sect. 11. "Under a mining lease, whether the mines or minerals leased are already opened or in work or not (*n*), unless a contrary intention is expressed in the settlement (*o*), there shall be from time to time set aside, as capital money arising under this Act (*p*), Part of mining rent to be set aside.

(*n*) *Open* mines may be worked by a tenant for life though impeachable for waste: *Clavering* v. *Clavering*, 2 P. Wms. 388; *Viner* v. *Vaughan*, 2 Beav. 466; and consequently they may be leased by him either by a mining lease granted under this Act, in which case it would seem that *one* fourth of the rent should be set aside, see Wolst. S. L. Acts, p. 24; or by a lease granted under his statutory or other general power of granting leases for terms not exceeding twenty-one years; see *Campbell* v. *Leach*, Amb. 740; *Clegg* v. *Rowland*, L. R. 2 Eq. 160; see also Co. Lit. 54 b. In the latter case the whole of the rents or royalties will belong to the tenant for life: *Daly* v. *Beckett*, 24 Beav. 114; *Miller* v. *Miller*, L. R. 13 Eq. 263. Open mines.

(*o*) Where a settlement gave the trustees power during the minority of any person entitled to possession to receive and apply rents and profits in management of the estate and maintenance of the minor and to accumulate and apply the surplus as directed, and also power to grant leases; it was held that rents derived from mining leases were to be applied by the trustees in accordance with the trusts of the settlement, as being excluded from the operation of the Act by a "contrary intention": *Re Duke of Newcastle's Estates*, 24 Ch. D. 129.

(*p*) The part of the rent so set aside will, at the option of the tenant for life, be paid to the trustees of the settlement or into Court: in the former case the trustees should be parties to the lease, and the portion of the rent set apart should be made payable to them. For a form of summons for payment into Court of the part of a mining rent set aside under this section, see Appendix to the Rules under the Settled Land Act, 1882, Form X. Setting aside part of mining rent.

It must be borne in mind that by sect. 39 (1), it is provided that, "notwithstanding anything in this Act, capital money arising under this Act shall not be paid to fewer than two persons as trustees of a settlement, unless the settlement authorizes the receipt of capital trust money of the settlement by one trustee." If therefore there are not at the time of payment of the money two persons answering to the description of "trustees of the settlement," for the purposes of the Act, such persons must be

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part of the rent as follows, namely:—where the tenant for life is impeachable for waste in respect of minerals, three-fourth parts of the rent, and otherwise one-fourth part thereof, and in every such case the residue of the rent shall go as rents and profits."

Leasing powers for special objects.

Sect. 12. "The leasing power of a tenant for life extends to the making of—

"(i.) A lease for giving effect to a contract entered into by any of his predecessors in title for making a lease, which, if made by the predecessor, would have been binding on the successors in title (*q*); and

"(ii.) A lease for giving effect to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the settled land (*r*); and

"(iii.) A lease for confirming, as far as may be, a previous lease, being void or voidable; but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted, under this Act, or otherwise, as the case may require."

Surrender and new grant of leases.

Sect. 13.—"(1.) A tenant for life may accept, with or without consideration, a surrender of any lease of settled land, whether made under this Act or not, in respect of the whole land leased, or any part thereof, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and minerals, or any of them.

"(2.) On a surrender of a lease in respect of part only of the land or mines and minerals leased, the rent may be apportioned.

"(3.) On a surrender, the tenant for life may make of the land or mines and minerals surrendered, or of any part thereof, a new or other lease, or new or other leases in lots.

"(4.) A new or other lease may comprise additional land or mines and minerals, and may reserve any apportioned or other rent.

"(5.) On a surrender, and the making of a new or other lease,

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appointed, and if necessary an application to the Court must be made for that purpose; otherwise the person paying the money will not obtain an effectual discharge. As to the appointment by the Court of trustees of settlement, see *ante*, tit. APPOINTMENT OF NEW TRUSTEES, Vol. II., p. 16 *et seq.*

(*q*) It has been held that independently of this Act trustees had power on behalf of an infant remainderman to carry into effect a contract by a deceased tenant for life to grant a lease under a power: see *Davis* v. *Harford*, 22 Ch. D. 128.

(*r*) Formerly application must have been made for an Act of Parliament to carry out such contracts: see *Cust* v. *Middleton*, 3 De G. F. & J. 33.

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whether for the same or for any extended or other term, and whether or not subject to the same or to any other covenants, provisions, or conditions, the value of the lessee's interest in the lease surrendered may be taken into account in the determination of the amount of the rent to be reserved, and of any fine to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease.

"(6.) Every new or other lease shall be in conformity with this Act."

Power to grant to copyholders licences for leasing (*s*).

Sect. 14.—"(1.) A tenant for life may grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to make any such lease of that land, or of a specified part thereof, as the tenant for life is by this Act empowered to make of freehold land.

"(2.) The licence may fix the annual value whereon fines, fees, or other customary payments are to be assessed, or the amount of those fines, fees, or payments.

"(3.) The licence shall be entered on the court rolls of the manor, of which entry a certificate in writing of the steward shall be sufficient evidence."

Restriction as to mansion-house, park, &c. (*t*).

Sect. 15. "Notwithstanding anything in this Act, the principal mansion-house on any settled land, and the demesnes thereof, and other lands usually occupied therewith, shall not be sold or leased by the tenant for life, without the consent of the trustees of the settlement, or an order of the Court."

Dedication for streets, open spaces, &c. (*u*).

Sect. 16. "On or in connexion with a sale or grant for building purposes, or a building lease, the tenant for life, for the general benefit of the residents on the settled land, or on any part thereof,—

"(i.) May cause or require any parts of the settled land to be appropriated and laid out for streets, roads, paths, squares, gardens, or other open spaces, for the use, gra-

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Custom of manor.

(*s*) The lord, whether his interest is absolute or limited, may be precluded by the custom of the manor from granting a licence to lease beyond a certain term: see *Hanbury* v. *Litchfield*, 2 My. & K. 629. And such a restriction is not removed by this section: see Wolst. S. L. Acts, 28.

Meaning of terms.

(*t*) The meaning of the words "principal mansion house," "park," and "demesnes," is discussed, *ante*, Vol. I., p. 415, note. For form of summons for leasing under this section, see Appendix to the Rules of the Supreme Court, Forms IV. and V.

Dedication.

(*u*) Independently of this Act, a dedication of streets, &c., to the public by a tenant for life or other limited owner does not bind persons entitled in remainder: *Wood* v. *Veal*, 5 B. & Al. 454; *Harper* v. *Charlesworth*, 4 B. & C. 591.

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tuitously or on payment, of the public or of individuals, with sewers, drains, watercourses, fencing, paving, or other works necessary or proper in connexion therewith; and

"(ii.) May provide that the parts so appropriated shall be conveyed to or vested in the trustees of the settlement, or other trustees, or any company or public body, on trusts or subject to provisions for securing the continued appropriation thereof to the purposes aforesaid, and the continued repair or maintenance of streets and other places and works aforesaid, with or without provision for appointment of new trustees when required; and

"(iii.) May execute any general or other deed necessary or proper for giving effect to the provisions of this section (which deed may be inrolled in the Central Office of the Supreme Court of Judicature (*x*)), and thereby declare the mode, terms, and conditions of the appropriation, and the manner in which and the persons by whom the benefit thereof is to be enjoyed, and the nature and extent of the privileges and conveniences granted."

Separate dealing with surface and minerals, with or without wayleaves, &c.

Sect. 17.—"(1.) A sale, exchange, partition, or mining lease, may be made either of land, with or without an exception or reservation (*y*) of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, wayleaves or rights of way, rights of water and drainage, and other powers, easements, rights, and privileges for or incident to or connected with mining purposes, in relation to the settled land, or any part thereof, or any other land."

Completion of sale, lease, &c., by conveyance.

Sect. 20.—"(1.) On a sale, exchange, partition, lease, mortgage, or charge, the tenant for life may, as regards land sold, given in exchange or on partition, leased, mortgaged, or charged, or intended so to be, including copyhold or customary or leasehold land vested in trustees, or as regards easements or other rights or privileges

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Enrolment of conveyances of land for public purposes.

(*x*) A conveyance of land to trustees for a public purpose is of the nature of a charitable conveyance, and will require to be enrolled pursuant to the stat. 9 Geo. 2, c. 36: see 1 Jarm. Wills, 208. But a conveyance to a local authority empowered by statute to take land will not require enrolment. A simple dedication to the public differs from a conveyance in that in the former case the freehold in the soil remains in the landowner: *Re Pratt*, 24 L. J., M. C. 113: a dedication will therefore not require enrolment, as it operates merely as evidence of the transaction: see Wolst. S. L. Acts, 30.

(*y*) See, as to exceptions and reservations, *post*, p. 132.

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sold or leased, or intended so to be, convey or create the same by deed, for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner requisite for giving effect to the sale, exchange, partition, lease, mortgage, or charge.

"(2.) Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this Act, is effectual to pass the land conveyed, or the easements, rights, or privileges created, discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests and charges subsisting or to arise thereunder, but subject to and with the exception of—

"(i.) All estates, interests and charges having priority to the settlement; and

"(ii.) All such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed; and

"(iii.) All leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money or money's worth, or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding in the successors in title of the tenant for life.

"(3.) In case of a deed relating to copyhold or customary land, it is sufficient that the deed be entered on the court rolls of the manor, and the steward is hereby required on production to him of the deed to make the proper entry; and on that production, and on payment of customary fines, fees, and other dues or payments, any person whose title under the deed requires to be perfected by admittance shall be admitted accordingly; but if the steward so requires, there shall also be produced to him so much of the settlement as may be necessary to shew the title of the person executing the deed; and the same may, if the steward thinks fit, be also entered on the court rolls."

And by sect. 31 of the same Act it is enacted that a tenant for life:—

Power for tenant for life to enter into contracts.

"(iii.) May contract to make any lease; and in making the lease may vary the terms, with or without consideration (*z*), but so that the lease be in conformity with this Act; and

(*z*) It would seem that the tenant for life will be entitled to the

Special Powers.

"(iv.) May accept a surrender of a contract for a lease, in like manner and on the like terms in and on which he might accept a surrender of a lease; and thereupon may make a new or other contract, or new or other contracts, for or relative to a lease or leases, in like manner and on the like terms in and on which he might make a new or other lease, or new or other leases, where a lease had been granted."

"(2.) Every contract shall be binding on and shall enure for the benefit of the settled land, and shall be enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor; but so that it may be varied or rescinded by any such successor, in the like case and manner, if any, as if it had been made by himself.

"(3.) The Court may, on the application of the tenant for life, or of any such successor, or of any person interested in any contract, give directions respecting the enforcing, carrying into effect, varying, or rescinding thereof.

"(4.) Any preliminary contract under this Act for or relating to a lease shall not form part of the title or evidence of the title of any person to the lease, or to the benefit thereof."

Before proceeding to grant leases under the statutory powers given by the Settled Land Act, 1882, the tenant for life must give notice to the trustees of the settlement of his intention so to do. By sect. 45 of the Act it is enacted :—

Notice to trustees.

Sect. 45.—"(1.) A tenant for life, when intending to make a sale, exchange, partition, lease, mortgage, or charge, shall give notice (*a*) of his intention in that behalf to each of the trustees of the settlement, by posting registered letters, containing the notice,

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benefit of any consideration money paid for varying the terms of a lease from those of the contract: see *Earl Cowley* v. *Wellesley*, L. R. 1 Eq. 660.

Form of notice.

(*a*) Some difference of opinion was expressed by conveyancers as to proper form and contents of a notice under this section, and the present editor ventured to maintain the proposition that it must be, not a general notice, but a notice of the particular transaction intended by the tenant for life (see Vol. I., p. 418 note). This view received judicial confirmation in *Re Ray's Settled Estates*, 25 Ch. D. 464. And consequently by the Settled Land Act, 1884 (47 & 48 Vict. c. 18), it is enacted that "the notice required by sect. 45 of the Act of 1882 of intention to make a sale, exchange, partition, or lease, may be notice of a general intention in that behalf." The protection given to remaindermen by sect. 45 of the Act of 1882 is thus practically withdrawn, except in the cases of mortgages and charges. As to which *vide post*, tit. MORTGAGES.

addressed to the trustees, severally, each at his usual or last known place of abode in the United Kingdom, and shall give like notice to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by posting a registered letter, containing the notice, addressed to the solicitor at his place of business in the United Kingdom, every letter under this section being posted not less than one month before the making by the tenant for life of the sale, exchange, partition, lease, mortgage, or charge, or of a contract for the same. Special Powers.

"(2.) Provided that at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement.

"(3.) A person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by this section."

The powers conferred by this Act are not assignable, and a contract by the tenant for life not to exercise any such power is void, and a tenant for life who has assigned his interest for value by way of mortgage or otherwise, does not require the assignee's consent to grant leases, provided they are made at the best rent and are in conformity to the Act: sect. 50. And any direction, declaration, limitation over, or condition in a settlement or will purporting or attempting to forbid or prevent a tenant for life from exercising, or to induce him not to exercise, or to put him into a position inconsistent with his exercising any such power, is void: sect. 51.

Part XII. of the Settled Land Act contains various restrictions, savings, and general provisions, of which the following are material to the present purpose:—

Sect. 54. "On a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of this Act." General protection of purchasers, &c.

Sect. 55.—"(1.) Powers and authorities conferred by this Act on a tenant for life or trustees or the Court or the Land Commissioners are exerciseable from time to time. Exercise of powers; limitation of provisions, &c.

"(2.) Where a power of sale, enfranchisement, exchange, partition, leasing, mortgaging, charging, or other power is exercised

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by a tenant for life, or by the trustees of a settlement, he and they may respectively execute, make, and do all deeds, instruments, and things necessary or proper in that behalf.

"(3.) Where any provision in this Act refers to sale, purchase, exchange, partition, leasing, or other dealing, or to any power, consent, payment, receipt, deed, assurance, contract, expenses, act, or transaction, the same shall be construed to extend only (unless it is otherwise expressed) to sales, purchases, exchanges, partitions, leasings, dealings, powers, consents, payments, receipts, deeds, assurances, contracts, expenses, acts, and transactions under this Act."

Saving for other powers.

Sect. 56.—"(1.) Nothing in this Act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exerciseable by a tenant for life, or by trustees with his consent, or on his request, or by his direction, or otherwise (*b*); and the powers given by this Act are cumulative.

"(2.) But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exerciseable for any purpose provided for in this Act.

"(3.) If a question arises, or a doubt is entertained, respecting any matter within this section, the Court may, on the application of the trustees of the settlement, or of the tenant for life, or of any other person interested, give its decision, opinion, advice, or direction thereon."

Additional or larger powers by settlement.

Sect. 57.—"(1.) Nothing in this Act shall preclude a settlor from conferring on the tenant for life, or the trustees of the settlement, any powers additional to or larger than those conferred by this Act.

"(2.) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, operate and be exerciseable in like manner, and with all the like incidents, effects, and consequences, as if they were conferred by this Act, unless a contrary intention is expressed in the settlement."

(*b*) In *Re Duke of Newcastle's Estates*, 24 Ch. D. 129, it was held that rents derived from mining leases were to be applied as directed by the settlement without regard to this Act, there being an indication of "contrary intention" within the meaning of sect. 11: see *ante*, p. 35.

3. By Joint Tenants, Co-parceners, and Tenants in Common.

By Joint Tenants, Co-parceners, and Tenants in Common.

A lease made by a joint tenant is binding, in respect of his share, on his companion or companions surviving, though made to commence at his decease: *Harbin* v. *Barton*, Moore, 395, pl. 514; *S. C.* cit. nom. *Harby* v. *Balton*, Cro. Jac. 91; *Herbin* v. *Birton*, Cro. Jac. 417; Dy. 187; *Harbin* v. *Loby*, Noy, 157; *Bellingham* v. *Alsop*, Cro. Jac. 52; *Clark* v. *Turner*, 2 Vern. 323. On the death of one of several joint lessors the lessee's interest survives, and the rent accrues, to the surviving lessors or lessor: *Henstead's Case*, 5 Rep. 10 b; *Doe* d. *Aslin* v. *Summersett*, 1 B. & Ad. 135.

Joint tenants.

Joint tenants have but one freehold, and therefore, in leases granted by them, the demise by, reservations to, and covenants with them, are made precisely in the same manner as where the lease is granted by a sole owner, the plural number being substituted for the singular. Whether the lessors are trustees, or beneficial owners, the form of the demise is the same. It is not often that leases are made by joint tenants, except in a fiduciary character. In such cases, the lessors' covenants should not be severed, as the intention always is, that the liability under them shall survive. See 2 Burr. 1190.

Form of covenants in lease by joint tenants.

Tenants in common, on the other hand, have several freeholds, and a lease granted by them concurrently operates as a separate lease by each, of his share: Co. Litt. 45 a, 196 b. If, in a lease made by tenants in common, the rent be reserved to them and their heirs simply, without any words of severance, this will not prevent their taking it as tenants in common, as the rent will follow the reversion: Co. Litt. 196 b (*c*); and separate actions may be maintained by them on covenants entered into with them in similar terms, for it is the interest of the

Tenants in common.

(*c*) In leases made after the commencement of the Conveyancing and Law of Property Act, 1881, the rent is in all cases annexed to the reversion: see *post*, p. 233.

By Joint Tenants, Co-parceners, and Tenants in Common.

covenantees, and not the form of the covenants, which regulates the form of the action in such a case: *Eccleston* v. *Clipsham*, 1 Saund. 153. It is also clear, that a tenant in common may distrain separately for his share of the rent: *Whitley* v. *Roberts*, M'Cl. & Y. 107; notwithstanding that his co-tenant has himself become possessed of the lease: *Snelgar* v. *Henston*, Cro. Jac. 611; and the other tenants in common may also maintain an action on the covenants against such a co-tenant: *Yates* v. *Cole*, 2 Br. & B. 660. If the lessee pay over the whole rent to one lessor, tenant in common, after notice from the other, he will be liable to pay the share paid to such other again: *Harrison* v. *Barnby*, 5 T. R. 246. So, tenants in common cannot jointly sue for double value, upon a holding over after the expiration of a tenancy from year to year, unless it be shown that the tenancy arose under a joint demise: *Wilkinson* v. *Hall*, 1 Scott, 675. See *Cutting* v. *Derby*, 2 W. Bl. 1075.

As to the best mode of reservation.

Under a reservation of an entire rent to tenants in common, they have the option of bringing either joint or several actions, and it should therefore seem that this mode of reservation is preferable to that of reserving several rents to them. Where there are several reservations, of course a joint action cannot be brought, which may occasion inconvenience and expense both to the lessee and the lessors. See *Story* v. *Johnson*, 2 Y. & C. 586, as to the effect of a lease granted by two of three tenants in common.

As to leases by co-parceners.

The preceding remarks in regard to leases by tenants in common are generally applicable to leases by co-parceners, because, though they have but one freehold with regard to the ancestor, yet, as to their disposing power, they have several interests; and therefore, a lease by several co-parceners is a separate demise by each of her share: *Milliner* v. *Robinson*, Moore, 682, pl. 939; and see Bac. Ab. tit. *Leases* (O). But it has been held that one co-parcener cannot sue separately for her portion of the rent due to herself and her co-parceners: *Decharms* v. *Horwood*, 10 Bing. 526.

Lease by one joint tenant

Joint tenants, tenants in common, and co-parceners

may make leases of their parts to their co-owners; for this merely gives the lessee the right to take the whole profits instead of a part; and they may contract with their co-owners for that purpose as with a stranger: see Co. Litt. 186 a.

Leases by Corporations, &c.

&c., to another.

4. Leases by Corporations.

Generally.] — Corporations are either lay or ecclesiastical. Lay corporations are divided into two classes, civil and eleemosynary corporations. Civil corporations and ecclesiastical corporations may be either aggregate or sole; but there does not appear to be any instance of an eleemosynary corporation sole. See 1 Kyd on Corporations, p. 20 *et seq.*

Corporations divided into lay and ecclesiastical.

The following are instances of the different classes of corporations:—

Civil corporations sole: the Sovereign; the Chamberlain of London is also said to be a corporation sole by custom: see 4 Rep. 65 a; and the Chancellor of Oxford seems also to be a corporation sole: see *Chase's Case*, Year-book, 8 Hen. 6, c. 18.

Civil corporations aggregate: the mayor and commonalty of a borough; the master and fellows of a college; companies and other societies and associations for other than charitable purposes, incorporated by Royal charter or particular statutes (*d*).

Eleemosynary corporations: the governing bodies of hospitals, almshouses, charity schools, and other charitable institutions, if duly incorporated.

Ecclesiastical corporations sole: archbishops, bishops, deans, archdeacons, canons and prebendaries, chancellors, precentors, and parsons, all of whom are corporations sole by the common law; and perpetual curates whose curacies are augmented by the Governors of Queen Anne's Bounty are made corporations by the stat. 1 Geo. 1, st. 2, c. 10, sect. 4.

Ecclesiastical corporations aggregate: deans and chapters of cathedral and collegiate churches.

(*d*) The Societies of the Inns of Court are not corporations, but the benchers hold the property in trust for their respective societies: see 1 Kyd, Corp. 6.

Leases by Corporations, &c.

Leases by corporations must be under seal.

The powers of leasing possessed by corporations belonging to the different classes above-mentioned will be hereafter examined in detail, but it may be here remarked that (except so far as otherwise provided by statutory enactment) a lease for years, like any other conveyance of property belonging to a corporation aggregate, must be by deed sealed with the common seal: *R.* v. *Chipping Norton*, 5 East, 239. But the payment and acceptance of rent will raise a presumption that a yearly tenancy has been created in the case of a corporation as in that of an individual: *Doe* d. *Pennington* v. *Tannière*, 12 Q. B. 998. So if a person enters upon, occupies, and pays rent for corporate property under a demise not under the common seal, he becomes tenant from year to year of the corporation, subject to the terms of the demise, so far as applicable to a yearly tenancy: *Eccl. Commrs.* v. *Merral*, L. R. 4 Ex. 162.

Description of corporation party to a lease.

As a corporation aggregate never dies, it is not necessary, in stating the parties to a deed, to give the names and descriptions of the individuals composing the corporation; thus it will be sufficient to express a lease to be made "between the President and Fellows of Trinity College, Oxford, of the one part," and the lessee of the other part; but in the case of a corporation sole the proper name and description of the lessor should be given, as "the Most Reverend William, Lord Archbishop of York," or "the Reverend John Smith, Rector of the parish of Stoke, in the county of, &c." (*e*). A corporation

Enforcement of provisions of lease by corporation.

(*e*) Whether a corporation sole must appear by attorney when suing or being sued for any thing relating to his corporate rights does not appear to be well settled. If it be necessary to enforce the provisions of a lease of property belonging to a corporation aggregate, proceedings must by the common law be brought by attorney (Co. Lit. 66 b), who must be appointed by an instrument sealed with the common seal: *Arnold* v. *Mayor, &c., of Poole*, 2 Dowl. N. S. 574. In the Year-book, 6 Ed. 3, c. 50, it is recorded that the Archbishop of York "fuit sum a un quo warranto ad respondend. domino Regi p. q. garrantie il cleym aux prises des vins en la porte del Eawe de Hull et l'Archevescq vient en pper person et dit," &c., but there does not seem ever to have been an express decision on the point. An opinion adverse to the right of a corporation sole to appear in person is expressed by an able and learned author: see Grant on Corporations, 636.

must convey by its proper corporate name; but an immaterial variation will not defeat the conveyance; "the name of a corporation in grants and conveyances need not be *idem syllabis seu verbis*, it is sufficient if it be *idem re et sensu*:" *Mayor, &c., of Lynne Regis* v. *Payn*, 10 Rep. 122 a; see *Mayor, &c., of Carlisle* v. *Blamire*, 8 East, at p. 490. Leases by Corporations, &c.

The Crown.]—The Crown cannot grant or lease any lands thereunto belonging (except advowsons and vicarages), for a longer period than thirty-one years, or three lives, except in the case of dilapidated buildings, which may be granted for fifty years, or three lives: 1 Anne, stat. 1, c. 7, ss. 5 & 6; see also 1 Geo. 3, c. 1; 34 Geo. 3, c. 75 (*f*). The Crown.

By the stat. 10 Geo. 4, c. 50, most of the Crown lands have been placed under the management of the Commissioners of Woods, Forests, and Land Revenues: sect. 8. The Commissioners may grant leases thereof for any term not exceeding thirty-one years: sect. 22; and building leases may be made for ninety-nine years: sect. 23. Leases granted in pursuance of this Act may be either in possession or reversion, and are to contain a reservation of rent clear of taxes and other assessments, and a proviso for re-entry, the lessee is to execute a counterpart, and no lessee is to be made dispunishable for waste except in the case of mining leases, and in the discretion of the Commissioners, building leases: sects. 26, 27. The rent reserved is to be a rack rent without fines, but acceptance of a surrender is not to be considered as taking a fine: sects. 28, 29. In building leases, however, a nominal rent only may be reserved during the first three years of the term, and a fine may be taken, in the discretion of the Commissioners, not exceeding one-third of the rent: sects. 30, 31. In mining leases the rent may be reserved partly in kind: sect. 33; and by sect. 4 of the stat. 36 & 37 Vict. c. 36, the Commissioners

(*f*) These statutes do not apply to her Majesty's private estates, which are regulated by the stat. 25 & 26 Vict. c. 37.

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are empowered to grant mining leases of Crown lands for terms not exceeding sixty-three years.

As to leases of lands of the Duchy of Lancaster, see stats. 48 Geo. 3, c. 73; 1 & 2 Geo. 4, c. 52. And as to leases of mines, &c., of the Crown in the Forest of Dean, see stat. 1 & 2 Vict. c. 43, amended by 24 & 25 Vict. c. 40.

Lands of the Duchy of Cornwall, if vested in the Crown, may be demised under the stat. 1 & 2 Will. 4, c. 50. Other lands of this Duchy are regulated by the stats. 26 & 27 Vict. c. 49; 31 & 32 Vict. c. 35.

Disabling Act.

Municipal Corporations.]—At common law there was no restraint on civil corporations granting such leases as they might think fit: *Smith* v. *Barrett*, 1 Sid. 161. But the Act 5 & 6 Will. 4, c. 76, sect. 94, restrains municipal corporations from alienating or leasing the corporation lands (except in pursuance of some contract or resolution made before the 6th of June, 1835), for more than thirty-one years from the date of the lease, reserving a rent without fine; unless with the consent of three of the Lords Commissioners of the Treasury, obtained after one month's public notice. Sect. 95 authorizes the renewal of leases, where there is a covenant, or ancient practice to renew; and sect. 96 authorizes leases of lands for not more than seventy-five years, the lessee covenanting or agreeing to erect buildings of greater value than the land.

Although renewals made under this Act need not be on exactly the same terms, there must be such an uniformity as to shew that the former lease has been renewed, and not a different lease granted: *Attorney-General* v. *Corporation of Great Yarmouth*, 21 Beav. 625.

Leases by railway and other companies.

Railway and other Companies.]—Where a company or other association is incorporated by Royal Charter or by a private Act of Parliament, the powers of leasing the corporate lands will depend upon the terms of the instrument of incorporation. Where a private Act of Parliament gave to a corporation a power to sell land, it was held that a lease of the

Leases by Corporations, &c.

land giving the lessee the option of purchase was valid: *Re Female Orphan Asylum*, 15 W. R. 1056; S. C. 17 L. T. 59.

The directors or committee of directors of a company incorporated by Act of Parliament for the purpose of carrying on any undertaking, are by virtue of the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16), sect. 97, enabled to make demises binding on the company and its successors: such demises, if for more than three years, must be made under the common seal of the company; or, if for a less period, may be made by the directors or committee on behalf of the company, by writing signed by any two of them, or by parol.

Leases by railway companies under Railways Clauses Act.

With respect to railway companies, the Railways Clauses Consolidation Act (8 & 9 Vict. c. 20), sect. 112, enacts as follows:—

"Where the company shall be authorized by the special Act to lease the railway or any part thereof to any company or person (*g*), the lease to be executed in pursuance of such authority shall contain all usual and proper covenants on the part of the lessee for maintaining the railway, or the portion thereof comprised in such lease, in good and efficient repair and working condition during the continuance thereof, and for so leaving the same at the expiration of the term thereby granted, and such other provisions, conditions, covenants, and agreements as are usually inserted in leases of a like nature."

Leases by universities and colleges.

Universities and Colleges.]—The Universities of Oxford and Cambridge claim to be corporations by prescription, and the latter University so returned itself to a *mandamus:* see *R.* v. *Chancellor, &c., of Cambridge University*, 1 Stran. 557. These two Universities were re-incorporated by the stat. 13 Eliz. c. 29. And the Universities of Durham and London have also been incorporated by more recent statutes. The several colleges in each University are also regarded as corporations.

Formerly the Universities of Oxford and Cambridge, and the masters and fellows of the several

(*g*) Railway Companies have no power to lease their line except by virtue of their special Acts.

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colleges, like other aggregate corporations, civil (*h*) and ecclesiastical, might have made leases for years or lives, of their lands at their will and pleasure. But the abuse of these powers led to their being restrained by various statutory enactments: see stats. 13 Eliz. c. 10; 14 Eliz. c. 11; 18 Eliz. c. 6; 39 & 40 Geo. 3, c. 41. These statutes may be regarded as virtually obsolete, so far as relates to the matter under discussion, and the law on the subject is now regulated by the following enactments.

Universities and College Estates Act, 1858.

By the Universities and College Estates Act, 1858 (21 & 22 Vict. c. 44), it is provided that the Universities of Oxford, Cambridge, and Durham, and any college therein respectively (including Christ Church, Oxford), and the Colleges at Winchester and Eton may, by indenture sealed by such university or college with their common seal, grant leases for terms not exceeding twenty-one years at rack rents. The leases are to contain powers of re-entry on non-payment of rent, or breach of covenant, and are to be made on reasonable terms and conditions, and the lessees are to execute counterparts of such leases (sect. 10). They are also empowered to grant building and repairing leases for terms not exceeding ninety-nine years at rack rents; such leases are to reserve powers of re-entry on non-payment of rent or breach of covenant, and are to contain proper covenants as mentioned in the Act for repairs, insurance, and other matters. The leases may also contain provisoes against forfeiture without prior action for damages (*i*); and the lessees are to execute counterparts of such leases (sect. 11). The universities and colleges may enter into contracts for granting leases, and afterwards grant leases pursuant thereto (sect. 12). Variations between the leases and such contracts are not to be material, and the contracts are not to form part of the title (sect. 13). The universities and colleges may insure buildings, &c., comprised in any lease, and charge

(*h*) The Universities are regarded as civil corporations: see *R.* v. *Vice-Chancellor of Cambridge University*, 3 Burr. 1656.

(*i*) The insertion of a similar proviso is permitted in ecclesiastical leases: see *post*, p. 56.

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the tenants with the premiums (sect. 14). The lessors may enter into arrangements with lessees as to lighting, paving, &c. (sect. 16); and as to payment of land tax and tithe rent charges (sect. 17). The lessors may also appropriate any parts of the lands leased for streets, squares, &c. (sect. 18). The universities and colleges are further empowered to lease running water and to grant water-leaves, way-leaves, &c., for terms not exceeding sixty years (sect. 19); and they may also grant mining leases for similar terms (sects. 20, 21). They may release persons from their contracts, and enter into new contracts for leases, and accept surrenders of existing leases (sect. 22). On recovery of possession of any lands under a condition of re-entry, new leases may be granted (sect. 23). Leases which may be void or voidable by reason of any technical error or informality may be confirmed (sect. 24). The receipts endorsed upon leases are to be evidence of the execution of the counterparts (sect. 25). The leasing powers of the Act are not to extend to the precincts of any college or to premises adjoining and necessary to the enjoyment thereof (sect. 26).

And sect. 30 of the same Act is as follows:—

Act not to restrain existing powers.

"Nothing in this Act contained shall restrain the said Universities or any College therein respectively, or the Colleges of Saint Mary of Winchester, near Winchester, or of King Henry the Sixth at Eton, from exercising any powers of sale, enfranchisement, exchange, purchase, or borrowing monies, or from granting any leases or making any grants, whether by way of renewal or otherwise, which the said Universities or any such College as aforesaid might have exercised or granted under the provisions of any public or private Act of Parliament, or under any other authority, or in any other manner whatsoever, in case this Act had not been passed, provided . . . . that notwithstanding the provisions of the Act passed in the eighteenth year of the reign of her Majesty Queen Elizabeth, chapter six, it shall not be necessary to reserve or make payable in corn any part of the rent to be reserved upon any lease to be granted under the powers of this Act."

By the Extension Act, 1860 (23 & 24 Vict. c. 59), sect. 3, lands once leased at rack rents are not thereafter to be leased upon fines.

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And by the Public Schools Act, 1868 (31 & 32 Vict. c. 118), sect. 24, the Governing Body of Eton College, constituted by the Act, is empowered to make schemes for running out their leases, so as to bring the whole of them into a system of being let at rack-rent instead of being let on leases renewable on payment of fines.

The leasing powers of the University of London, and colleges not within the Acts of 1858 and 1860, are regulated by their own charters, statutes, or bye-laws: Woodf. L. & T. 30.

Confirmation necessary to leases by sole ecclesiastical corporations.

Ecclesiastical Corporations, sole and aggregate.]—By the common law, churchmen, after being completely inducted into their benefices, and reputed to be seised in fee in right of them, enjoyed as ample a power of leasing as any person seised of a temporal estate in his natural capacity, provided the consent of necessary parties was previously obtained: Co. Litt. 44 a.; 4 Bac. Ab. *Leases* (E). To leases by ecclesiastical corporation *aggregate*, no consent was essential. But to those made by *sole* ecclesiastical corporations, as archbishops, bishops, deans, archdeacons, prebendaries, parsons, and vicars, the consent and confirmation of others were required in order to bind their respective successors: Toller on Tithes, 24; Shep. Touchst. 281; and see *Doe* d. *Brammall* v. *Collinge*, 7 C. B. 939. Leases made by parsons, vicars, prebends, &c., *before* induction or installation, &c., although confirmed, are not binding on the successor: Degge's Parson's Counsellor, 120, 6th ed. c. 10. If the patron have only a partial or defeasible interest, his confirmation fails upon the expiration or defeazance of his interest: Bac. Ab. *Leases* (G. 3); Co. Litt. 30 b.

Considerable alteration, however, was introduced by the several enabling and restraining statutes, namely, 32 Hen. 8, c. 28; 1 El. c. 19; 13 El. c. 10; 14 El. cc. 11, 14; 18 El. c. 11; 43 El. c. 29; 1 Jac. 1, c. 3 (*k*). Their principal result is, that all colleges,

(*k*) As to the present state of the law with regard to leases of property belonging to the universities and colleges, see *ante*, p. 49.

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cathedrals, and other ecclesiastical and eleemosynary corporations, and all parsons and vicars are thereby restrained from making any leases of their lands (except in the cases of certain houses in corporate and market towns) for more than twenty-one years or three lives, reserving the ancient and accustomed rent.

These restrictive statutes do not enable any persons to make such leases as they were by common law disabled to make. Therefore, a parson or vicar is not enabled to make any lease at all, so as to bind his successor, without the consent of the patron and ordinary, which must be obtained during the incumbency of the lessor: Bac. Ab. *Leases* (G. 3); Co. Litt. 44 b. Although leases contrary to these Acts are declared void, yet they are good against the *lessor* during his life, if he be a sole corporation; and are also good against an aggregate corporation, so long as the head of it lives, who is presumed to be the most concerned in interest: Co. Litt. 45 a; Bac. Ab. *Leases* (H. 1); *Heister* v. *Evans*, Dyer, 372 b. So it has been held that leases granted by deans and chapters not in conformity with the disabling and restraining statutes, are not void, but voidable only: *Pennington* v. *Cardale*, 3 H. & N. 656. But in the recent case of the *Governors of Magdalen Hospital* v. *Knotts*, 4 App. Ca. 324, it was held that a lease by an eleemosynary corporation, the members of which have no personal interest in the property, if not in conformity with 13 Eliz. c. 10, sect. 3, is absolutely void. The lessee is entitled to emblements on the death or resignation of his lessor: *Bulwer* v. *Bulwer*, 2 B. & Al. 470. See *Doe* d. *Kerby* v. *Carter*, Ry. & M. 237; and see Woodf. 22.

The statutes above referred to were followed by the stat. 39 & 40 Geo. 3, c. 41, which contains provisions as to the apportionment of ancient rents; the stat. 42 Geo. 3, c. 116, relating to the reservation as rent of land tax redeemed by a bishop; and the stat. 6 & 7 Will. 4, c. 20, whereby the renewal of leases and granting of concurrent leases by ecclesiastical persons, &c., are restricted within certain limits. See also stat. 6 & 7 Will. 4, c. 64.

These statutes, though not actually repealed (see

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Present law as to ecclesiastical leases.

Jenkins v. *Green*, 27 Beavan, 440), may be regarded as virtually obsolete for most purposes, and are of little practical value to conveyancers. For further information on the subject reference may be made to the third edition of this work, pp. 244 *et seq.*, and to Woodfall, L. & T. pp. 16 *et seq.* The law with regard to ecclesiastical leases is now governed by several statutes passed in the reign of her present Majesty.

Stat. 1 & 2 Vict. c. 106.

By the stat. 1 & 2 Vict. c. 106, sect. 59, it is enacted that :—

Lease of parsonage-house to contain condition for avoiding the same.

"Any agreement made for the letting of the house of residence, or the buildings, gardens, orchards, or appurtenances necessary for the convenient occupation of the same, belonging to any benefice, to which house of residence any spiritual person may be required by order of the bishop as aforesaid, to proceed and to reside therein, or which may be assigned or appointed as a residence to any curate by the bishop, shall be made in writing, and shall contain a condition for avoiding the same, upon a copy of such order, assignment or appointment being served upon the occupier thereof, or left at the house, and otherwise shall be null and void."

Stat. 5 & 6 Vict. c. 27.

Farming leases by incumbents.

By sect. 1 of the stat. 5 & 6 Vict. c. 27, entitled "An Act for better enabling Incumbents of Ecclesiastical Benefices to Demise the Lands belonging to their Benefices on Farming Leases," incumbents of benefices are enabled, with consent of the bishop and patron, to lease lands belonging to their benefices (*l*) for any term not exceeding fourteen years under certain restrictions (*m*), and in

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Interpretation of "benefices."

(*l*) By sect. 15 the word "benefice" is to be construed so as to comprehend every rectory, vicarage, perpetual curacy, donative, endowed public chapel, parochial chapelry, and district chapelry, the incumbent of which in right thereof shall be a corporation sole.

(*m*) The principal restrictions are as follows :—The lease must take effect in possession, the best rent must be reserved without fine, &c., and made payable to the incumbent quarterly (see *Jenkins* v. *Green*, 27 Beav. 440), the lessee must not be made dispunishable for waste, and must covenant to pay rent, taxes, rates, &c., not to assign or underlet without leave of the bishop and patron as well as of the incumbent, to cultivate properly, to repair and insure, &c. ; mines, minerals and underwood must be reserved out of the demise. Where the land leased is of copyhold or customary tenure, the consent of the lord of the manor is required to be testified by his execution of the lease. A stringent power of re-entry set forth in the statute must be inserted.

certain cases leases may be granted for twenty years (*n*).

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By sect. 2 it is provided that the parsonage house and offices and ten acres of glebe situate most convenient for occupation therewith shall not be leased.

By sect. 3, before any lease is granted a surveyor is to be appointed, who shall make maps, certificates, valuations and reports respecting such intended lease.

By sect. 4 it is enacted that :—

Lessor's receipt for counterpart or attested copy of lease to be evidence of its execution, and execution by bishop and patron to be evidence that lands are proper to be leased.

"The receipt in writing of the incumbent by whom any lease shall be granted under the authority of this Act, acknowledging that he has received the counterpart, or an attested copy in all cases where there shall be only one part of such lease, and signed by such incumbent, and endorsed on the lease, shall be conclusive evidence that the counterpart or lease (as the case may be) has been duly executed by the lessee, and also in all cases where there shall be only one part of such lease that the attested copy is a true and faithful transcript of the original lease ; and the execution by the bishop and patron, whose consents are hereby made requisite, of any lease to be granted under the authority of this Act, shall be conclusive evidence that the lease does not comprise any lands which ought not to be leased under the provisions of this Act, and that a proper portion of the glebe land remains unleased, and that the rent reserved by such lease is the best and most improved rent that could be reasonably gotten for the lands and hereditaments comprised therein at the time of granting such lease, and that all the covenants contained in such lease are proper covenants."

Sect. 5 provides that no surrender of any lease granted under this Act shall be made unless the bishop and patron and the incumbent are made parties to and execute the deed.

(*n*) That is to say :—"Where the lessee shall covenant thereby to adopt and use any mode or system of cultivation more expensive than the usual course, or to drain or subdivide, or embank and warp, at his expense, any part of the demised premises, or to erect, at his own expense on the said premises, any buildings, or to repair in a more extensive manner or at a greater expense than is usually required of lessees of farms any buildings on the demised premises, or in any other manner to improve, at his expense, the demised premises or any part thereof."

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Stat. 5 & 6 Vict. c. 108.

By the Ecclesiastical Leasing Act, 1842 (5 & 6 Vict. c. 108), sect. 1, ecclesiastical corporations, aggregate or sole, except any college or corporation, vicars choral, priest vicars, senior vicars, custos and vicars, or minor canons, and except also ecclesiastical hospital, or the master thereof, are empowered to grant building leases for any term not exceeding ninety-nine years, to take effect in possession and under certain restrictions (*o*). By sect. 4 leases of running water and wayleaves, and other rights and easements, may be granted by such corporations for any term not exceeding sixty years in possession. And by sect. 6 mining leases may be granted by such corporations for any term not exceeding sixty years in possession, subject to such restrictions, &c., as shall be approved of by the Ecclesiastical Commissioners, regard being had to the custom of the country in which the mines are situate.

The consent of the Ecclesiastical Commissioners is necessary to all leases granted under this Act; and when the lease is made by the incumbent of a benefice, the consent of the patron is also necessary; and in the case of copyhold lands the consent of the lord must be obtained, if generally required according to the custom of the manor: see sect. 20.

By sect. 30 leases under this Act were to be void if any fine or premium was paid, but this restriction has been removed. For, by the Ecclesiastical Leasing Act, 1858 (21 & 22 Vict. c. 57), sect. 1, leases under the stat. 5 & 6 Vict. c. 108, may be granted in consideration of premiums in cases where the Ecclesiastical Commissioners shall consider that such a course is advisable.

The stat. 14 & 15 Vict. c. 104, intituled "An Act

(*o*) It is to be observed that sect. 1 of this Act authorises a lease "with or without a proviso that no breach of covenant (except the covenant for payment of rent, and other such covenants, if any, as may be agreed to be excepted) shall occasion any forfeiture unless judgment shall have been obtained in an action for such breach of covenant, nor unless the damages and costs to be recovered in such action shall have remained unpaid for the space of three calendar months after judgment shall have been obtained in such action." The provisions of this and other Ecclesiastical Leasing Acts will be further noticed in the notes to the Precedents.

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to facilitate the Management and Improvement of Episcopal and Capitular Estates in England" (*p*), empowers ecclesiastical corporations, sole and aggregate, with the approval in writing of the Church Estate Commissioners, to sell, enfranchise, or exchange their church lands, or purchase the interests of their lessees, and by sect. 9 of that Act it is enacted that—

Stat. 14 & 15 Vict. c. 104.

How leases of lands acquired by any ecclesiastical corporation under this Act may be made.

"No lease of any lands purchased or acquired, or in which the estate or interest of a lessee, or a holder of copyhold or customary land, is purchased or acquired, by any ecclesiastical corporation under this Act, shall, except as hereinafter provided, be granted by such ecclesiastical corporation, otherwise than from year to year, or for a term of years in possession not exceeding fourteen years, at the best annual rent that can be reasonably gotten, without fine, the lessee not to be made dispunishable for waste or exempted from liability in respect of waste: Provided always, that it shall be lawful for such ecclesiastical corporation, with the approval of the Church Estates Commissioners, from time to time to grant mining or building leases of any such lands, for such considerations, upon such terms, and generally in such manner as such Commissioners, under the circumstances of each case, may think fit; and it shall be lawful for such Commissioners to require that any portion of the rent received on any such lease shall be invested and disposed of in like manner as herein provided with respect to monies to be received on the sale of any lands by any such corporation."

Stat. 23 & 24 Vict. c. 124.

By the stat. 23 & 24 Vict. c. 124, after providing that the Ecclesiastical Commissioners shall assign lands for the endowment of archiepiscopal and episcopal sees, enacts as follows:—

Lands assigned as endowments how to be leased.

Sect. 8. "No lands assigned or secured as the endowment of any see under this Act shall be granted by the archbishop or bishop otherwise than from year to year, or for a term of years in possession not exceeding twenty-one years, at the best annual rent that can reasonably be gotten without fine, the lessee not to be made dispunishable for waste or exempted from liability in respect of waste; and so that in every such lease such or the like cove-

(*p*) This Act, originally merely temporary, has been continued by successive Expiring Laws Continuance Acts, and lastly by the Expiring Laws Continuance Act, 1885 (48 & 49 Vict. c. 59), until the 31st December, 1886.

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nants, conditions, and reservations be entered into, reserved, or contained with or for the benefit of the archbishop or bishop and his successors, as under section 1 (*pp*) of the Act 5 & 6 Vict. c. 27 (for better enabling the incumbents of ecclesiastical benefices to demise the lands belonging to their benefices on farming leases), are to be entered into, reserved, or contained in a lease granted under that enactment to or for the benefit of the incumbent and his successors, or as near thereto as the circumstances of the case will permit; but where, under the said section of the last-mentioned Act, any consents are provided for or required, the consent only of the archbishop or bishop for the time being shall be requisite: Provided always, that it shall be lawful for the archbishop or bishop, with the approval of the Estates Committee of the Ecclesiastical Commissioners, testified under the common seal of the said Commissioners, which the said Committee are hereby empowered to affix to any lease for this purpose, from time to time to grant mining or building or other leases of any such lands, for such periods, for such considerations, upon such terms, and generally in such manner as such Committee under the circumstances of each case may think fit, and it shall be lawful for such Committee to require that any portion of the rent reserved on any such lease shall be payable to the said Ecclesiastical Commissioners."

By sect. 9 of this Act the Estates Committee may inspect the property from time to time, and give notice of dilapidations, &c., to be repaired by the archbishop or bishop, and by sect. 11 it is enacted that—

Estates committee, where required, to manage the lands assigned.

"The Estates Committee shall, when required by any archbishop or bishop to whom lands may have been assigned as an endowment under this Act, undertake the management of such lands, and receive the rents and profits thereof during the incumbency of the archbishop or bishop; and in every such case as aforesaid the Estates Committee, during their management, may grant all such leases as might have been granted by such archbishop or bishop if the lands had continued under his or their management, and may, with the approval of such archbishop or bishop, grant such other leases as might have been granted by him or them, with the approval of the Estates Committee; and the Commissioners shall, during the time such lands are under the management of the said Estates Committee, pay to such archbishop or bishop the annual income to secure which the lands may have been assigned."

(*pp*) See this section set out, *ante*, p. 54.

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Leases of lands belonging to benefices not to be made in consideration of fines.

By sect. 1 of the stat. 24 & 25 Vict. c. 105, intituled "An Act to prevent the future grant by copy of court-roll and certain leases of lands and hereditaments in England belonging to ecclesiastical benefices," no prebendary (other than a prebendary of a cathedral or collegiate church) and no rector, vicar, perpetual curate, or incumbent, is to make any grant by copy of court-roll or lease of any lands, &c., belonging to a benefice in consideration of a fine, premium, or foregift, but he may lease the same under the provisions of the stat. 5 & 6 Vict. c. 27, 5 & 6 Vict. c. 108, and 21 & 22 Vict. c. 57. But, by sect. 2, nothing contained in the Act is to interfere with the right and power of any such then present ecclesiastical person as aforesaid, during his incumbency, to make any grant by copy of court-roll or lease which he might lawfully have made before the passing of the Act; or to prejudice or affect any right of renewal or tenant-right in any lands, &c., held under any lease.

Stat. 25 & 26 Vict. c. 52.

By the stat. 25 & 26 Vict. c. 52, sect. 1, after reciting that it was expedient to amend the stat. 24 & 25 Vict. c. 105, it is enacted that—

How far prohibition as to making of leases is to extend.

"The prohibition to make any grant by copy of court roll or lease contained in the first section of the said Act shall not only extend to grants of the said manors, lands, tenements, and hereditaments made in consideration of any fine, premium, or foregift, but shall also extend to all grants and leases of such manors, lands, tenements, and hereditaments made for any longer term or in any other way than according to the provisions of the several statutes mentioned in the said first section and in the third section of the said Act hereby amended."

Finally, by the stat. 31 & 32 Vict. c. 114, sect. 9, it is enacted as follows:—

Leases by Dean and Chapter when re-endowed.

"After the passing of this Act none of the Deans and Chapters mentioned in the schedule to an Act of the present session, chapter 19, intituled *An Act for declaring valid certain orders of Her Majesty in Council relating to the Ecclesiastical Commissioners for* England, *and to the Deans and Chapters of certain Churches*, and no Dean and Chapter after the making of any Order in Council respecting them in pursuance of this Act, shall demise any lands vested in them otherwise than from year to year, or for a term of years in possession, not exceeding twenty-one, at the best annual

Leases by Parish Officers.

rent that can be reasonably got without fine, and shall not make the lessee dispunishable for or exempt from liability in respect of waste; and in every such lease such or the like covenants, conditions, and reservations shall be entered into, reserved, or contained with or for the benefit of the Dean and Chapter, and their successors, as under section one (*q*) of the Act of the session of the fifth and sixth years of the reign of her present Majesty, chapter 27, "for better enabling incumbents of ecclesiastical benefices to demise the lands belonging to their benefices on farming leases," are to be entered into, reserved, or contained with or for the benefit of the lessor and his successors in a lease granted under that section, or as near thereto as the circumstances admit."

5. Leases by Parish Officers.

Real property belonging to a parish is vested in the churchwardens and overseers of the poor for the time being as a *quasi corporation*: Smith, L. & T. 73.

The stat. 59 Geo. 3, c. 12, after empowering the churchwardens and overseers to purchase or hire 20 acres (*r*), enacts that—

Sect. 13. "It shall be lawful for the churchwardens and overseers of the poor of any parish, with the consent of the inhabitants in vestry assembled, to let any portion or portions of such parish lands as aforesaid, or of the land to be so purchased or taken on account of the parish, to any poor and industrious inhabitant of the parish, to be by him or her occupied and cultivated on his or her own account, and for his or her own benefit, and at such reasonable rent, and for such terms as shall by the inhabitants in vestry be fixed and determined."

The strict observance of the provisions of this section are essential to the validity of leases under the Act: see *Woodcock* v. *Gibson*, 6 D. & R. 524; *Phillips* v. *Pearce*, 8 D. & R. 43. See Co. Litt. 3 a. A lease granted by churchwardens before the Act, created a tenancy from year to year: *Doe* d.

(*q*) See this section set out, *ante*, p. 54.

(*r*) The hiring power now extends to 50 acres: see stat. 1 & 2 Will. 4, c. 42; and the hiring, purchasing, and letting powers have been transferred by the stat. 5 & 6 Will. 4, c. 69, to the guardians of the poor, or to the overseers, if there are no guardians, under the control of the Local Government Board. See also as to leases of allotments to cottagers, stats. 8 & 9 Vict. c. 118, sect. 109, 36 Vict. c. 19, and 45 & 46 Vict. c. 80.

Leases by Infants.

Higgs v. *Terry*, 4 A. & E. 274; *Doe* d. *Hobbes* v. *Cockle*, 4 A. & E. 478. A covenant in a lease of lands by the churchwardens and overseers of a township, that the lessee might take all manure, &c., from the poor-house, to be used on the land, the lessee covenanting to provide straw to be used in the poor-house, was held not to bind succeeding oveerseers: *Snowden* v. *Emsley*, 3 Stark. 28. The Act does not extend to copyholds: *Doe* d. *Bailey* v. *Foster*, 3 C. B. 217.

6. Leases by Infants.

A lease by an infant is, by the Common Law, voidable only, not void (*Ketsey's Case*, Cro. Jac. 320; *Ashfield* v. *Ashfield*, Sir W. Jon. 157), though the rent reserved may not be the best which can be obtained; for, as observed by Lord *Mansfield*, there may be most beneficial considerations for a lease, though no rent be reserved: *Zouch* d. *Abbot* v. *Parsons*, 3 Burr. 1806. *Bullen*, J., is reported to have said in the case of *Maddon* v. *White*, 2 T. R. 159, "All the modern cases have expressly held that an infant cannot avoid a lease which is for his own benefit: and Lord *Mansfield*, in *Drury* v. *Drury* (Dom. Proc. 26 May, 1762), laid it down as a general principle, that if an agreement be for the benefit of an infant at the time, it shall bind him. Lord *Hardwicke* afterwards adopted this rule." But, in a recent case, *Jessel*, M.R., on this case being cited, in the course of the argument, said that "There must be some mistake in the report of what *Bullen*, J., is stated to have said. No case can be found in which Lord *Mansfield* or Lord *Hardwicke* had laid down any such general principle." And his lordship decided the case then before him (which was as to the validity of an assignment by an infant to secure money advanced for necessaries) on the general principle, that, as a rule, contracts by infants are voidable: *Martin* v. *Gale*, 4 Ch. D. 428. The lease is voidable by the infant on coming of age: *Slater* v. *Brady*, 14 Ir. Com. L. R. 61; but not before: *Slater* v. *Trimble*, 14 Ir. Com. L. R. 342. If an infant

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lessor die under age, his heir cannot avoid the lease: 4 Cru. Dig. 74; nor can the lessee avoid the lease on the ground of his lessor's infancy: *Zouch* d. *Abbot* v. *Parsons*, 3 Burr. 1806. The acceptance of rent by an infant after he attains his majority amounts to an affirmation of the lease: *Ashfield* v. *Ashfield*, Sir W. Jon. 157; and a similar effect has been held to arise from expressions used towards the lessee, referring to his future enjoyment, as, wishing him joy of it, &c.: *Anon.*, 4 Leon. 4; or from recitals contained in a deed made between the parties: see *Story* v. *Johnson*, 2 Y. & C. 607.

Guardian in socage.

A guardian in socage may lease the infant's estate till his age of fourteen, and of course, by so doing, may take a surrender from the lessee of the infant's father: Com. Dig. *Guardian* (B.) 4; *Willis* v. *Whitewood*, 1 Leon. 322.

Guardian by election.

When, after fourteen, an infant is destitute of a guardian, he sometimes appoints one by election, principally to enable him to make leases of all the infant's lands: see *ante*, tit. Appointment, Vol. I., p. 798 n. The guardian in socage, as well as he whom the infant may choose after fourteen, alike derive their authority not from the infant, but from the law, and accordingly make leases, grant copies of court roll (*Shopland* v. *Ryoler*, Cro. Jac. 99), make distresses for rent of the infant's lands (Bradby on Distresses, 91), and transact all affairs in their own name, and not in the name of the infant, as they would be obliged to do if their authority were derived from him. If the guardian grants leases for a term longer than the term of his guardianship, such leases are voidable, and may accordingly be ratified by acceptance of rent, or other act of the infant when he comes of age: Bac. Ab. *Guardian* (A.), *Leases* (I.) 9. The office of a testamentary guardian appointed by the father, under 12 Car. 2, c. 24, as to the duty and power, is the same as the law before had prescribed and settled of guardian in socage, excepting that it may be held for a longer time, namely, till the heir attains the age of twenty-one: *Bedell* v. *Constable*, Vaugh. 179; and it seems, therefore, that a testamentary guardian, like a

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guardian in socage, may make valid leases in his own name, to continue during the guardianship. An infant may, by the custom of some places, lease socage lands at the age of fifteen: Co. Litt. 45 b.

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The stat. 11 Geo. 4 & 1 Will. 4, c. 65, s. 16, enacts that when any infant or feme coverte might, in pursuance of any covenant or agreement, be compelled to renew any lease, freehold, or chattel, the Court of Chancery (*q*) may, by order made in a summary way, upon petition of the infant or his guardian, or of the feme, or of any person entitled to such renewal, authorize such infant, &c., to accept a surrender, and grant a new lease.

Leases of lands of infants, &c., under 11 Geo. 4 & 1 Will. 4, c. 65:— Renewals;

Sect. 17 empowers the Court of Chancery, if it shall appear to be beneficial, by order upon petition, to authorize any infant or his guardian in his name, to let lands to which the infant is entitled in fee or in tail (*r*), or leaseholds; for building, or working mines, or otherwise improving the same, or for farming or other purposes, for such term or terms of years, and subject to such rents or covenants as the court shall direct, but without fine, and for the best rent that can be had, regard being had to the nature of the lease, which is to be settled by a Master, and a counterpart of it deposited in the Master's office until the infant attains twenty-one; provided, that no lease be made of the capital mansion-house, and the park and grounds held therewith, for any period exceeding the infant's minority.

Building and farming leases.

Sect. 18 provides for renewals where persons bound to renew (whether under disability or not) are out of the jurisdiction; and by sect. 31 leases granted under the Act are rendered valid as if the infant had been of full age.

(*q*) Now the Chancery Division of the High Court, see 36 & 37 Vict. c. 66, s. 34.

(*r*) The Court has power under this section to grant leases when lands stand limited in fee, defeasible in certain events, provided all parties interested in those events are before the Court: *Re Clark*, L. R. 1 Ch. 292; and also where an infant is entitled in fee simple in reversion expectant on the determination of his father's estate by the curtesy: *Re Letchford*, 2 Ch. D. 713; *Re Spencer*, 37 L. J., Ch. 18.

Leases by Infants.

By the Trustee Act, 1850 (13 & 14 Vict. c. 60), sect. 7, it is enacted—

Court of Chancery may by order convey estates of infant trustees and mortgagees in lands.

"That where any infant shall be seised or possessed of any lands upon trust, or by way of mortgage, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the infant trustee or mortgagee had been twenty-one years of age and had duly executed a conveyance or assignment of the lands in the same manner for the same estate."

By the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), sect. 46, tenants for life, &c., of settled estates are empowered to grant leases for twenty-one years: *vide ante*, p. 26. And by sect. 49 of that Act it is enacted that—

Provision as to infants, lunatics, &c.

"All powers given by this Act, and all applications to the Court under this Act, and consents to and notifications respecting such applications, may be executed, made, or given by, and all notices under this Act may be given by or to guardians (*s*) on behalf of infants, and by or to committees on behalf of lunatics, and by or to trustees or assignees of the property of bankrupts, debtors in liquidation, or insolvents: Provided nevertheless, that in the cases of infant or lunatic tenants-in-tail no application to the Court or consent to or notification respecting any application may be made or given by any guardian or committee without the special direction of the Court."

The Settled Land Act, 1882 (45 & 46 Vict. c. 38), enacts that—

Infant absolutely entitled to be as tenant for life (*t*).

Sect. 59. "Where a person, who is in his own right seised of or entitled in possession to land, is an infant, then for the purposes of this Act the land is settled land (*u*), and the infant shall be deemed tenant for life (*u*) thereof."

Tenant for life, infant.

Sect. 60. "Where a tenant for life, or a person having the

(*s*) "Guardians" here means not testamentary guardians, but persons appointed for the special purpose: *Re James*, L. R. 5 Eq. 334.

(*t*) The Conveyancing, &c., Act, 1881 (44 & 45 Vict. c. 41), sect. 41, provides that under the circumstances above mentioned, "the land shall be deemed to be a settled estate within the Settled Estates Act, 1877."

(*u*) For the definitions given by the Act of these terms, see *ante*, p. 29 *n.* See also *infra*, tit. SETTLEMENTS, where the Settled Land Act, 1882, will be fully discussed.

powers of a tenant for life under this Act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this Act, the powers of a tenant for life under this Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders."

Leases by Married Women.

The share to which an infant becomes entitled on an intestacy in partnership lands is within this section, so that the leasing powers given by the Act may be exercised on his behalf with respect to such lands: *Re Wells*, 31 W. R. 764. An infant who will become absolutely entitled at twenty-one with a trust for his maintenance and education in the meantime is a tenant for life within this section: *Re Powell*, W. N. 1884, p. 67. During the minority of an infant entitled in possession, no consent is necessary to the exercise by the trustees on his behalf of the statutory powers of the Act: *Re Duke of Newcastle's Estates*, 24 Ch. D. 129.

7. By Married Women.

At Common Law.]—At Common Law a demise by a *feme covert* of freehold land is absolutely void and incapable of confirmation. Nothing less than a re-execution by the lessor, after the removal of the disability, will give effect to such leases. See *Goodright d. Carter* v. *Strahan*, Cowp. 201. A wife may, however, in exercise of an express power, grant valid leases without her husband's concurrence.

At common law.

As to freeholds, &c.

A lease by a husband and wife concurrently of lands of the latter, made otherwise than in accordance with the statutory provisions hereinafter referred to, will be good until the determination of the coverture, or of the term (*x*), whichever shall first happen. If the lease is made by deed, it will be voidable by the widow after the husband's death: *Jordan* v. *Wykes*, Cro. Jac. 332; see also *Toler* v. *Slater*, L. R. 3 Q. B. 42. If the husband survives,

(*x*) Of course if the term exceeds three years the lease must be by deed: see 29 Car. 2, c. 3, ss. 1, 2; 8 & 9 Vict. c. 106, s. 3.

Leases by Married Women.

and becomes tenant by the curtesy, the lease will be good as against him until the determination of the term; but if he do not become tenant by the curtesy (not having had any issue which might have inherited), the lease will, upon the wife's death, become void as against her heir-at-law and all persons deriving title under her: Woodf., L. & T. 40; see also *Howe* v. *Scarrott*, 28 L. J. Ex. 325; *Hill* v. *Saunders*, 4 B. & C. 529.

A lease made by a husband and wife without deed will be good during the husband's life: *Bateman* v. *Allen*, Cro. Eliz. 438; but is void as against the wife surviving: *Walsall* v. *Heath*, Cro. Eliz. 656. If a lease be made by a husband and wife, and executed under a power of attorney in both their names, the execution by attorney being void as to the wife, it is the lease of the husband only: *Gardiner* v. *Norman*, Cro. Jac. 617.

As to leaseholds.

A wife's chattels real do not vest in the husband absolutely, but if not disposed of by him during the coverture revert to her if she survive him. The husband has, however, at common law, full power of disposing of his wife's chattels real by grant or by demise; if, therefore, he grant an underlease for part of his wife's term, reserving a rent, such rent will, until the expiration of the term granted by the underlease, belong to the husband, and after his death pass to his executors or administrators to the exclusion of his widow: *Blaxton* v. *Heath*, Poph. 145; see also Com. Dig. tit. *Baron and Feme*, E. 2; Co. Litt. 46 b, 351 a. It is no objection that the lease commences at his death: *Grute* v. *Locroft*, Cro. Eliz. 287. But the *feme* shall have the residue of the term not granted by the husband if she survive him: *Sym's Case*, Cro. Eliz. 33. If the husband survives his wife, her chattels real become his absolute property: Co. Litt. 300 a, 351 a, note. A husband may demise his wife's leaseholds for a term to commence after her death, and it will be good though the wife survive; "the *baron* having an interest to dispose of in his life, he might dispose of all the term, and it should bind the *feme:* so when he hath disposed by an act executed in his life of the interest

Husband's right to lease wife's chattels real.

Leases by Married Women.

of the term, and hath created a term in interest, this is as good as if he had granted all the term:" *Grute* v. *Locroft,* Cro. Eliz. 287. See also *Herbin* v. *Chard,* Poph. 96; 1 Roll. Abr. 344.

Husband's right to lease chattels real to which wife entitled as executrix.

A husband may dispose of leaseholds to which his wife is entitled as executrix, in virtue of his power of administration *jure uxoris,* exercisable without her consent: *Thrustout d. Levick* v. *Coppin,* 2 W. Bl. 801.

Lease by wife with husband's concurrence.

Statutory Powers.]—Leases of lands belonging to married women were formerly effected with the husband's concurrence by means of fictitious suits compromised by leave of the Court, which were denominated *fines.*

Fines.

When a married woman was party to a fine, it was necessary that she should be examined apart from her husband, in order to ascertain that the proposed disposition of her land was in accordance with her own wishes, and not extorted by the threats or improper influence of her husband.

Various statutory enactments have been passed from time to time conferring powers of leasing on married women.

Leases by husband of wife's lands.

By the repealed statute 32 Hen. 8, c. 28, husbands entitled in right of, or jointly with, their wives to lands for an estate in fee simple or in tail, were empowered to grant leases with the concurrence of their wives.

The Fines and Recoveries Abolition Act (3 & 4 Will. 4. c. 74), sects. 77—88 empowers married women to grant leases of their lands for any term consistent with their estates or interests therein by deed executed with the concurrence of their husbands (*y*), and duly acknowledged. This statute applies to leaseholds as well as freeholds (*z*).

(*y*) By sect. 91 of this Act provision is made for dispensing, by order of the Court, with the concurrence of a husband who is a lunatic (whether so found by inquisition or not) in any case in which his concurrence is required by that Act or otherwise. To obtain such order it should be shown that the land is actually contracted to be conveyed: *Re Graham,* 13 W. R. 782. See further as to orders dispensing with the concurrence of a lunatic: *Re Murphy,* 4 Man. & Gr. 635; *Re Turner,* 3 C. B. 166.

(*z*) The sections above referred to are set out at length, *ante,*

Leases by Married Women.

And by the Settled Estates Act, 1877, sect. 46, a husband seised in right of his wife of any settled estates (unless the settlement otherwise declares), or entitled to the possession, or to the receipt of the rents and profits of any unsettled estates as tenant by the curtesy, or in right of a wife who is seised in fee, may grant leases of her lands for terms not exceeding twenty-one years, and subject to the provisions of the Act, without any need of obtaining the leave on authority of the Court. The Court is empowered to sanction the granting of leases under the Act for longer terms than twenty-one years for building and other special purposes.

45 & 46 Vict. c. 38.

The Settled Land Act, 1882 (45 & 46 Vict. c. 38), confers extensive powers of leasing on tenants for life and other limited owners of settled lands (*a*), and contains the following provisions as to married women :—

Married women how to be affected.

Sect. 61.—"(1.) The foregoing provisions of this Act do not apply in the case of a married woman.

"(2.) Where a married woman who, if she had not been a married woman, would have been a tenant for life or would have had the powers of a tenant for life under the foregoing provisions of this Act, is entitled for her separate use, or is entitled under any statute, passed or to be passed, for her separate property, or as a *feme sole*, then she, without her husband, shall have the powers of a tenant for life under this Act.

"(3.) Where she is entitled otherwise than as aforesaid, then she and her husband together shall have the powers of a tenant for life under this Act (*b*).

"(4.) The provisions of this Act referring to a tenant for life and a settlement and settled land shall extend to the married woman without her husband, or to her and her husband together,

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Vol. I., pp. 234, *et seq.*, tit. ACKNOWLEDGMENTS. A lease under this Act does not require enrolment unless the married woman is tenant in tail, as to which see sect. 41 of the Act.

(*a*) See the sections of the Act relating to these powers set out in full, *ante*, pp. 28, *et seq.*

Acknowledgment.

(*b*) Whether a lease granted by a husband and wife concurrently under this power requires acknowledgment is a question not altogether free from doubt, and discussed, *ante*, tit. ACKNOWLEDGMENTS, Vol. I., p. 212. Until the point is settled by judicial decision the safe course will be for the wife to acknowledge the lease.

as the case may require, and to the instrument under which her estate or interest arises, and to the land therein comprised.

Leases by Married Women.

"(5.) The married woman may execute, make, and do all deeds, instruments, and things necessary or proper for giving effect to the provisions of this section.

"(6.) A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this Act."

By the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), sects. 7, 8, provided that all personal estate coming to a woman married after the passing of the Act as next of kin of an intestate, and the rents and profits of all freehold, copyhold, and customary property descending to such married woman on an intestacy, were to belong to her for her separate use. This Act and the Amendment Act of 1874 are now repealed with a saving of acts done and rights acquired thereunder. And by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), sect. 1, married women are rendered capable of holding property and contracting as *femes soles;* by sect. 2, all real and personal property of a woman married after the commencement of that Act is to be held by her as a *feme sole;* and by sect. 5, all real and personal property acquired by a woman married before the commencement of the Act, provided her title thereto "shall accrue after the commencement of the Act (*c*), is to be held by her as a *feme sole;* sect. 19, contains a saving of existing settlements and the power to make future settle-

(*c*) In *Boynton* v. *Collins*, 27 Ch. D. 604, *Chitty*, J., held that property to which a married woman was at the commencement of this Act entitled in reversion or remainder, and which fell into possession after that time, became under sect. 5 her separate property, and this decision with some hesitation by *Kay*, J., in *Re Thompson and Curzon*, 29 Ch. D. 177, who stated himself bound thereby. *Boynton* v. *Collins* and *Re Thompson and Curzon* were decided on *ex parte* applications, but the question was fully argued in *Re Tucker*, W. N. 1885, p. 148, before *Pearson*, J., who held that the section does not apply to property the reversionary title to which accrued before the commencement of the Act; and *Kay*, J., on this decision being cited to him in a case which was also fully argued, said that it was now his duty to decide the question according to his own view, and held that such an interest is not separate property of a married woman under this section; see *Re Adames' Trust*, W. N., 1885, p. 153.

Accruer of title of married woman.

Leases by Committee of Lunatics.

ments (*d*). The effect of this Act is that a married woman may without her husband's concurrence grant a valid demise of any property belonging to her to which the Act applies, whether freehold or chattels real, unless in the latter case, she is restrained from underletting by the lease under which she holds; as to which see *post*, p. 205.

8. Leases by Committees of Lunatics.

A lease by a person *non compos mentis*, whether idiot or lunatic, may be avoided by his heirs: *Beverley's Case*, 4 Rep. 123. Generally speaking contracts by a lunatic are *primâ facie* binding on him, but are liable to be set aside if the person dealing with the lunatic knowingly took advantage of his insanity: *Brown* v. *Joddrell*, 1 Moo. & M. 105; *Beavan* v. *M'Donnell*, 1 Exch. 184; *Elliott* v. *Ince*, 7 De. G. M. & G. 475.

Stat. 16 & 17 Vict. c. 70.

By the stat. 16 & 17 Vict. c. 70, the committee of a lunatic may in the name and on behalf of the lunatic under an order of the Lord Chancellor, make building and other leases, subject to such covenants, &c., as the Lord Chancellor shall order, of lands to which the lunatic is entitled in fee or in tail (sect. 129); and accept surrenders of renewable leases, and make new leases of the premises surrendered (sect. 134); and by sect. 139 of the Act:

Deeds, &c., to be executed under this Act to be as valid as if lunatic of sound mind.

"Every surrender, lease, agreement, deed, conveyance, mortgage, or other disposition granted, accepted, made, or executed by virtue of this Act shall be as valid and legal to all intents and purposes as if the person in whose name or place, or on whose behalf the same was granted, accepted, made, or executed, had been of sound mind, and had granted, accepted, made, or executed the same."

Settled Estates Act, 1877.

Sect. 49 of the Settled Estates Act, 1877, contains provisions as to the exercise of powers given by, and making applications to the Court under

(*d*) These sections of the two Acts above referred to will be found set out at length and discussed, *ante*, tit. Acknowledgments, p. 224, *et seq.*

that Act, &c., on behalf of lunatics by their committees (*e*).

Leases by Trustees of Settled Lands.

By the Settled Land Act, 1882 (45 & 46 Vict. c. 38), it is enacted :

Settled Land Act, 1882.

Sect. 62. "Where a tenant for life, or a person having the powers of a tenant for life under this Act, is a lunatic (*f*), so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or other person intrusted by virtue of the Queen's Sign Manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under this Act ; and the order may be made on the petition of any person interested in the settled land, or of the committee of the estate."

Tenant for life, lunatic.

9. Leases by Trustees of Settled Lands.

It was formerly considered that trustees might grant ordinary agricultural leases, in exercise of their duty of managing the trust estate, but not building leases : *Att.-Gen.* v. *Owen*, 10 Ves. 560. In one case a lease for ten years by trustees to whom lands were devised in trust to raise two annuities, and subject to them in trust for several persons for life, was upheld : *Naylor* v. *Arnitt*, 1 Russ. & M. 501 ; see also *Drohan* v. *Drohan*, 1 B. & B. 185 ; *Middleton* v. *Dodswell*, 13 Ves. 268. But in *Wood* v. *Patteson*, 10 Beav. 541, Lord *Langdale*, M.R., said "As to *Naylor* v. *Arnitt*, I should be afraid to act on it; for if the trustees unauthorized by the will, have the power of leasing for ten years, I see no reason why they should not have power to lease for sixty." And in *Re Shaw*, L. R. 12 Eq. 124, *Wickens*, V.-C., said, that he did not consider the decision in *Naylor* v. *Arnitt* to be good law, and refused to follow it. The following points may how-

Leases by trustees.

(*e*) A committee should in no case make any such application without the permission of the Court in lunacy : *Re Woodcock*, L. R. 3 Ch. 229.

(*f*) It has been held that where an infant is of unsound mind the case falls within the *ordinary* jurisdiction of the Court : *Re Arrowsmith*, 6 W. R. 642 ; *S. C.*, 4 Jur. (N. S.) 1123 ; *Beall* v. *Smith*, L. R. 9 Ch. 85 ; *Re Edwards*, 10 Ch. D. 605.

Leases by Trustees of Charities.

ever be regarded as free from all doubt:—(i.) that where there is a simple trust, trustees cannot demise without the concurrence of the *cestui que trust* in possession: Lewin on Trusts 515; (ii.) that a trust for sale does not *primâ facie* imply a power to demise: *Evans* v. *Jackson*, 8 Sim. 217; *Michells* v. *Corbet*, 34 Beav. 376; (iii.) that whether or not trustees may grant agricultural leases, they have no authority (except by statute during the minorities of their *cestuis que trustent*), to grant mining leases which involve *pro tanto* a destruction of the *corpus*: *Wood* v. *Patteson*, 10 Beav. 541.

As to the statutory powers of trustees to grant leases during the minority of a *cestui que trust* in possession, see *ante*, p. 64.

10. Leases by Trustees of Charities.

The leasing powers of trustees of lands held by them for charitable purposes are now regulated by the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), as amended by the Charitable Trusts Amendment Act, 1855 (18 & 19 Vict, c. 124).

The former Act, after constituting the Charity Commissioners (who might act by two of their number), a Board to carry the Act into execution (see sect. 6), provided that the leases, &c., authorized by such Board under the powers of this Act should have the like effect and validity as if they had been authorized or directed by the express terms of the trust affecting the charity. And by the Act of 1855 it is enacted:

The official trustee of charity lands constituted.

Sect. 15. "The secretary for the time being of the board shall be a corporation sole by the name of 'The Official Trustee of Charity Lands,' for taking and holding charity lands, and by that name (instead of the name of 'Treasurer of Public Charities') shall have perpetual succession; and all land, or estates, or interest in land, now vested in the 'Treasurer of Public Charities' by that name shall become, upon the passing of this Act, and by virtue thereof, vested in like manner and upon the same trusts in 'The Official Trustee of Charity Lands,' and all provisions of the principal Act which have reference to the 'Treasurer of Public Charities' shall operate as if the name of 'The Official Trustee of Charity

Lands' had been used therein instead of the name of 'Treasurer of Public Charities.'"

Leases by Trustees of Bankrupts.

Sect. 16. "The acting trustees of every charity, or the majority of them, provided that such majority do not consist of less than three persons, shall have at law, and in equity, power to grant all such leases or tenancies of land belonging thereto, and vested in the official trustee of charity lands, as they would have power to grant, in the due administration of the charity, if the same land were legally vested in themselves; and all covenants, conditions, and remedies contained in, or incident to any lease or tenancy so granted, shall be enforceable by and against the trustees or persons acting in the administration of the charity for the time being, and their alienees or assigns, in like manner as if such lands had been legally vested in the trustees granting such lease or tenancy at the time of the execution thereof, and had legally remained in or had devolved to such trustees or administrators for the time being, their alienees or assigns, subject to the same lease or tenancy."

Power to acting trustees to grant leases.

Trustees of charities must not lease to one of themselves: *Att.-Gen.* v. *Earl of Clarendon*, 17 Ves. 491; and they should be cautious as to granting a lease of the property of the charity to a relative of one of their number, "for the suspicion which that circumstance is calculated to excite, where there is any other fact to confirm it, is one which it would require a very strong case to remove:" per Lord *Cottenham*, C., in *Ferraby* v. *Hobson*, 2 Phil. at p. 261.

See further as to leases of charity lands, Lewin on Trusts, 493 *et seq.*

Lands already devoted to charitable purposes are not within the Mortmain Act, and may be leased upon other charitable uses: *Walker* v. *Richardson*, 2 M. & W. 882. See *Att.-Gen.* v. *Wilson*, 2 Kee. 680.

Leases in mortmain.

11. By Trustees of Bankrupts.

On the appointment of a trustee in bankruptcy, the property of the bankrupt will forthwith vest in him: see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), sect. 54 (2). The trustees may accordingly demise the lands of or to which the bankrupt is seised or entitled, unless in the case of leaseholds he

Leases by Executors or Administrators.

has disclaimed the lease (as to which, *vide infra*, p. 115), or unless the lease contains a clause for forfeiture on the lessee's bankruptcy.

12. By Executors or Administrators.

All leaseholds and terms of years, however long, are chattels real, and as such pass to the executor or administrator of the deceased owner, but freehold terms and leases for lives vest in the devisee or heir.

Leases by executors or administrators.

It is frequently laid down, that executors and administrators may demise lands vested in them in that capacity, and that before probate; Bac. Abr. tit. *Leases* (1) 7; *Roe* v. *Summerset*, 2 W. Bl. 694; Com. Land. and Ten. 44; as this power is included in the *jus disponendi* which they possess over all the personal estate of their testator or intestate; see *Holman* v. *Chute*, Cro. Jac. 685; *Bailey* v. *Drew*, 2 Lev. 100; *Doe* d. *Hayes* v. *Sturges*, 7 Taun. 217; and a lease by one of several executors or administrators is good: *Simpson* v. *Gutteridge*, 1 Mad. 616; *Jacomb* v. *Harwood*, 2 Ves. Sen. 265; *Doe* d. *Hayes* v. *Sturges*, 7 Taun. 222; but no person can be advised to accept a lease from an executor in trust of leaseholds which are specifically bequeathed, without the concurrence of the legatee, or ascertaining that the executor has not assented to the bequest, which would vest the legal title in the legatee, and enable him to recover the land by ejectment: *Doe* d. *Lord Saye and Sele* v. *Guy*, 3 East, 120; see also *Young* v. *Holmes*, 1 Stra. 70; *Fenton* v. *Clegg*, 9 Exch. 680; *Doe* d. *Sturgess* v. *Tatchell*, 3 B. & Ad. 675 (*g*).

It does not follow that a lease, which it is improper in an executor to grant, is therefore void in respect of the lessee. In *Doe* d. *Hayes* v. *Sturges*, 7 Taun. 217, an executor, who was himself beneficially entitled as legatee for life, with a power of leasing, granted a

(*g*) It is well established that the assent of an executor to a bequest of a particular estate, *e.g.*, for life, is an assent to the bequest in remainder: *Stevenson* v. *Mayor of Liverpool*, L. R. 10 Q. B. at p. 84. And see Wms. Exors. p. 1382.

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lease, without reference to the power, for a longer term than was authorized by the power; and it was held, that this lease was to be taken as granted by him in the character of executor, though inconsistent with his duty as such, and not as legatee; and could not, therefore, be avoided by the legatees over. The rent reserved, or an underlease granted by an executor or administrator, is assets in his hands: Bac. Abr. *Leases* (I.) 7; and if the executor or administrator dies before the estate is fully administered, the rent, at his death, devolves upon his own representatives, and does not go to the administrator *de bonis non* of the original testator or intestate: see *Baily* v. *Drew*, 2 Lev. 100; 1 Vent. 275; *Norton* v. *Hervey*, 1 Vent. 259; *Davie* v. *Drury*, cit. 1 Vern. 94; and actions brought by the executor or administrator on the covenants contained in such leases, must be in his own right, and not as representative (*h*).

Feme covert administratrix.

During the coverture of a *feme* executrix, leases might formerly have been granted by the husband alone, without her concurrence. See 4 T. R. 616. But the wife could not do any act as executrix or administratrix without the concurrence of her husband, and it was therefore necessary that he should be a party to all leases granted by her in such capacity: *Arnold* v. *Bidgood*, Cro. Jac. 318; *Thrustout* d. *Levick* v. *Coppin*, 2 W. Bl. 801. But now the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), after providing that a married woman is to be capable of holding property and of contracting as a *feme sole* (sect. 1), enacts that "a married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, ... may sue or be sued . . . . . without her husband, as if she were a *feme sole*." And by sect. 24 of the same Act it is provided that:

"The word 'contract' in this Act shall include the acceptance

(*h*) It would seem that the executor or administrator of the deceased executor cannot distrain: *Baily* v. *Drew*, 2 Lev. 100. A reversion is a necessary foundation for a distress: see *Precie* v. *Corrie*, 5 Bing. 24; *Burne* v. *Richardson*, 4 Taun. 720. See further as to leases by executors and administrators, Wms. Exors., pp. 942, *et seq.*

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of any trust or the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or interfered in the trust or administration."

Infant executor.

During the infancy of an executor he cannot act, but administration with the will annexed is granted to his guardian, or some fit person, who has the same powers as, in case of intestacy, an administrator *durante minore ætate* of the next of kin. 38 Geo. 3, c. 87, s. 6. See *Ex parte Sergison*, 4 Ves. 149. Such administrator cannot grant a lease to subsist beyond the period of his authority: *Sir M. Finch's Case*, 6 Rep. 68 a.

Underleases by executors.

In *Keating* v. *Keating*, Ll. & G. 133, a reversionary underlease granted by executors was set aside under the circumstances by Lord *St. Leonards*, then Sir *E. Sugden*, C. But his Lordship said, "Many circumstances would justify an executor in equity in granting a lease instead of selling the premises; and I would sustain such a lease by an executor simply acting in a due administration of the assets; but such an act is not regularly within the province of an executor; and I must hold, that it is incumbent on the persons taking a lease from executors, to shew that the act was for the benefit of the persons beneficially interested in the property. If the lessee take an unusual lease, he is at least bound to see that the consideration is fully stated on the face of the instrument, otherwise he enables the executor to commit a fraud, by concealing the receipt of the fine." In the case of the *Oceanic Steam Navigation Co.* v. *Sutherberry*, 16 Ch. D. 236, it was held that although an executor or administrator may grant an underlease of the leaseholds of a testator or administrator if necessary for the due administration of the property, he cannot grant to the underlessee an option of purchasing the original term at a future date.

Leases by Agents.

13. Leases by Agents.

An agent appointed by parol may enter into a binding *agreement* to let, provided the agreement is not under seal: *Coles* v. *Trecothick*, 9 Ves. 250; *Clinan* v. *Cooke*, 1 Sch. & L. 22; but an agent cannot make a valid *lease* for more than three years, without an authority under seal (*infra*, p. 107). A power to lease an incorporeal hereditament, being a power to bind by deed, must be by writing under seal: *Berkely* v. *Hardy*, 8 D. & R. 102. An agent must act in the name of his principal: *White* v. *Cuyler*, 6 T. R. 177; *Barford* v. *Stuckey*, 2 Br. & B. 333; but if the fact that he does so act is made apparent, the form of the execution is immaterial: *Wilks* v. *Back*, 2 East, 142. If an agent grants a lease in excess of his authority, his principal will not be bound, but an action will lie against the agent personally for breach of the implied warranty that he has authority from his principal to grant the lease: *Fenn* v. *Harrison*, 3 T. R. 758; *Simons* v. *Patchett*, 7 E. & B. 568; *Collen* v. *Wright*, 8 E. & B. 647; *Spedding* v. *Nevell*, L. R. 4 C. P. 212. If an attorney covenant in his own name, it will be his personal covenant on which he will be personally liable, although he be described in the instrument as covenanting for and on the part of his principal: *Appleton* v. *Binks*, 5 East, 148; *Kendry* v. *Hodges*, 5 Esp. 228; and similarly, if he agree by an instrument not under seal: *Cooke* v. *Wilson*, 1 C. B. N. S. 153; *Saxon* v. *Blake*, 29 Beav. 438. If, therefore, an agent who has sufficient authority makes a demise on behalf of his principal, he should execute the lease or agreement in the name of his principal, as "A. B. by C. D., his attorney:" *Combe's Case*, 9 Rep. 77 a.; but other forms will be sufficient, if they show that the signature was made as agent and not as principal; see *Alexander* v. *Sizer*, L. R. 4 Ex. 102. See further as to this, *post*, tit. Powers of Attorney. A steward or land agent cannot, without express authority to bind his principal, grant a lease: *Ridgway* v. *Wharton*, 3 De G. M. & G. 677; *Collen* v. *Gardiner*, 21 Beav. 540;

Leases by Mortgagors and Mortgagees.

nor, apparently, has a town house-agent as such, but express authority will be presumed on slight evidence: *Slack* v. *Crewe*, 2 F. & F. 59. An ordinary farm bailiff with authority to receive rents, and let on yearly tenancies on the usual conditions, has no implied authority to bind his principal by making demises for longer terms with special stipulations: *Turner* v. *Hutchison*, 2 F. & F. 185. An unauthorized demise by an agent is capable of subsequent adoption and ratification by the principal: such ratification, if the instrument is not under seal, may be either in writing: *Fitzmaurice* v. *Bayley*, 6 E. & B. 868; or by parol: *Rodwell* v. *Eden*, 1 F. & F. 542; if the demise is under seal, the ratification must be by redelivery: *Tupper* v. *Foulkes*, 9 C. B. N. S. 797. As to what amounts to delivery of a deed, see Shep. Touch. 58, and see *ante*, tit. Attestation, Vol. II., p. 257 (n.). See further as to leases by agents and bailiffs, Woodf. L. & T. 57 *et seq.*

14. Leases by Mortgagors and Mortgagees.

Leases by mortgagor before mortgage.

Leases by Mortgagor before Mortgage.]—A mortgage does not disturb leases already granted, but only passes the reversion with the right to future rents to the mortgagee: *Rogers* v. *Humphreys*, 4 A. & E. 299; but the right to arrears of rent does not pass unless expressly included: *Salmon* v. *Dean*, 3 Mac. & G. 344. Although no attornment is necessary to give effect to the mortgagee's rights, the lessees may safely continue to pay their rents to the mortgagor until they receive notice from the mortgagee to pay the rents to him: 4 Ann. c. 16, ss. 9, 10. See *Cook* v. *Moylan*, 1 Exch. 67. After giving such notice, the mortgagee becomes entitled to all rent then unpaid, which has accrued due since the date of the mortgage, as well as to all subsequent rent: *Moss* v. *Gallimore*, 1 Doug. 279; *S. C.* 1 Sm. L. C. 629; *Pope* v. *Biggs*, 9 B. & C. 245. If a tenant holds under a yearly tenancy or under an agreement, the mortgagee, after giving notice, may recover such rents in an action for use and occupation: *Birch* v. *Wright*, 1 T. R. 378; *Rawson* v. *Eicke*,

7 A & E. 451. And if the rent has been increased since the mortgage, the mortgagee may claim arrears of the improved rent: *Barrows* v. *Gradin*, 1 D. & L. 213. If, however, a tenant, after notice, pays rent to the mortgagor, and is afterwards compelled to pay it over again to the mortgagee, he cannot recover the amount paid from the mortgagor: *Higgs* v. *Scott*, 7 C. B. 63.

Leases by Mortgagors and Mortgagees.

Leases by Mortgagor alone after Mortgage.]—Where lands are already in mortgage, a tenant taking a lease from the mortgagor alone will be estopped during his possession thereunder from disputing his lessor's title: *Alshorne* v. *Gomme*, 2 Bing. 54; *Morton* v. *Woods*, L. R. 3 Q. B. 658; and until the mortgagee interferes, the mortgagor is entitled to receive the rent for his own use, and may distrain for it: *Trent* v. *Hunt*, 9 Exch. 14. But, except where the mortgagor is authorized by the terms of the mortgage or by statutory enactment (as to which *vide infra*) to grant leases without the mortgagee's concurrence, the mortgagee may, at any time, eject the tenant, on giving notice of the mortgage to him: *Walmesley* v. *Milne*, 7 C. B. N. S. 115; or the mortgagee may continue the tenant in possession, giving notice that the rents are to be paid to himself instead of to the mortgagor. Such notice will not of itself constitute a new tenancy between the mortgagee and the lessee, for which purpose the assent of the latter by attornment or otherwise is necessary: *Rogers* v. *Humphreys*, 4 A. & E. 299; *Partington* v. *Woodcock*, 6 A. & E. 690. See *Wheeler* v. *Branscombe*, 5 Q. B. 375. Until such new tenancy is created, the mortgagee cannot distrain; and even actual payment of rent to the mortgagee, pursuant to notice, will not of itself necessarily support a distress for previous rent: *Evans* v. *Elliott*, 9 A. & E. 342. But, after attornment or other express or implied assent by the tenant, the mortgagee may distrain for rent due as from the date thereof: *Gladman* v. *Plumer*, 10 Jur. 109.

Leases by mortgagor alone after mortgage.

Payment of rent to the mortgagee under compulsion is a good defence to a claim by the mortgagor

Payment of rent to mortgagee.

Leases by Mortgagors and Mortgagees.

for the rent so paid: *Johnson* v. *Jones*, 1 Per. & D. 651. And, though the tenant cannot dispute his landlord's title, he may show that it has determined: *Alshorne* v. *Gomme*, 2 Bing. 54; *Doe* v. *Edwards*, 5 B. & Ad. 1065.

Where a new tenancy is created between the mortgagee and the lessee, it appears to be a tenancy from year to year on the terms of the lease, so far as applicable: *Doe* v. *Boulter*, 6 A. & E. 675; and is determinable by either party on giving to the other notice to quit in the usual manner: *Corbett* v. *Plowden*, 25 Ch. D. 678; and, in the case of an agricultural holding, will import the provisions of the Agricultural Holdings (England) Act, 1883, as to notice to quit and otherwise.

Statutory leasing powers of mortgagor.

The position of a mortgagor in possession as regards leases granted by him, was formerly attended with serious difficulties (as to which see Coote on Mortgages, 778); but, by the Judicature Act, 1873 (36 & 37 Vict. c. 66), sect. 25, sub-sect. 5, it is enacted that—

Suits for possession of land by mortgagors.

"A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person."

As a mortgagor alone could not formerly (unless duly authorized so to do by the terms of the mortgage) grant a lease which would be valid as against the mortgagee, so, on the other hand, the mortgagee could not, before the passing of the statutory provisions hereafter noticed, make in equity a demise which would bind the mortgagor without his concurrence, unless, as it would seem, in case of absolute necessity: *Hungerford* v. *Clay*, 9 Mod. 1.

Statutory leasing powers of mortgagee.

With regard to mortgages made after the 31st of December, 1881, by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), the follow-

ing powers of leasing are given to mortgagors and mortgagees, except where such powers are excluded or modified by the terms of the mortgage deed :

Leases by Mortgagors and Mortgagees.

Sect. 18.—"(1.) A mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this Act, power to make from time to time any such lease of the mortgaged land, or any part thereof, as is in this section described and authorised.

Leasing powers of mortgagor and of mortgagee in possession.

"(2.) A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have, by virtue of this Act, power to make from time to time any such lease as aforesaid.

"(3.) The leases which this section authorizes are—

"(i.) An agricultural or occupation lease for any term not exceeding twenty-one years ; and

"(ii.) A building lease for any term not exceeding ninety-nine years (*i*).

"(4.) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.

"(5.) Every such lease shall be made to take effect in possession not later than twelve months after its date.

"(6.) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.

"(7.) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

"(8.) A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee and all persons deriving title under him, be sufficient evidence.

"(9.) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, having erected, or agreeing to erect within not more than

(*i*) For a definition of a building lease in this Act see *ante*, p. 29 n. A mining lease is not here expressly authorized, but if it is desired that the mortgagor or the mortgagee while in possession shall be able to grant such leases (which of course involve *pro tanto* a destruction of the *corpus*), an express power of granting such leases may be conferred on him by the mortgage deed : see sub-sect. 14 of this section.

Leases by Mortgagors and Mortgagees.

five years from the date of the lease, buildings, new or additional, or having improved or repaired buildings, or agreeing to improve or repair buildings within that time, or having executed, or agreeing to execute, within that time, on the land leased, an improvement for or in connexion with building purposes.

"(10.) In any such building lease a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term.

"(11.) In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee; but the lessee shall not be concerned to see that this provision is complied with.

"(12.) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding.

"(13.) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained.

"(14.) Nothing in this Act shall prevent the mortgage deed from reserving to or conferring on the mortgagor or the mortgagee, or both, any further or other powers of leasing or having reference to leasing; and any further or other powers so reserved or conferred shall be exerciseable, as far as may be, as if they were conferred by this Act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in the mortgage deed.

"(15.) Nothing in this Act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrancers, if this Act had not been passed.

"(16.) This section applies only in case of a mortgage made after the commencement of this Act; but the provisions thereof, or any of them, may, by agreement in writing made after the commencement of this Act, between mortgagor and mortgagee, be applied to a mortgage made before the commencement of this Act, so, nevertheless, that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

"(17.) The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting."

Leases by Mortgagors and Mortgagees.

It is not unusual in practice to insert in mortgages a proviso excluding or modifying the provisions of this section, on the ground that the powers thereby conferred on mortgagors are unduly extensive. Where the operation of the section is thus negatived, the concurrence of the mortgagee in leases will be required, as was generally the case before the passing of the Act. This concurrence the mortgagor is often unwilling to apply for, on account of its leading to a disclosure of the security to the lessee; and yet no mortgagor, unless he be duly empowered to do so, can honestly attempt to grant a lease, without the concurrence of the mortgagee. This state of things is also inconvenient to the mortgagee (see *ante*, p. 78). As the mortgagor has an interest in the property sufficient to prevent him from making disadvantageous leases, there seems to be no great danger in a mortgagee's conceding to the mortgagor the power of leasing given by the statute or some modification thereof. An objection which might formerly have been urged to the plan, viz., that by this means a lease might be granted by the mortgagor without the knowledge of the mortgagee, and the remedies of the latter, by distress or ejectment, might consequently be obstructed, is obviated by the provision as to delivery of the counterpart to the mortgagee in sub-sect. (11) of the above section (*k*).

Covenants in leases by mortgagor and mortgagee.

Where lands in mortgage are demised (except where express or statutory powers of leasing apply), the concurrence of both the mortgagor and mortgagee is requisite; but such leases are subject to this inconvenience, that if the mortgagor enter into the lessor's covenants for quiet enjoyment, &c. (as he usually does), seeing that the legal estate is in

(*k*) The question how far it is desirable to exclude the operation of this section will be more fully considered, *post*, tit. MORTGAGES.

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the mortgagee, and not in him, such covenants are covenants in gross only, and do not run with the land, so as to bind the grantee of the reversion. And, by parity of reasoning, actions on the covenants entered into by the lessee with the mortgagor can only be brought in the name of the covenantee or his representatives. The lessee's covenants should therefore always be made with the mortgagee, as the owner, for the time being, of the legal estate, and when the debt is paid, and the estate reconveyed to the mortgagor, the right to maintain an action on such of the covenants as run with the land, will pass to the mortgagor as incident to the reversion: *Webb* v. *Russell*, 3 T. R. 393; *Stokes* v. *Russell*, 3 T. R. 678; 1 H. Bl. 562. See *Whitton* v. *Peacock*, 2 Bing. N. C. 411; *Doe* v. *Adams*, 2 Cr. & J. 232. For the same reason an action on the lessor's implied covenant resulting from the words of demise should be brought against the mortgagee only, and not against him and the mortgagor jointly, though the latter may have joined in the lease: *Smith* v. *Pocklington*, 1 Cr. & J. 445. A covenant for quiet enjoyment from both lessors would, in the absence of any express covenant, be implied: *Coleman* v. *Sherwin*, 1 Salk. 137; but an express covenant from the mortgagor excludes such implication: *Nokes's Case*, 4 Rep. 80; *Smith* v. *Pocklington*, 7 Scott, 69.

Reservation of rent.

The legal estate in the land being in the mortgagee, it is proper to reserve the rent to the mortgagee, or generally; not, as is sometimes done, to the mortgagee till payment of the debt, and then to the mortgagor. If the rent be made payable simply to the mortgagee, who has the reversion, or, which would have the same effect, be reserved generally, without saying to whom, the benefit of the reservation will, upon reconveyance, pass with the estate to the mortgagor (*kk*). So also the power for re-entry should be given to the

(*kk*) The question of the proper mode of reserving rent will be fully considered later, see *post*, p. 143. A lease of land in mortgage should contain a proviso that the rents shall be paid to the mortgagor, until the mortgagee gives notice to the tenant to pay the rents to him.

mortgagee and not to the mortgagor: *Doe* d. *Barney* v. *Adams*, 2 C. & J. 232; *Saunders* v. *Merryweather*, 3 H. & C. 902. Leases by Copyholders.

15. By Copyholders.

Copyholders cannot demise lands except by special custom (*l*), or by licence from the lord, for a longer period than one year, without incurring a forfeiture: see *Melwich* v. *Luter*, 4 Rep. 26; *Luttrel* v. *Weston*, Cro. Jac. 308; *Doe* v. *Bousfield*, 6 Q. B. 492. A number of leases for one year, executed at the same time, each to take effect after the determination of the preceding one, is a forfeiture: *Mathews* v. *Whetton*, Cro. Car. 235. If the license be exceeded, the lease will be void *in toto*: *Jackson* v. *Neal*, Cro. Eliz. 395; *Haddon* v. *Arrowsmith*, Cro. Eliz. 461; *Worledge* v. *Benbury*, Cro. Jac. 436. The lease, however, of course, need not be for the *whole* period specified in the license: *Goodwin* v. *Longhurst*, Cro. Eliz. 535. The license formerly bound only the estate of the person who granted it; if, therefore, it was granted by a person having a limited interest, it was void against the succeeding lord: *Petty* v. *Evans*, 1 Roll. Abr. 511; *Munifas* v. *Baker*, 1 Keb. 25. But by the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), sect. 9, the powers of leasing given by that Act to limited owners are to include powers to lords of settled manors to give licenses to their copyhold or customary tenants to grant leases. Leases by copyholders.

And now by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), it is enacted:—

Sect. 14.—"(1.) A tenant for life may grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to make any lease of that land, or of a speci- Power to grant to copyholders licences to lease.

(*l*) See *Porphyry* v. *Legingham*, 2 Keb. 344. The lord has an uncontrollable discretion whether he will grant a licence or not: *Reg.* v. *Hale*, 1 Per. & D. 293. See *Ballard* v. *Agard*, Toth. Holborn's ed. 107. The steward, as such, has no authority to grant a licence to lease, Co. Cop. s. 44. By the special customs of some manors copyholders may grant leases for three, nine, or twenty-one years, Kitch. 201; or even for a life and forty years after. Com. Dig. tit. *Copyhold* (K. 3). By the custom of

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fied part thereof, as the tenant for life is by this Act empowered to make of freehold land (*m*).

"(2.) The licence may fix the annual value whereon fines, fees, or other customary payments are to be assessed, or the amount of those fines, fees, or payments.

"(3.) The licence shall be entered on the court rolls of the manor, of which entry a certificate in writing of the steward shall be sufficient evidence."

Licence to demise runs with land.

A licence to demise, though not in terms granted to assignees, will (unless the custom be otherwise) run with the land, and may be exercised by the devisee (or it would seem any other alienee) of the grantee. If granted upon condition, of course the condition must be performed (see however *Haddon* v. *Arrowsmith*, Cro. Eliz. 461); but a licence to assign for ninety-nine years, the premises being intended to be improved, has been held not to imply a condition that the lease should contain a covenant to build: *Whitton* v. *Peacock*, 3 My. & K. 325.

Effect of licence to demise.

A lease, though void against the lord for want of licence, will be binding on the parties themselves: *Wells* v. *Partridge*, Cro. Eliz. 469; *Fareley's Case*, Cro. Jac. 36. The forfeiture may of course be waived by the lord, whereby the lease will become good as against him: *Doe* v. *Bousfield*, 6 Q. B. 492; and if the lord die before entry or forfeiture, the remainderman or reversioner cannot enforce the forfeiture: *Montague's* (*Lady*) *Case*, Cro. Jac. 301. Where a licence is once granted, the interest demised may, being a common-law interest (*n*), be assigned without

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the manor of Highbury in the county of Middlesex, it appears that leases may be granted without licence for terms not exceeding twenty-one years: *Rawstorne* v. *Bentley*, 4 Bro. C. C. 415. And in the manors of Hackney and Stepney, in the same county, such leases may be granted for terms not exceeding thirty-one years and four months in possession and subject to certain formalities: Scriv. Cop. p. 193. According to the custom of some manors, *e.g.* that of Ealing, the lord's power of licence is restricted to leases not exceeding twenty-one years: see *Hanbury* v. *Litchfield*, 2 My. & K. 629.

(*m*) As to leases by tenants for life under these Acts see *ante*, pp. 26 and 28. A licence under this section must not of course override such customs of the manor as would be binding on an owner in fee: see Wolst. S. L. Act, p. 26.

(*n*) Co. Cop. s. 51; Tr. 119. So, a demise by licence over-rides

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further licence from the lord: Gilb. Ten. 299; *Johnson* v. *Smart*, 1 Roll. Ab. 508, pl. 14; *Turner* v. *Hodges*, Hutt. 102. So, if the copyholder should forfeit his estate, the lease would stand good against the lord, the demise being by licence: Hob. 117, pl. 203; 6 Vin. Ab. 218, pl. 5. It was extendible at law, even before the 1 & 2 Vict. c. 100: Gilb. Ten. 467. Although copyholds are excepted in the Register Acts, yet as leases of copyholds by licence are common-law interests, it is usual to register them, and all assignments, if the estate created be of such a nature or extent as, if derived from a freehold, would require registry: Sugd. Vend. 732.

The terms of the licence will depend on the custom of the particular manor, but the licence is usually given as a matter of course on payment of a fine: see Scriv. Cop. 193. It might sometimes be proper to provide in the licence, that the copyholder shall not take any fine or premium on granting the lease.

As to demises by copyholders without a licence.

It is clear that a demise of copyholds for a year, with a covenant to grant a new lease at the end of each year during a certain term if the lord will grant a licence, does not create a forfeiture, inasmuch as it only operates as a lease for one year, unless the further term specified is warranted by licence, or by special custom: see *Lufkin* v. *Nunn*, 11 Ves. 170. And it has been decided, that a covenant that the lessee *shall enjoy* is equally inoperative as a demise, and therefore to produce forfeiture: *Montague's (Lady) Case*, Cro. Jac. 301; *Lenthall* v. *Thomas*, 2 Keb. 267 (but see *Richards* v. *Sely*, 2 Mod. 79); *Doe* d. *Nunn* v. *Lufkin*, 4 East, 221; for though expressions of this nature have sometimes been held to amount to actual demises, *vide infra*, p. 103; yet the courts are disinclined to give this construction to them where the effect would be to cause a forfeiture: see *Doe* d. *Coore* v. *Clare*, 2 T. R. 739; and especially where the lease contains a formal demise, showing thereby that the parties had in view the distinction between demise and covenant. Where the lessor covenants

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the free-bench of the copyholder's widow: *Salisbury* d. *Cooke* v. *Hurd*, Cowp. 481.

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to grant a new lease at the expiration of the term for which the demise is made, and so from time to time during a given period, it is clear that the covenant affords no defence to an ejectment: *Fenny* d. *Eastham* v. *Child*, 2 Mau. & S. 255.

The lessee's only remedy would be an action either for breach of covenant, or to enforce the specific performance of the covenant. As to the construction of the covenant to renew in such cases, see *infra*, p. 217.

The lessor's surrenderee is an assignee of the reversion within the 32 Hen. 8, c. 34, and may sue upon the covenants in the lease, and the lessee cannot dispute his title: *Whitton* v. *Peacock*, 3 My. & K. 325.

16. Underleases.

Cautions to be observed in preparing underleases.

All lessees and tenants, except tenants at will and on sufferance, may assign or demise their property or any part of it, unless expressly precluded from so doing. In preparing underleases no point more readily suggests itself (though it is not always attended to) than that the original lease should be examined, and that the covenants and provisions of the underlease should correspond in substance (with such modifications as may be necessary) with those of the original lease, in order that the original lessee may take care to bind his sub-lessee, in respect of the premises sub-demised, by all the obligations by which he is himself bound. It was decided in *Neale* v. *Wyllie*, 3 B. & C. 533, that in such a case, if the under-lessee breaks his covenant, by means of which his lessor is exposed to an action by his own lessor, he (the under-lessor) may recover against the under-lessee, as well the damages and costs recovered against him in such action, as the costs incurred in defending it; but this decision, so far as the costs of the action by the superior landlord were concerned, was doubted in the case of *Pennell* v. *Watts*, 7 M. & W. 249; and was overruled in *Walker* v. *Hatton*, 10 M. & W. 249, where under similar circumstances it was held that the costs incurred in the action by the superior landlord were not recoverable against

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the under-lessee, not being directly attributable to his breach of covenant. See also *Colley* v. *Streeton*, 2 B. & C. 273; *Williams* v. *Williams*, L. R. 9 C. P. 659. On the other hand, it behoves the under-lessee on his part to see what are the conditions under which his lessor holds the property; for, by a neglect of this precaution, it has sometimes happened that an under-lessee has exposed himself to forfeiture by the violation of covenants in the original lease, of the existence of which he was ignorant; and he has in such a case, no remedy against his lessor upon the usual limited covenants for quiet enjoyment for the non-disclosure of the condition (*o*).

There being no privity between the original lessor and the under-lessee, it is clear that they cannot bring actions against each other on the covenants contained in the lease and underlease: *Holford* v. *Hatch*, 1 Doug. 183. As to the effect of a surrender of the lease by an under-lessor, see *post*. And as to the effect of the disclaimer of the superior lease by the trustee in bankruptcy of the lessee on the position of a person holding an agreement for an underlease, see *Taylor* v. *Gilliatt*, L. R. 20 Eq. 682.

Tenancy from year to year cannot be determined by the superior landlord by notice.

Upon the principle that the relation of landlord and tenant does not subsist between the original lessor and an under-lessee, it is clear that a sub-tenancy from year to year cannot be determined by the superior landlord, to whom the mesne landlord has surrendered his interest: *Pleasant* d. *Hayton* v. *Benson*, 14 East, 234. In order with certainty to determine the sub-tenancy in such a case, it is conceived the correct course would be for the superior landlord to give a regular notice to quit to his lessee, and for the latter to give a like notice to the under-lessee (though this last notice would not be legally necessary); and then, as the original tenancy would

(*o*) The grant of an underlease by a leaseholder is not within the provisions of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78) sect. 2, or of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41) and consequently in such a case the lessor's title must still be shown: see *Stranks* v. *St. John*, L. R. 2 C. P. 376.

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at all events be determined, the derivative tenancy must fall with it, and the superior landlord might treat the under-tenant holding over after that period as a trespasser, and recover against him in an action of ejectment: *Roe* v. *Wiggs*, 2 Bos. & P. N. R. 330; and if the derivative tenancy was not expired, this, though it might form a ground of action by the sub-tenant against *his* landlord, could not interfere with the paramount claim of the ulterior owner to the possession. It may be asked, however, if the original tenancy may be determined by notice, so as to enable the landlord to maintain an ejectment against the sub-tenant, why may not the intermediate tenant dispense with the notice, and place the premises in the same situation by a surrender of a part in the name of the whole? Perhaps there is some difficulty in completely disposing of this objection; but the judges who decided *Pleasant* v. *Benson* (though they considered that no surrender of the whole had been attempted to be made in that case) expressed an unequivocal opinion that the sub-tenant would not have been affected by it, upon the ground of Lord *Coke's* doctrine, and such would no doubt be the present determination of the courts on the subject: see *Roe* d. *Blair* v. *Street*, 4 N. & M. 42; *Rex* v. *Banbury*, 3 N. & M. 292. In *Roe* v. *Street*, where B. came into possession under a contract for sale of the premises, and E. and F. held of him, notice to quit served by the owner of the fee upon E. and F. was considered sufficient.

Assignments and under-leases by tenants from year to year.

Cases in which a tenant from year to year sub-lets are to be distinguished from those in which he *assigns*, where the tenancy of course subsists from the same period, and on the same terms in regard to the assignee, as in regard to the original tenant: *Doe* d. *Castleton* v. *Samuel*, 5 Esp. 172. A demise from year to year, by a person who was himself tenant from year to year, was held to be in legal operation a demise from year to year during the continuance of the original tenancy, and properly so described in pleading, although, at the time of making the contract, no such qualification was mentioned: *Pike* v. *Eyre*, 9 B. & C. 909. See *Peirse* v.

Sharr, 2 M. & Ry. 418; *Freeman* v. *Jury*, Moo. & M. 19. Who may be Lessees.

It is clear that where the instrument operates as a transfer of the whole residue of the term, though the rent is reserved to the grantor, and not to the original lessor, it is an assignment, and not an underlease: *Palmer* v. *Edwards*, Doug. 178, n.; see also *Parmenter* v. *Webber*, 8 Taun. 593; *Thorne* v. *Woolcombe*, 3 B. & Ad. 586; *Wollaston* v. *Hakewill*, 3 Man. & Gr. 297; *Beardman* v. *Wilson*, L. R. 4 C. P. 57. If the reversion of a single day is left to the grantor, it is attended with the same legal consequences as where he retains a substantial interest: *Holford* v. *Hatch*, Doug. 183. It is to all intents an underlease, and the same language should be employed in framing the demise as in other cases of leases. What an assignment as distinguished from underlease.

17. Who may be Lessees.

This question may be here briefly noticed. Generally speaking, all persons not under any legal disability are competent to take leases of houses or lands, and in case of the death of the lessee during the term, his liabilities under the lease will devolve on his personal representatives. Generally.

Leases to Corporations.]—A corporation aggregate can take a lease which will go in succession, as the corporation is always in being: Bac. Abr. tit. *Corporation* (E. 4). But "if a lease for yeares be made to a bishop and his successors, yet his executors or administrators shall have it *in auter droit*, for regularly no chattell can goe in succession in the case of a sole corporation": Co. Lit. 46 b. A sole corporation, as a bishop or a parson, cannot make a lease to himself; so a lease made by one member of a corporation aggregate, as such, to another member is void. A lease may, however, be made to a prebendary of a chapter, for a prebendary is not an integral part of the body corporate: *Salter* v. *Grosvenor*, 8 Mod. 303. So a lease to one of the governors of Harrow School was set aside, though there was Leases to corporations aggregate and sole.

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no fraud, as being inconsistent with his office: *Att.-Gen.* v. *Earl of Clarendon*, 17 Ves. 491.

Parsons as lessees.

The stat. 1 & 2 Vict. c. 106, sect. 28, enacts that—

Spiritual persons beneficed or performing ecclesiastical duty not to hold above eighty acres without consent of the bishop, and then not beyond seven years, under penalty of 40*s.* per acre.

"It shall not be lawful for any spiritual person holding any cathedral preferment or benefice (*p*), or any curacy or lectureship, or who shall be licensed or otherwise allowed to perform the duties of any ecclesiastical office whatever, to take to farm for occupation by himself, by lease, grant, words, or otherwise, for term of life or of years, or at will, any lands exceeding eighty acres in the whole, for the purpose of occupying or using or cultivating the same, without the permission in writing of the bishop of the diocese specially given for that purpose under his hand; and every such permission to any spiritual person to take to farm for the purpose aforesaid any greater quantity of land than eighty acres shall specify the number of years, not exceeding seven, for which such permission is given; and every such spiritual person who shall without such permission so take to farm any greater quantity of land than eighty acres, shall forfeit for every acre of land above eighty acres so taken to farm the sum of forty shillings for each year during or in which he shall so occupy, use, or cultivate such land contrary to the provision aforesaid."

Councils of boroughs, &c., as lessees.

By the stat. 9 & 10 Vict. c. 74, the council of incorporated boroughs, and duly appointed commissioners in parishes not within incorporated boroughs (with the approval of one of her Majesty's principal secretaries of state), may take leases of public baths and washhouses (*q*). And by the Public Libraries Act, 1855 (18 & 19 Vict. c. 70), sect. 18, as amended by the Public Libraries Act, 1871 (34 & 35 Vict. c. 71), the council of any borough and the board of any district respectively may "rent any lands or suitable buildings" for the purposes of "public

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Definition of "benefice."

(*p*) By sect. 124 the term "benefice" is defined "to mean benefice with cure of souls and not otherwise (unless it shall otherwise appear from the context) and therein to comprehend all parishes, perpetual curacies, donatives, endowed public chapels, parochial chapelries, and chapelries or districts belonging to or reputed to belong, or annexed or reputed to be annexed to any church or chapel."

(*q*) Such leases with all incident liabilities vest in the corporation, not in the council: *Cowley* v. *Mayor, &c., of Sunderland*, 6 H. & N. 565.

libraries or museums, or both, or for schools of science and art." Who may be Lessees.

Parish Officers.]—By the stat. 59 Geo. 3, c. 12, sect. 12 the churchwardens and overseers of the poor of any parish with the consent of the vestry are empowered "to hire or take on lease for or on account of the parish any suitable portion or portions of land within or near to such parish not exceeding twenty acres in the whole," for the employment of paupers in the cultivation thereof. And by sect. 17 of that Act, lands so hired or taken on lease are to be demised to the churchwardens and overseers, who may hold the lands and bring or defend actions, &c., as a body corporate. Such demises should be made to them "and their successors:" *Burnaby* v. *Barsby*, 4 H. & N. 326. These hiring powers are now exerciseable by the guardians of the poor or overseers: see *ante*, p. 6, note (*r*). Parish officers as lessees.

By the stat. 4 & 5 Will. 4, c. 76, sect. 23, the Poor Law Commissioners (and now the Local Government Board), with the consent of a majority of the guardians of any union or of the ratepayers in any parish, may order the overseers or guardians of any parish or union not having a workhouse or workhouses, to hire land for the purpose of building a workhouse or workhouses thereon, or to hire a workhouse or workhouses, or any building or buildings for the purpose of being used as or converted into a workhouse or workhouses, and, with the like consent, may order the overseers or guardians of any parish or union having a workhouse or workhouses or buildings capable of being converted into such, to hire any additional workhouse or workhouses or building or buildings to be used as or converted into such, or to hire any land for building such additional workhouse or workhouses: And the overseers or guardians may raise moneys required for the purposes specified in such order as therein mentioned.

By the stat. 24 & 25 Vict. c. 125, it is enacted that,

Sect. 1. "The overseers of any parish in England the population whereof shall exceed four thousand persons according to the census Leases to overseers for parish offices.

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for the time being, with the consent of the vestry, called after due notice, and with the consent of the Poor Law Board, signified by an order under their seal, may hire any room, or purchase or take upon lease or exchange any land or building, or sell land belonging to such parish, and invest the proceeds of such sale in the purchase of other land and building, or erect a suitable building on any land acquired as aforesaid, for the purpose of an office or for the transaction of the business of the parish."

And by the stat. 30 & 31 Vict. c. 106, sect. 13 :

Temporary hirings without order under seal.

"Guardians may, with the approval of the Poor Law Board, hire or take on lease, temporarily or for a term of years not exceeding five, any land or buildings for the purpose of the relief or employment of the poor and the use of the guardians or their officers, without any order of the said Board under seal."

Leases to rate-payers for public improvements.

As to the power of a majority of two-thirds of the rate-payers duly assembled of any parish or district having a population of five hundred or upwards according to the last census, to levy rates in aid of public improvements, and to *lease* lands for the purpose of paving any public walk, exercise or play ground, or for improving any open walk or footpath, and other purposes of a similar nature, see 23 & 24 Vict. c. 30.

Leases to infants.

Infants.]—Leases to infants are voidable by them at their majority ; but the election to avoid the lease must be made within a reasonable time after their minority has ceased. See *Ketsey's case,* Cro. Jac. 320. In *Holmes* v. *Blogg,* 8 Taun. 35, several learned judges expressed an opinion (though the case principally turned upon other points), that an acquiescence of four months precluded an infant from subsequently disaffirming the lease. It was held in this case, that an infant could not, on avoiding the lease, recover back a sum of money which he had paid as a premium in consideration of it : *S. C.,* 2 Moore, 552.

An infant may contract for a necessary lodging : *Crisp* v. *Churchill,* 1 Bos. & P. 340. Whether a house hired by an infant wherein he carried on his occupation as a barber was a necessary, was held to be a question for the jury : *Lowe* v. *Griffith,* 1 Scott, 458. An infant cannot trade, nor, therefore, hire a

house for the purpose of a trade: *Hands* v. *Slaney*, 8 T. R. 578. And see *ante*, tit. Bonds, Vol. II., p. 270, *seq.* Who may be Lessees.

Where an infant obtained a lease on an implied representation that he was of age, the lessor seeking to set aside the lease on that ground was held to be entitled to a declaration that the lease was void, but not to make the defendant liable for use and occupation: *Lemprière* v. *Lange*, 12 Ch. D. 675.

Married Women.]—A married woman might always be a lessee without her husband's assent, but her husband might have at any time disagreed thereto and divest the estate, and she might on his death have avoided the lease. Co. Lit. 3 a; see *Swaine* v. *Holmen*, Hob. 204. And a married woman living separate from her husband, could bind her separate estate for payment of the rent and observance of the covenants of a lease. Leases to married women.

A married woman may now enter into and render herself liable to the extent of her separate property in respect of any contract, and on her death her rights and liabilities thereunder devolve on her legal personal representatives: See Married Woman's Property Act, 1882 (45 & 46 Vict. c. 75), sects. 2, 23.

Lunatics.]—Idiots and lunatics may be lessees, but may avoid their leases on recovery of a sane mind: Co. Lit. 26. If, however, the lessor is aware of the lessee's condition and takes advantage of it, the lease may be set aside: *Dane* v. *Viscountess Kirkwall*, 8 Car. & P. 679. Leases to lunatics.

By 16 & 17 Vict. c. 70, sect. 113, the committee of a lunatic may under the direction of the Lord Chancellor surrender leases and accept new leases on behalf of the lunatic of the premises comprised in the surrendered lease. Leases to committee of lunatics.

Trustees Generally.]—When a lease is made to a trustee, he will be personally liable for payment of the rent and performance of the lessee's covenants, and the lessor has no remedy against the *cestui qui trust* in respect thereof: *Walters* v. *Northern Coal* Leases to trustees.

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Co., 5 De G. M. & G. 629; see also *White* v. *Hunt*, L. R. 6 Ex. 32.

Trustees may not lease to one of themselves. If a person in a fiduciary position takes a lease of the trust property, he will be liable for any loss which may accrue, and must account for all profits if the lease proves beneficial: *Ex parte Hughes*, 6 Ves. 617; *Att.-Gen.* v. *Earl of Clarendon*, 17 Ves. 491. But a lease like a sale to a trustee of trust property may be rendered valid by the express and actual confirmation of the *cestui qui trust* if under no disability. As to what is requisite to such confirmation, see Lewin on Trusts, 449.

Renewal of lease by trustee.

A lease renewed by a trustee or executor in his own name, even in the absence of fraud and though the lessor may have refused to grant a new lease to the *cestui qui trust*, will be ordered to be held upon trust for the person entitled to the old lease: *Keech* v. *Sandford*, Sel. Ca. Ch. 61; and see the notes to that case in 1 Wh. & Tud. L. C. 46 *seq.*; see also *Cooper* v. *Phibbs*, L. R. 2 H. L. 149; *Mill* v. *Mill*, L. R. 3 H. L. 828.

Leases to trustees of char ty.

Trustees of Charities.]—Leases to trustees for charitable uses, like other conveyances of lands in England and Wales, must be made in accordance with the Mortmain Act (9 Geo. 2, c. 36), sect. 1. By the stat. 26 & 27 Vict. c. 106, after reciting previous Acts relating to conveyances to charitable uses, it is enacted that—

Deeds by which lands are demised for charitable uses to take effect from the making thereof.

Sect. 1. "Every deed or assurance by which any land shall have been demised for any term of years for any charitable use shall, for all the purposes of the said recited Acts, be deemed to have been made to take effect for the charitable use thereby intended immediately from the making thereof, if the term for which such land shall have been thereby demised was thereby made to commence and take effect in possession at any time within one year from the date of such deed or assurance."

By the stat. 31 & 32 Vict. c. 44, leases of land not exceeding two acres *bonâ fide* made to trustees for religious purposes or for the promotion of education, arts, literature, or other like purposes, are exempt

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from the operation of the Mortmain Acts: sect. 1. The trustees may however, if they think fit, cause the deeds to be enrolled: sect. 2. But a deed need not be acknowledged in order to enrolment: sect. 3.

Leases of land already devoted to charitable purposes, are not within the Mortmain Act, 9 Geo. 2, c. 36: *Walker* v. *Richardson*, 2 M. & W. 882. See *Att.-Gen.* v. *Wilson*, 2 Kee. 680.

Friendly societies.

By the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), sect. 16, sub-sect. (2), it is enacted that—

Holding of land.

"A society (*p*), or any branch of a society, may (if the rules thereof so provide) hold, purchase, or take on lease in the names of the trustees for the time being of such society or branch, in every county where it has an office, any land, and may sell, exchange, mortgage, or lease, or build upon the same (with power to alter and pull down buildings and again rebuild), and no purchaser, assignee, mortgagee, or tenant shall be bound to inquire as to the authority for any sale, exchange, mortgage, or lease by the trustees, and the receipt of the trustees shall be a discharge for all moneys arising from or in connection with such sale, exchange, mortgage, or lease; and for the purpose of this section no branch of a registered society need be separately registered: Provided that nothing herein contained shall authorize any benevolent society to hold land exceeding one acre in extent at any one time."

Leases to agents.

Agents.]—If an agent takes a lease from his principal, it is incumbent on him to show that the rent reserved represents the fair value of the property: *Lord Hardwicke* v. *Vernon*, 4 Ves. 411; and that the transaction was in other respects fair and reasonable: *Lady Ormond* v. *Hutchinson*, 16 Ves. 94; *Grosvenor* v. *Sherratt*, 28 Beav. 659.

Renewal of lease by agent.

A person acting as agent or in any similar capacity cannot take a renewal of a lease in which his principal was interested: *Mulhallen* v. *Marum*, 3 Dru. & W. 317. See *Griffin* v. *Griffin*, 1 Sch. & L. 352; *Mulvany* v. *Dillon*, 1 Ba. & B. 417.

(*p*) Sect. 8 of this Act enumerates the classes of societies which may be registered thereunder, amongst which are "friendly societies" and "benevolent societies," the latter being defined as "societies for any benevolent or charitable purpose."

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Leases to aliens.

Aliens.]—Formerly aliens were not entitled to hold houses or lands by demise, but such houses or lands would, upon office found, belong to the Crown: *Calvin's Case*, 7 Rep. 17; see Co. Lit. 2 b. Various statutes modifying the Common Law rule on the subject were passed from time to time, and now by the Alien Act, 1870 (33 Vict. c. 14), which repeals the previous statutes relating to the possession of land by aliens, it is enacted that "real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural born British subject."

Leases to alien enemy.

It has been held that, notwithstanding the previous enabling statutes, an alien enemy could not hold a lease for any purpose whatever: *Alcinous* v. *Negren*, 4 E. & B. 217.

CHAPTER II.

AGREEMENTS FOR LEASE.

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1. What Constitutes a Lease, as Distinguished from an Agreement.

What constitutes a Lease, as distinguished from an Agreement.

Observations on agreements for leases.

Where a person agrees to let premises for a term, it is not unusual for the intended lessee to be let into possession on executing an agreement for a lease, either as a temporary arrangement until a lease can be executed, or with a view of avoiding the expense of a lease altogether. Formerly the tenant under an agreement had no security for his possession, since he was liable to eviction in an action at law: *Hamerton* v. *Stead*, 3 B. & C. 478; nor had the owner any power of enforcing payment of his rent by distress: *Hegan* v. *Jackson*, 2 Taun. 148; *Dunk* v. *Hunter*, 5 B. & Al. 322; unless, indeed, rent had been paid under the agreement, in which case the payment of rent created an actual tenancy from year to year between the parties, so as to enable the landlord to distrain for rent, and also to maintain an action for breach of any of the stipulations in the agreement: *Tempest* v. *Rawling*, 13 East, 18; *Doe* d. *Oldershaw* v. *Breach*, 6 Esp. 106; *Mann* v. *Lovejoy*, 1 Ry. & M. 355.

But, since the Judicature Acts, the rule no longer holds that a person occupying under an executory agreement for a lease only becomes, by payment of rent, tenant from year to year; there is only one Court, and equity prevails in it; the tenant therefore holds as if the lease had been granted, and is subject to the landlord's right of distress: *Walsh* v. *Lonsdale*, 21 Ch. D. 9. The effect of this decision

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would seem to be to do away with all practical difference between an agreement for a lease and an actual lease, so far as the parties themselves are alone concerned (*a*): see as to this *Allhusen* v. *Brooking*, 26 Ch. D. 559. Where, however, a mortgagor, without the privity of his mortgagees, entered into an agreement to grant a lease for twenty-one years, under which possession was taken, and subsequently the mortgagees gave notice to the tenant to pay the rents to them, it was held that the effect of such assertion of paramount right by the mortgagees, and of payment of rent to them by the tenant pursuant to notice, put an end to the agreement for the lease, but created a tenancy from year to year, which the tenant was at liberty to determine by notice in the usual manner: *Corbett* v. *Plowden*, 25 Ch. D. 678.

Whether instruments operate as leases or as agreements only.

The question, whether informal instruments, bearing the form of agreements, operate as present demises, or as executory contracts only, has been in former times a prolific source of litigation, but its practical importance has been much diminished by the passing of the stat. 8 & 9 Vict. c. 106, whereby all instruments not under seal are prevented from operating as leases where by law a lease is required to be in writing (see *post*, p. 107); and also by the passing of the Stamp Act, 1870 (33 & 34 Vict. c. 97), whereby the distinction between agreements for leases and actual leases for terms not exceeding 35 years as regards stamping, has been abolished (see *post*); and, lastly, by the recent decision above referred to (*aa*). The subject seems still, however, to be

(*a*) A mere agreement for a lease could not, as it is conceived, give a landlord a right to distrain on the goods of a stranger being on the premises. It has been recently expressly decided by the Court of Appeal that the Judicature Acts have not abolished the distinction between legal and equitable interests as regards the rights of third parties: *Joseph* v. *Lyons*, 15 Q. B. D. 280; *Hallas* v. *Robinson*, 15 Q. B. D. 288.

(*aa*) The effect of the decision in *Walsh* v. *Lonsdale*, *supra*, as regards stamps would seem to be that a considerable saving of duty may sometimes be effected without much risk of practical inconvenience to the parties, as regards demises for terms exceeding thirty-five years, if the transaction is carried out by means of an agreement for a lease instead of an actual lease.

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of sufficient interest and importance to require some consideration. It is, therefore, proposed here to give a brief statement of both classes of cases, namely, of those in which instruments of this nature have been held to amount to actual leases, and those in which they have been decided to be agreements only (*b*).

Informal instruments held to be leases.

One of the first cases of the former class is *Maldon's Case*, Cro. Eliz. 33, which arose on a parol lease before the Statute of Frauds. The words were, "I will you shall have a lease for twenty-one years of my lands in D., paying ten shillings yearly rent; make a lease in writing, and I will seal it." This was holden to be a valid lease; for the intention of the parties was sufficiently expressed, and the lease to be made was only for further assurance. (Compare this case with *Plesaunts* v. *Higham*, 1 Roll. Abr. 848.)

Harrington v. *Wise*, Cro. Eliz. 486; cit. Roll. Abr. 847, p. 46. By articles indented and under seal, it was covenanted between the parties, that J. H. "doth let" certain lands for a certain term, to begin at the feast of St. Michael next following, at a certain rent; and the parties covenanted that a lease should be made and sealed, according to the effect of these articles. It was held that this was a good present lease, and what followed only for further assurance. See also *Tisdale* v. *Essex*, Hob. 34; *Whitlock* v. *Horton*, Cro. Jac. 91; *Baxter* d. *Abrahall*, v. *Browne*, 2 W. Bl. 973; *Barry* v. *Nugent*, 3 Dou. 179, cit. 5 T. R. 165; *Doe* d. *Warner* v. *Browne*, 8 East, 164.

In the case of *Poole* v. *Bentley*, 12 East, 160, there was an agreement to grant a lease or leases of land and premises as soon as certain houses were covered in, the agreement "to be considered binding till one fully prepared can be produced." The Court of King's Bench held that it amounted to an actual lease. Lord *Ellenborough* said, "The rule to be collected from all the cases is, that the intention of the parties, as declared by the words of the instru-

(*b*) The following remarks are abbreviated from an elaborate and able examination of the subject in the 3rd Edition of this Work, Vol. IV., p. 264 *seq.*

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ment, must govern the construction; and here their intention appears to have been, that the tenant, who was to expend so much capital upon the premises within the first four years of the term, should have a present legal interest in the term, which was to be binding upon both parties; though, when a certain progress was made in the buildings, a more formal lease or leases, in which, perhaps, the premises might be more particularly described for the convenience of under-letting or assigning, might be executed." Of this case *Taunton*, J., observed (in *Warman* v. *Faithful*, 3 N. & M. 139), that he had always considered it as settling the law on this question. See also *Doe* d. *Walker* v. *Groves*, 15 East, 244; *Pinero* v. *Judson*, 6 Bing. 206; *Wilson* v. *Chisholm*, 4 Car. & P. 474, in all which cases the agreement provided that the parties should observe the stipulations thereof in the meantime until the lease should be executed. And in *Warman* v. *Faithful*, 3 N. & M. 137, an instrument, intitled "A memorandum of an agreement," was held to operate as a present demise, though it contained an agreement for the granting of a lease, without any stipulation that the agreement should be binding in the meantime, and though the agreement was for a lease of seven, fourteen, or twenty-one years; it appearing that every thing which was intended to be provided for between the parties was, by the instrument in question, provided for. See also *Doe* d. *Penson* v. *Ries*, 1 Moo. & Sc. 259.

Informal instruments held to be demises.

In *Pearce* v. *Cheslyn*, 5 N. & M. 652, an agreement for the letting of a farm from year to year, which contained words of present demise, and minute stipulations, &c., and did not contemplate a future lease, was abandoned, and subsequently an agreement was signed between the parties for letting the farm, on the conditions contained in the abandoned agreement, but at a different rent. This agreement concluded with these words, "And we further bind ourselves each to the other to execute a similar agreement to the one recited and referred to." It was held, that the two agreements together constituted a present demise.

Agreement constituted by

In *Chapman* v. *Bluck*, 5 Scott, 515, an agreement, constituted by letters, was held to amount to a

present demise. In that case *Parke*, J., said: "The rule, to be collected from all these cases is, that the intention of the parties, as declared by the words of the instrument, must govern the construction. Subsequent acts and declarations of the parties may be looked to in aid of the construction." See *Wilkinson* v. *Hall*, 4 Scott, 301.

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letters may amount to a demise.

It is no reason for not applying the established rules of construction to instruments of this nature, that, by so doing, a hardship will be imposed on one party, which he cannot be supposed to have contemplated: see *Doe* d. *Phillip* v. *Benjamin*, 1 Per. & D. 440, where, an agreement entered into by A., who was in possession as yearly tenant to B., was held to be a lease, though the effect was to cause a surrender of the previous term, and to merge the rent accruing due for the current half-year, and it appeared that the parties did not contemplate such a consequence of their acts.

Informal instruments held to be demises.

In the recent case of *Hand* v. *Hall*, 2 Ex. D. 355, the plaintiff and defendant entered into the following agreement not under seal: "Jan. 26. Hand agrees to let and Hall agrees to take a large room, &c., from the 14th February next until the following Midsummer twelvemonths, and with right at the end of that term for the tenant, by a month's previous notice, to remain on for three years and a half more:" it was held by the Court of Appeal (reversing the decision of the Exchequer Division) that the instrument was divisible, and contained an actual demise for a term of less than three years with a further agreement for a renewal of the tenancy at the defendant's option.

Informal instruments held to be agreements only.

The second class of cases remains to be considered, namely, those in which they have been held to operate, as executory agreements only. One of the first of these is *Sturgion* v. *Painter*, Noy, 128, where this construction obtained, notwithstanding that there were clear words of present demise. The terms of the instrument were as follow: "Articles agreed upon, &c. *Imprimis*, A. doth demise his close to S. to have it for forty years, and rent reserved, with clause of distress, &c. In witness whereof," &c. It was ruled that this was not a sufficient lease.

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Informal instruments held to be agreements only.

Goodtitle d. *Estwick* v. *Way*, 1 T. R. 735. The instrument, which was not under seal, and was written on unstamped paper (and the date of which does not appear), purported to be articles of agreement between Lord A. and W., by which Lord A. agreed to let to W. for the term of seven, fourteen, or twenty-one years, if Lord A. should so long live, all his estate at R. The instrument proceeded as follows: "It is agreed that the said W. shall enter on all the said premises immediately, but not commence payment of rent till Lady-day next. It is further agreed, that leases with the usual covenants shall be made and executed by the parties on or before Michaelmas next." It was decided that this was merely an agreement.

Roe d. *Jackson* v. *Ashburner*, 5 T. R. 163. "March 4th, 1783. Articles of agreement between T. and D., entered into in regard to his fulling mills, &c. That the said mills, &c. he shall enjoy, and I engage to give him a lease in, for the term of thirty-one years from Whitsuntide, 1784, at the clear yearly rent of £110, ... and that D., on his part, engages to keep the mills, wear, and every other matter in repair, he having at all times the privilege of the roads, to make what repairs may be wanted." This was held to be an agreement only.

Doe d. *Bromfield* v. *Smith*, 6 East, 530. In this case the paper was in the following terms: "3rd March, 1778. Agreed this day to let Mr. S. my house, situate in W., at the yearly rent of thirty guineas, he paying the taxes; also an inclosure called G. at the yearly rent of £7. The above agreement to continue during my life, supposing it to be occupied by himself, or a tenant agreeable to me. A clause to be added in the lease, to give my son a power to take the house for himself if he chooses, when he comes of age." The Court was of opinion that the words importing that something ulterior to the agreement was to be done by way of regular lease, showed the intention of the parties, that the writing should only operate as an agreement for a lease, and not as a lease itself.

Hegan v. *Johnson*, 2 Taun. 148. A. agreed "that he would, by indenture, demise to B. a house for

fourteen years, from the 25th day of December then last past, at the yearly rent of £40," the Court held that the agreement had no operation as a demise; for if, at any time before the end of the first year, a lease had been tendered to the occupier, and he had refused to execute it, the lessor might have ejected him without any notice to quit, and if he had executed it, he would thenceforward have held, not under the supposed demise, but under the lease. See also *Browne* v. *Warner*, 14 Ves. 156.

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Informal instruments held to be agreements only.

The next case is *Tempest* v. *Rawling*, 13 East, 18, which was an action by a landlord against his tenant for mismanagement of a farm. The instrument produced, which was stamped as an agreement only, was in these words: "Conditions of letting the four farms after mentioned, &c." (which were offered in so many lots), and then it proceeded, "the term to be from year to year: The lands to be entered upon on the 3rd of February, 1808, and the housing on the 12th of May, and six months' notice to quit to be given." Then, after stating certain regulations to be observed by the tenant, it proceeded, "a lease to be made upon these conditions with all usual covenants." At the foot of the paper was written, "I agree to take Lot one (the premises in question) at the rent of &c., subject to the covenants." This was signed by the defendant, and dated. Lord *Ellenborough* said, "This is nothing more than an agreement for a lease, which was to be made thereafter, and time was given to prepare it before the term was to commence. In *Poole* v. *Bentley*, (*ante*, p. 101), the tenant was to have immediate possession, and to lay out money in building, and the rent was to commence immediately; here, there was no immediate occupation to be taken by the tenant."

In *Morgan* v. *Bissell*, 3 Taun. 65, *Lawrence*, J., observed, "Where there is an instrument, by which it appears that one party is to give possession and the other to take it, that is a lease, unless it can be collected from the instrument itself that it is an agreement only for a lease to be afterwards made." In *Dunk* v. *Hunter*, 5 B. & Al. 322, the principal ground of decision was, that there was no specific

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rent agreed upon, or time of the commencement of the tenancy determined. See *Warman* v. *Faithful*, 3 N. & M. 143.

Informal instruments held to be agreements only.

In *Colley* v. *Streeton*, 2 B. & C. 273, and *Hamerton* v. *Stead*, 3 B. & C. 478, an attempt was made to maintain, that agreements to let premises upon certain terms, and grant a lease, operated as a demise; but the Court treated it as quite clear, that no legal interest passed.

In *Clayton* v. *Burtenshaw*, 5 B. & C. 41; the instrument, which was under seal, was held not to operate as a present demise, inasmuch as it did not fix when the interest was to commence, nor how long it was to continue. Occupancy under an agreement, without payment of rent, does not create a tenancy: *Regnart* v. *Porter*, 5 Moo. & P. 370.

An agreement, containing stipulations as to the terms upon which the tenant shall hold until a lease is granted, will not operate as a demise, if it is expressly declared that it shall not be construed so to operate: *Perring* v. *Brook*, 7 Car. & P. 360.

In *John* v. *Jenkins*, 1 Cr. & M. 227, there was a subsisting tenancy between the parties. The agreement provided that "E. lets this farm to D.," at a valuation as therein provided, and that D., when leaving the farm, was to leave the crop behind at a similar valuation, and (*inter alia*) to give sureties to answer for the rent. No award was made, nor sureties given. It was held, that the provisions for a valuation and sureties prevented the agreement from operating as a demise, so as to determine the former tenancy. As to the valuation, see *Chapman* v. *Bluck*, 5 Scott, 515.

An agreement cannot operate as a lease where, on the face of it, the intended lessor appears to have no present power to demise: *Hayward* v. *Haswell*, 1 N. & P. 411; 6 A. & E. 265; and see *Doe* v. *Clair*, 2 T. R. 739.

In *Bicknell* v. *Hood*, 5 M. & W. 104, the agreement was that A. should grant and B. should accept a lease on terms mentioned, which lease was to contain covenants on the part of B. to pay the rent, &c., and all such other similar covenants as were contained in

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the lease to A., dated, &c., provided that, "until such lease shall have been granted as aforesaid, it shall be lawful for A., his executors, &c., to distrain for all or any part of the rent which may become due from B. at any time after the execution of this agreement." *Parke*, B., said, "I think the true construction of the instrument is, that the lessor agrees to grant a future lease, and the lessee agrees that, if, before it is granted, he is permitted to occupy and does occupy, then the lessor is to have power to distrain." *Maule*, B.—"There would be no doubt in the case if it were not for the clause relating to the power of distress. But, if the intention of the whole instrument were, that it should operate as a present demise, that clause would be idle, because the lessor would have had power to distrain without it. I think, therefore, the very clause appealed to confirms the view taken by the Court, that this is not a lease, but an agreement only." Compare this case with *Pinero* v. *Judson*, 6 Bing. 206; and *Hancock* v. *Caffyn*, 8 Bing. 358. See also *Hartshorne* v. *Watson*, 4 Bing. N. C. 178.

Informal instruments held to be agreements only.

A comparison of the cases above referred to will serve to show the impossibility of reconciling all the decisions upon the subject. The sound and sensible rule seems to be, that, where the document is executory in its language, and indicates an intention to execute a lease, unaccompanied by any words of present demise, it is to be construed as an agreement only; but it is impossible, consistently with all the cases, to lay down any such doctrine. This, at least, seems to be clear, that, if the instrument contains a stipulation, that, until a lease is granted, the agreement shall regulate the terms of the tenancy, or evinces in any manner that such is the intention of the parties, it will be construed as an actual lease, notwithstanding that a more formal instrument is to be prepared.

Practical importance of distinction between agreements and leases.

At the present time the main distinction of practical importance between agreements for leases and actual leases arises out of the combined operation of the Statute of Frauds and the stat. 8 & 9 Vict. c. 106, whereby a demise for less than three years may

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Lease when necessary.

Provision of Statute of Frauds as to agreements for leases.

be made by parol or writing not under seal, but if the demise be for a term exceeding three years, the lease must be by deed executed by the lessor or his agent. And such agent must be authorized by deed to execute the lease: *Harrison* v. *Jackson*, 7 T. R. 207; *Berkeley* v. *Hardy*, 5 B. & C. 355.

An agreement for a lease, though not within the enactments above referred to, is governed by another section of the Statute of Frauds which enacts that no action shall be brought "upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." The result of this is that while a lease for a year but not exceeding three years may be by parol agreement for leases for a term of a year and upwards must be reduced to writing and duly signed: See *Edge* v. *Strafford*, 1 Cr. & J. 341; *Michelen* v. *Wallace*, 7 A. & E. 49; *Vaughan* v. *Hancock*, 3 C. B. 766.

When specific performance of agreement for lease may be enforced.

If, however, a tenant on the faith of a parol agreement for a lease has entered into possession and paid an increased rent or laid out money, or done acts for the benefit of the property, or by reason of his occupation has altered his position or mode of living, he will be entitled to enforce specific performance of the agreement: *Frame* v. *Dawson*, 14 Ves. 386; *Lindsay* v. *Lynch*, 2 Sch. & L. 1; *Ramsden* v. *Dyson*, L. R. 1 H. L. 129; *Bankart* v. *Temant*, L. R. 10 Eq. 141; *Coles* v. *Pillaington*, L. R. 19 Eq. 174; *Williams* v. *Evans*, L. R. 19 Eq. 547. But the outlay or other act of part performance must be unequivocally referable to the agreement, it is not sufficient that they are merely consistent with the agreement: *Maddison* v. *Alderson*, 8 App. Ca. 467; see also *Humphreys* v. *Green*, 10 Q. B. D. 148, disapproving of *Nunn* v. *Fabian*, L. R. 1 Ch. A. 35. See further as to the effect of part performance in taking an agreement out of the Statute of Frauds, *ante*, tit. AGREEMENTS, Vol. I., p. 296, *et seq.*

2. Of Performance of the Agreement.

Performance of Agreement for Lease.

Where an instrument invalid as a lease is upheld as an executory agreement, either party may claim that it shall be specifically performed by means of a lease for the term, and subject to the covenants and stipulations, &c., agreed upon; or, in the absence of express agreement as to the covenants and stipulations to be inserted, then upon the usual covenants and stipulations. The benefit of an agreement for a lease is assignable in the absence of express stipulation to the contrary, so that the assignee is entitled to claim specific performance, and the omission of the word "assigns" makes no difference in this respect: *Crosbie* v. *Tooke*, 1 My. & K. 431; *Church* v. *Brown*, 15 Ves. 258; *Buckland* v. *Papillon*, L. R. 2 Ch. A. 67.

Specific performance of agreements for leases.

The general rules of law as to specific performance apply to leases as to other contracts. Thus specific performance will not be enforced in the case of an agreement for a lease, the terms of which cannot be carried out immediately, but impose liabilities or duties to be continuously performed, the supervision of which the Court cannot undertake: *Blockett* v. *Bates*, L. R. 1 Ch. A. 117. Nor where the agreement does not specify on what day the term is to begin, unless it can be inferred from the wording of the agreement that it is intended to commence from the date thereof: *Marshall* v. *Berridge*, 19 Ch. D. 233. So, also, where the name of the intending lessor or lessee is not stated: *Williams* v. *Jordan*, 6 Ch. D. 517; *Williams* v. *Brisco*, 22 Ch. D. 441; or where, upon the construction of letters or other informal documents relied upon, there is no such final and definite memorandum of contract as is sufficient to satisfy the requirements of the Statute of Frauds: *Nesham* v. *Selby*, L. R. 7 Ch. A. 406; *Pulbrook* v. *Lawes*, 1 Q. B. D. 284; *Winn* v. *Bull*, 7 Ch. D. 29; see also *Baumann* v. *James*, L. R. 3 Ch. A. 508. The requirements of the Statute of Frauds as regards agreements generally are discussed at length *ante*, tit. Agreements, Vol. I., p. 272 *et seq.*

What agreements will be enforced.

Although an agreement in writing for a lease must set out the terms of the contract, and parol evidence

Collateral agreements

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is not admissible to vary or add to them, it may be shown that the parties entered into a collateral agreement by parol, which formed a consideration for the granting or acceptance of the lease. So where an intending tenant made it a condition of his taking a lease of a farm that the rabbits thereon should be destroyed, and alleged that he signed the lease which contained no reference to the destruction of the rabbits, on the faith of a verbal promise by the landlord to destroy them; it was held that the alleged promise was a parol agreement collateral to the lease, and that evidence thereof might properly be admitted: *Morgan* v. *Griffith*, L. R. 6 Ex. 70. See also *Erskine* v. *Adeane*, L. R. 8 Ch. A. 756, where the doctrine is thus stated by *Mellish*, L.J.: "No doubt as a rule of law, if parties enter into negotiations affecting the terms of a bargain, and afterwards reduce it into writing, verbal evidence will not be admitted to introduce additional terms into the agreement; but, nevertheless, what is called a collateral agreement, where the parties have entered into an agreement for a lease or for any other deed under seal, may be made in consideration of one of the parties executing that deed, unless, of course, the stipulation contradicts the terms of the deed itself." See also *Harris* v. *Rickett*, 4 H. & N. 1; 17 C. B. N. S. 578. So a landlord was held to be entitled to recover from a tenant holding under a lease, in addition to the rent reserved thereby, a further rent of £5 per annum under a verbal agreement to pay the same in consideration of the execution by the landlord of certain improvements on the property: *Donellan* v. *Read*, 3 B. & Ad. 899; see *Holz* v. *Roebuck*, 7 Taun. 157; *Lambert* v. *Norris*, 2 M. & W. 333.

Production of lessor's title.

As to Title.]—Formerly an intended lessor could not enforce specific performance of an agreement to take a lease without producing the title to the inheritance: *Fildes* v. *Hooker*, 2 Mer. 425; *Purvis* v. *Rayer*, 9 Pri. 488. But now under the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), sect. 2, under a contract to grant a term of years, whether to be derived out of a freehold or leasehold estate, the intended lessee is not entitled to call for the title

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of the freehold, subject to any stipulation to the contrary in the contract. Where, however, a leaseholder agrees to grant an underlease he will still, according to rule which formerly obtained in all cases, be bound to prove his title: see *Stranks* v. *St. John*, L. R. 2 C. P. 376 (*c*).

Notice of lessor's title.

A lessee has, however, constructive notice of his lessor's title, notwithstanding that in the absence of express stipulation he is precluded by the enactment above referred to from requiring its production. "What the Vendor and Purchaser Act does is this: in order that a lessee may obtain his lessor's title, it makes an express stipulation to that effect necessary, whereas formerly the rule was the other way, that without express stipulation the lessee had a right to the title. Formerly, if the lessee had expressly stipulated not to look into his lessor's title, it could not have affected the constructive notice. This is the meaning of the doctrine: you may bargain to shut your eyes, but if you do wilfully shut your eyes, whether as a bargain or not, you must be liable to the consequences of shutting your eyes"; per *Jessel*, M.R., in *Patman* v. *Harland*, 17 Ch. D. 353.

Production of title, how far important to lessee.

Formerly it was of vital importance to an intending lessee to require the production of the title of the person who assumed to grant the lease, to ascertain whether such person was absolute owner of the property or only a limited owner, and in the latter case whether he had a power of granting the intended lease. Thus all the leases of the Pulteney estate were set aside, on account of a power of leasing not having been duly proved. So, the Duchess of Bolton, who was tenant for life, but pretended to have a power of leasing for three lives, granted leases of lands in Devonshire, and received fines to the amount of £29,000; but as she had no such power, the leases were set aside. This danger is now in great measure

(*c*) The provision as to not requiring the title to a *leasehold* reversion contained in sect. 3 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), applies only to a "contract to sell and assign." And sect. 13 of that Act applies only to demises by *underlessees*, who are not now liable to produce the title to the mesne leasehold reversion.

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done away with by the powers of leasing given to limited owners by the Settled Land Act, 1882, as to which *vide ante*, p. 28, *et seq.* But even now unless the lessee examines the title-deeds, he cannot be sure that the lessor has not previously mortgaged the property; in which case he might be liable to be evicted by the mortgagee: *vide ante*, p. 79. An intending lessee who contemplates an outlay in improving the demised property ought not to omit to consider whether it will not be prudent to require production of sufficient proof of the lessor's right to grant the lease. In practice, indeed, especially in the case of great estates, that is often not done, because the tenant relies on the honour of his landlord; but whenever one of two innocent persons must be a loser, it is he who has not used diligence in looking into the title: *Keech* v. *Hall*, 1 Doug. 23. And see *White* v. *Foljambe*, 11 Ves. 343; *Deverell* v. *Lord Bolton*, 18 Ves. 505.

Lessors cannot always be advised to show their title. The *Newcastle Corporation Case* is a good lesson upon this subject of production. They produced their charters to satisfy curiosity; some persons got hold of them, and the consequence was, the corporation lost £7000 a-year: see remarks of Lord *Eldon*, C., in *Cock* v. *St. Bartholomew's Hospital*, 8 Ves. 141.

Underlease; notice of covenants in the original lease.

Although the lessor is bound to show a good title, where he himself claims under a lease, he is not, it seems, generally speaking, obliged to state to his intended lessee any unusual covenants which the original lease may contain; for the lessee having notice of the lease, and an opportunity of looking at it, should inform himself on that point: *Walter* v. *Maunde*, 1 Jac. & W. 181; *Barraud* v. *Archer*, 2 Sim. 437; *Flight* v. *Booth*, 1 Scott, 190; *Waring* v. *Hoggart*, 1 Ry. & M. 39. See *Hall* v. *Smith*, 14 Ves. 426; *Whatman* v. *Gibson*, 9 Sim. 196; *Cosser* v. *Collinge*, 3 My. & K. 283. In the latter case, however, the lessee had taken possession. See *ante*, tit. Conditions of Sale, Vol. II., p. 590.

But where the intended sub-lessee informed his lessor of the nature of the business he intended to

carry on in the premises, it was held that the silence of the lessor respecting the existence of covenants in restraint of such business was equivalent to a representation that there was no such restraint: *Flight* v. *Barton*, 3 My. & K. 282. See *ante*, tit. CONDITIONS OF SALE, Vol. II., p. 609.

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What conduct of intended Lessee will preclude his right to a specific performance.]—This has long been *vexata quæstio*. It is clear that if the intended lessee have done acts which, had the lease been granted, would have amounted to a forfeiture, the Court will not decree performance: *Weatherall* v. *Geering*, 12 Ves. 504; *Hill* v. *Barclay*, 18 Ves. 63; unless the landlord has, by the acceptance of rent subsequently due, or by any other act, waived the forfeiture: *Gourlay* v. *Duke of Somerset*, 1 Ves. & B. 72; and Lord *Eldon* seems to have thought that gross breaches of covenant, especially where they were of a nature not to admit of compensation in damages, might form a ground for refusing performance, even though, upon the terms of the agreement, no right of re-entry would have accrued, and notwithstanding the subsequent acceptance of rent by the landlord: *Boardman* v. *Mostyn*, 6 Ves. 472.

Whether enforced, where the tenant has done an act which would have been a forfeiture;

or has broken the covenants.

The acceptance of rent, or such other act on the part of the landlord, does not prejudice his claim under a covenant previously broken, though it prevents him from availing himself of a forfeiture previously incurred; for this obvious reason, that the act only amounts to a recognition of the subsisting relation of landlord and tenant, and such recognition is perfectly consistent with an intention to seek compensation for the violation of the covenant, but is not consistent with an intention to enter for the forfeiture, and thereby determine the tenancy.

Effect of subsequent acceptance of rent.

But the breach of condition or covenant (assuming the latter to be sufficient) must be clearly made out to induce the Court to withhold specific performance; "for the question, whether a covenant has been broken or not, if there is any doubt of the fact, is more proper for the determination of a court of law and a jury;" and the Court will decree performance,

Breach of covenant, &c., must be clearly proved.

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leaving the complaining party, if he can, to avail himself of any breach of covenant. See *Jones* v. *Jones*, 12 Ves. 186; *Rankin* v. *Ley*, 2 De J. F. & J. 65; *Poyntz* v. *Fontane*, 27 Beav. 393.

As to injuries not within the agreement.

Injuries accruing to the landlord by the acts of the tenant, but which do not amount to a breach of covenant, form no ground for refusing execution of the contract: *Gordon* v. *Smart*, 1 S. & S. 66.

Laches and delay.

Laches and delay on the part of the person to whom the lease is contracted to be granted, may afford a valid reason for refusing to enforce the contract: *Heapley* v. *Hill*, 2 S. & S. 29.

Misrepresentation.

Gross misrepresentation on the part of the intended lessee, at the time of entering into the agreement, has also been made a ground for refusing specific performance: see *Willingham* v. *Joyce*, 3 Ves. 168. And see as to the effect of misrepresentation on the right to enforce contracts generally, *ante*, tit. Conditions of Sale, Vol. II. p. 587, *et seq.*

Insolvency.

Whether the insolvency of the tenant is a valid ground for resisting the specific performance of an agreement for a lease, has never been completely decided. In most of the cases in which insolvency has been made a ground of objection, it has been mixed up with other circumstances, as in *Willingham* v. *Joyce*, *supra*.

In *Buckland* v. *Hall*, 8 Ves. 92, A. being in possession under a subsisting lease, contracted in 1798 for a new lease, and filed a bill for specific performance of the agreement, and an injunction to restrain an ejectment. The lessor alleged a breach of the agreement in not performing the stipulated repairs, and that the plaintiff became insolvent in 1801, and paid a composition. Lord *Eldon* said that insolvency admitted, and not cleared away, was a weighty objection to a specific performance of an agreement for a lease; and while refusing to decide this point on motion, his lordship dissolved the injunction. See also *Neale* v. *Mackenzie*, 1 Kee. 474; *O'Herlihy* v. *Hedges*, 1 Sch. & L. 123, where there were insolvency and misrepresentation on the part of the intended lessee; and *Pine* v. *Assheton*, 1 Y. & C. 441, where it was said that the Court would not

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compel a landlord to take an insolvent party as his lessee; this case was, however, mainly decided on the ground that the alleged agreement for a lease was too vague to be executed by the Court.

Disclaimer by trustee in bankruptcy.

In case of the bankruptcy of an intending lessee the agreement is not determined, in the absence of express stipulation to that effect; but the trustee in bankruptcy is at liberty to adopt or disclaim it: see the Bankruptcy Act, 1883, sects. 54 and 55; and the same rule apparently holds with regard to the trustee of a debtor who has entered into a statutory composition or scheme of arrangement with his creditors: see sect. 18, sub-sect. 13 of that Act. A trustee electing to adopt an agreement for a lease must enter into such covenants as the bankrupt himself was liable to enter into: *Powell* v. *Lloyd*, 2 Y. & J. 372; but in order to avoid the responsibility he would thus incur, the usual course is for the trustee to sell the benefit of the agreement, and then the purchaser enters into the lessee's covenants. The effects of disclaimer as regards a disclaiming trustee, and the liabilities of a trustee who does not disclaim, have been already fully considered, *ante*, tit. Disclaimer, Vol. II. pp. 847—852.

Effect of disclaimer by trustee as regards the bankrupt.

If the trustee disclaims a lease or an agreement for a lease, the bankrupt loses all interest in the property, and is freed from all liabilities in respect thereof: *Ex parte Llynvi Coal & Iron Co.*, L. R. 7 Ch. A. at p. 32; and specific performance of the agreement will not be enforced at the bankrupt's instance: *Brook* v. *Hewett*, 3 Ves. 255; *Weatherall* v. *Geering*, 12 Ves. 504.

Where a bankrupt has expended money on improvements, under an agreement for a lease, his trustee refusing to adopt the agreement, has no lien on the premises for the money expended by the bankrupt: *Ex parte Ladd*, 3 Dea. & C. 647.

In a case in Ireland, it appearing that the lease was intended for the personal benefit of the bankrupt, his assignees in bankruptcy were held not to be entitled to specific performance: *Flood* v. *Finlay*, 2 Ba. & B. 9.

If the intended lessee assigns the benefit of his

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agreement for a lease, and then becomes bankrupt, the assignee may compel specific performance, and the lessor cannot rely upon the bankruptcy of the assignor as a valid ground of objection: *Morgan* v. *Rhodes*, 1 My. & K. 435. But it is otherwise if the lessor can show that he entered into the agreement upon considerations personal to the intended lessee: *Crosbie* v. *Tooke*, 1 My. & K. 431.

Effect of bankruptcy of intended lessee after assignment of benefit of agreement.

3. What are Usual Covenants.

Usual covenants.

What are Usual Covenants.—Usual covenants may be defined as being such covenants as are incident to the nature of the contract, and presumably in the contemplation of the parties: *Wilkins* v. *Fry*, 1 Mer. 263; *Bozon* v. *Farlow*, 1 Mer. 473; *Harnett* v. *Yeilding*, 2 Sch. & L. 556; *Garrard* v. *Grinling*, 2 Swanst. 244. In order to show that a covenant proposed to be inserted in a lease is a usual covenant it will not be sufficient to show that it is in accordance with the custom of a particular county or district: see *Barrell* v. *Harrison*, 2 Vern. 231; unless the agreement expressly stipulates that the lease shall contain the "customary covenants of the neighbourhood" (as in *Boardman* v. *Mostyn*, 6 Ves. 467), or such covenants as are usually contained in "leases of the same nature," as in *Folkingham* v. *Croft*, 3 Anst. 700. The principle would seem to be the same where the parties stipulate that a lease shall contain the usual covenants, as where, the lease being silent as to questions arising during the term, it is attempted to supplement its provisions by an appeal to custom (*d*), that is to say, that the usage or custom to insert the particular covenant in leases, or to imply it therefrom, obtains over so extensive a district (being the district in which the property is situate) and is so notorious in that district that it may reasonably be presumed to have been present in the minds of both parties when they entered into the contract.

The question what are covenants proper to be in-

(*d*) The admissibility of evidence of custom for the purpose of supplementing or explaining leases will be considered later.

Usual Covenants.

serted in an agreement which stipulates for the usual covenants will in some measure depend on the nature of the property, so that a covenant which might properly be inserted in the lease of a public-house might not be upheld in the case of a private dwelling-house: see *Brookes* v. *Drysdale*, 3 C. P. D. 52. And what would not be a usual covenant in an agricultural lease might perhaps be upheld as such in a mining lease: see Woodf. L. & T. 112.

The question whether a particular covenant is shown to be a usual covenant appears to be one of fact and not of law, and to be properly determinable by the jury: see *Bennett* v. *Womack*, 7 B. & C. 627; *Brookes* v. *Drysdale*, 3 C. P. D. 52.

Covenant to pay rent.

A covenant to pay rent has always been regarded as a usual covenant: *Taylor* v. *Horde*, 1 Burr. 60. Under an agreement for a lease to contain "all usual and customary mining clauses" it was held that the landlord was not entitled to the insertion in the lease of a power of re-entry on breach of any of the lessee's covenants or otherwise except on non-payment of rent: *Hodgkinson* v. *Crowe*, L. R. 10 Ch. A. 622.

Covenant to pay taxes.

"Usual covenants" also (at all events in an agreement stipulating for a net rent) include a covenant on the part of the lessee to pay taxes, except landlord's taxes, *i.e.* taxes expressly charged by the legislature on the landlord: *Bennett* v. *Womack*, 7 B. & C. 627.

Repairs.

A covenant to keep and deliver up the premises in proper repair seems to be in all cases a "usual" covenant: *Doe* d. *Dymoke* v. *Withen*, 2 B. & Ad. 903. See *Doe* d. *Bromley* v. *Bettison*, 12 East, 305; *Kendal* v. *Hill*, 6 Jur., N. S. 968. But a lease under a power to lease with all the usual covenants has been held to be bad if it contain a proviso that if the buildings demised are blown down or burnt the rent shall cease until the lessor repairs or rebuilds: *Doe* d. *Ellis* v. *Sandham*, 1 T. R. 705; see *Sharpe* v. *Milligan*, 23 Beav. 419; *Kendall* v. *Hill*, 6 Jur., N. S. 968; *Yellowly* v. *Gower*, 11 Ex. 274.

Restriction as to trades, &c.

The common and usual covenants between landlord and tenant will not extend to covenants in restraint

Usual Covenants.

of trade: *Propert* v. *Parker*, 3 My. & K. 280; see *Wilbraham* v. *Livesey*, 18 Beav. 206. And a stipulation that the premises shall not be converted into a school is not to be so extended: *Van* v. *Corpe*, 3 My. & K. 269. Where an agreement provided that the lease should contain usual covenants and also covenants by the lessee to build and not to use the premises for any other purpose than a glass manufactory, it was held that an affirmative covenant by the lessee to use the premises for such purpose could not be introduced into the lease: *Doe* d. *Marquis of Bute* v. *Guest*, 15 M. & W. 160.

Repairs; custom of county.

A lease whereby the lessor undertook to keep in repair a mansion house comprised in the demise, and the lessee covenanted to execute all other repairs, the lessor allowing rough materials for such repairs, was upheld as a valid execution of a power in a will directing that leases thereunder should contain covenants, &c., according to the usage of the counties where the said premises to be leased were situate; it being shown that such covenants were usual in the county of Nottingham, where this property was situated: *Doe* d. *Bromley* v. *Bettison*, 12 East, 305.

To allow lessor to enter.

A covenant by the lessee to allow the lessor to enter and view the state of repair of the demised premises is a usual covenant: *Blakesley* v. *Whieldon*, 1 Ha. 181.

Registration of lease.

By an agreement for the sale and assignment of the lease of a public-house it was agreed that the purchaser should take the lease subject to "the performance of the covenants thereby reserved and contained, such covenants being common and usual in leases of public-houses;" the lease contained a proviso that all underleases and assignments should be left with the lessor's solicitor for registration; the jury having found that the clause was not usual, it was held that the purchaser was discharged from his agreement: *Brookes* v. *Drysdale*, 3 C. P. D. 52.

Whether a covenant not to assign is a usual covenant.

Much difference of opinion has existed, whether, under an agreement for a lease with the common and usual covenants, a lessor is entitled to have inserted in the lease a covenant not to assign without licence. The greatest modern judges have

differed on the subject. Although Lord *Eldon* determined that an agreement for a lease of a house for twenty-one years with usual covenants, does not include a covenant against alienation without licence : *Church* v. *Brown,* 15 Ves. 258 ; yet in *Boardman* v. *Mostyn,* 6 Ves. 471, he admitted, that if an agreement were to grant a farm lease, with the usual and customary covenants of the neighbourhood, what such usual and customary covenants are, might be made the subject of inquiry. Under these circumstances, and as many persons may not have at hand the works in which all the cases on this subject are reported, a statement of them, with the decisions of the Courts, may not be unacceptable.

Usual Covenants.

Cases on the point.

Henderson v. *Hay,* 3 Bro. C. C. 632. The plaintiff, being assignee of a lease of a public-house, without any covenant restrictive of alienation without licence, agreed with the owner of the land for the grant of a lease of the same, with other premises, upon common and usual covenants. A lease was accordingly prepared which contained a covenant that the plaintiff should not assign without licence from the grantor. The bill was filed for a specific performance, without such restrictive covenants. Lord *Thurlow* said, " Common and usual covenants must mean covenants incidental to the lease. That, though the covenant not to assign without licence might be a very usual one, as he believed it was, where a brewer or vintner let a public-house, that would not make it a common covenant." It was held that the defendant had no right to have such a clause inserted. See *Bennett* v. *Womack,* 7 B. & C. 627, *supra,* p. 117.

Morgan v. *Slaughter,* 1 Esp. 8 ; *assumpsit* to recover a penalty of £50 for breach of an agreement. The defendant agreed to assign to the plaintiff all his interest in a lease of a public-house, of which thirteen years were unexpired, and his good-will in the business for £200 ; and it was further agreed that the lease should contain none but fair and usual covenants ; the lease contained a covenant not to assign or underlet without licence ; the defendant insisted that the covenant was fair and

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Whether covenant not to assign is a usual covenant.

usual, and cited *Dumpor's Case*, 4 Rep. 119, where a question arose on a condition similar to this very covenant, whether the lessor, having once permitted an assignment, had not for ever dispensed with the condition. Lord *Kenyon* said he could not entertain a doubt concerning this being a fair and usual covenant. That it was a fair covenant as providing properly for the interest of the party demising; and as to its being a usual one, that it sufficiently appeared to have been a usual one so long since as the case cited by the defendant's counsel, and that he had never seen a lease properly drawn without it.

Folkingham v. *Croft*, 3 Anst. 700. Bill for performance of an agreement for the lease of a public-house at Leeds. The agreement was for a lease, "with all usual and reasonable covenants commonly inserted in leases of the same nature." The defendant insisted on a covenant, on the part of the lessee, not to assign or underlease without licence. It appeared, that there was no regular local practice upon the subject, it being equally common in such leases to insert or to omit the covenant in dispute. *Macdonald*, C.B.—"If this case came before us without any authorities, we should not find much difficulty in deciding upon it: the covenant in question is very old in the practice of the law, being recognised as well known in Lord *Coke's* time; and it is now so generally adopted, that a lease made without such a covenant would be considered by everybody as improvidently drawn. A doubt is, however, introduced by the opposite decisions which have taken place upon the subject. Upon the whole we are of opinion, that this covenant, being now so long established in common practice, may fairly be considered as a common and usual covenant to be inserted in leases." The bill was dismissed.

Browne v. *Raban*, 15 Ves. 528. Bill for performance of an agreement for a lease "with usual covenants." The defendant insisted upon the insertion of a covenant against assigning or underletting without consent, as a usual covenant. Sir *W. Grant*, M.R., expressed his opinion that on the whole the understanding of the Profession was, that this was

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a usual covenant, and proper to be inserted where there was an agreement for usual covenants.

After this opinion was delivered, the case of *Church* v. *Brown*, 15 Ves. 258 (*vide supra*), then depending before Lord *Eldon*, C., was decided, after a communication between his Lordship and the Master of the Rolls; upon which it was agreed that the plaintiff in the case of *Browne* v. *Raban* should take a lease without the covenant.

The decision in *Church* v. *Brown* was followed by *Romilly*, M.R., who held that the assignees in bankruptcy of a tenant holding under an agreement for a lease which was to contain all the usual covenants were entitled to assign the lease, as the agreement would not have warranted the introduction of a covenant against alienation in the lease: *Buckland* v. *Papillon*, L. R. 1 Eq. 477. And this decision was affirmed by Lord *Chelmsford*, C.: *S. C.*, L. R. 2 Ch. A. 67.

Determination of lease on bankruptcy of tenant.

Under an agreement to grant a lease of an hotel, to contain "such covenants as are usually inserted in leases of property of similar description," it was held by *Romilly*, M.R., that the lease ought to be made determinable on bankruptcy or making any assignment thereof for the benefit of creditors: *Haines* v. *Burnett*, 27 Beav. 500. But in *Hampshire* v. *Wickens*, 7 Ch. D. 555, which was the case of an agreement for a lease of a dwelling-house in London, "to contain all usual covenants and provisoes," *Jessel*, M.R., said that the last-mentioned decision appeared to him to be opposed both to principle and authority, and that it must now be treated as distinctly overruled (*e*), and held that a covenant not to assign cannot be inserted among "usual covenants." His Lordship, in the course of his judgment, quoted with approval the following passage from Mr. Davidson's "Precedents in Conveyancing." "The result of the authorities appears

(*e*) Having regard to the different wording of the stipulations, and to the different nature of the properties in the two cases, it would seem that this observation of the learned Master of the Rolls is perhaps stronger than was required for the purposes of his decision.

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Usual covenants.

to be that in a case where the agreement is silent as to the particular covenants to be inserted in the lease, and provides merely for the lease containing 'usual covenants,' or, which is the same thing, in an open agreement without any reference to the covenants, and there are no special circumstances justifying the introduction of other covenants, the following are the only ones which either party can insist upon, namely, covenants by the lessee:—1. To pay rent; 2. To pay taxes, except such as are expressly payable by the landlord; 3. To keep and deliver up the premises in repair; and, 4. To allow the lessor to enter and view the state of repair: and the usual qualified covenant by the lessor for quiet enjoyment by the lessee" (*f*). And his Lordship added, "When he refers to 'special circumstances' he means peculiar to a particular trade, as, for example, in leases of public-houses where the brewers have their own forms of leases, the 'usual covenants' would mean the covenants always inserted in the leases of certain brewers:" *i.e.* presumably the particular brewers who happen to be the lessors.

In *Hyde* v. *Warden*, 3 Ex. D. 72, it was held that a proviso for re-entry in a lease of a farm if the lessee should become bankrupt or make a composition with his creditors was not a "usual" clause, and that an intended assignee is not bound to accept an assignment of a lease containing such a proviso: see also *Hodgkinson* v. *Crowe*, L. R. 10 Ch. A. 622.

Quiet enjoyment.

A covenant by the lessor for quiet enjoyment of the demised premises without disturbance by the lessor and those claiming under him is a usual covenant, and proper to be inserted in all leases: *Hall* v. *City of London Brewery Co.*, 31 L. J., Q. B. 257.

Covenant not to mow meadow more than once a year.

In a lease of a farm a covenant not to mow meadow land more than once a year has been held not to be an unusual covenant so as to discharge an intending assignee from his contract to purchase the leasehold interest: *Hyde* v. *Warden*, 3 Ex. D. 72.

(*f*) See Dav. Conv. 3rd ed. vol. v. pp. 48, 49.

As to what are "usual and reasonable" powers in the case of leases granted in exercise of powers conferred by settlements or wills, see *ante*, p. 18.

Parol Evidence to explain Agreement.

Parol Evidence to explain Agreement.]—If an agreement refer to a plan as detailing the particular mode in which a building contract is to be executed, parol evidence is admissible to show the identity of the plan; but the evidence must be such as to leave no doubt of the identity of the papers to which the reference is made: *Hodges* v. *Horsfall*, 1 Russ. & M. 116. See *Clinan* v. *Cooke*, 1 Sch. & L. 32; *Blagden* v. *Bradbear*, 12 Ves. 471. In order to avoid questions of this nature, the plan should be signed by the parties, and annexed to the contract; or, which would be still better, should be indorsed on the contract.

Parol evidence to identify plan.

In *Baumann* v. *James*, L. R. 3 Ch. A. 58, parol evidence was admitted to connect an unqualified acceptance by the tenant of a landlord's offer of a renewal of a lease "at the rent and upon the terms agreed on," with a surveyor's report, made some time previously, recommending a grant of a lease for fourteen years at a given rent.

To connect acceptance with offer.

Fraud, Misrepresentation, and Mistake.]—The general rules of law with regard to the avoidance or rectification of contracts on the ground of fraud, misrepresentation, or mistake of the parties apply to agreements for leases. A full discussion of these questions will be found *ante*, sub tit. Conditions of Sale, Vol. II. p. 587 *et seq.* See also Woodf. L. & T. p. 103 *et seq.*

CHAPTER III.

THE DEMISE—PREMISES—HABENDUM—REDDENDUM.

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1. THE INSTRUMENT OF DEMISE.

Instrument of Demise.

Freehold leases.

Mode in which Demises are Effected.]—A lease of corporeal freehold hereditaments could be made at Common Law by parol, by writing not under seal, or by deed. Even before the stat. 8 & 9 Vict. c. 106, incorporeal hereditaments could not be demised for years, without a deed.

By the Statute of Frauds, 29 Car. 2, c. 3, it is enacted—

Parol leases, &c.

Sect. 1. "That all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such

parol leases or estates, or any former law or usage to the contrary notwithstanding."

Instrument of Demise.

Sect. 2. "Except, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two third-parts, at the least, of the full improved value of the thing demised."

Parol leases for not more than three years.

Sect. 3. "That no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, granted, or surrendered, unless it be by deed, or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing or by act and operation of law."

Parol assignments and surrenders void.

Parol leases.

The effect of a parol lease for a greater term than three years, in creating a tenancy from year to year, will be discussed, *infra*, Ch. VII., p. 267.

A parol lease, under the statute, must commence immediately, or rather must not assume to confer any interest to last beyond three years from the time of making of it: *Rawlins* v. *Turner*, Ld. Raym. 736: see *Ryley* v. *Hicks*, Str. 651, where a parol lease for a year and a half, to commence at a date one year from the making of the contract, was held to be valid, as the lease would terminate within three years. Such parol leases are valid as leases, when perfected by entry, but they confer no right to sue the lessee for damages for not taking possession: *Edge* v. *Strafford*, 1 Cr. & J. 391; *Inman* v. *Stamp*, 1 Star. 16. The name of the party being written by himself in the body of the lease or agreement, is not a signature within the Act: *Stokes* v. *Moore*, 1 Cox, 219, and see *ante*, tit. AGREEMENTS, Vol. I. pp. 309 *et seq.*

Agreements to pay increased rent.

Agreements to pay increased rent upon a subsisting demise are not within the statute, being merely personal contracts, and not conferring any interest in, or power over the lands: *Hoby* v. *Roebuck*, 7 Taun. 157; 2 Marsh. 433; *Donellan* v. *Read*, 3 B. & Ad. 899.

By the stat. 8 & 9 Vict. c. 106, sect. 3, "A lease required by law to be in writing, of any tenements

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Stat. 8 & 9 Vict. c. 106, s. 3.

or hereditaments . . . made after the first day of October, 1845, shall be void at law unless made by deed" (*a*). The effect of this enactment taken in conjunction with sects. 1 and 2 of the Statute of Frauds is that a lease for three years or less, at a rent not less than two-thirds of a rack rent, may be by parol or in writing not under seal: *Ryley* v. *Hicks*, Str. 651; *Lord Bolton* v. *Tomlin*, 5 A. & E. 856; but a demise not under seal for more than three years will be void as a lease. Such an instrument may, however, operate as an executory agreement to grant a lease: *Parker* v. *Taswell*, 2 De G. & J. 559; *Cowen* v. *Phillips*, 33 Beav. 18. And the Courts have generally been ready, if possible, to construe such instruments as agreements rather than to avoid them as leases, *ut res major valeat quam pereat*: *Rollason* v. *Leon*, H. & N. 73; *Tidey* v. *Mollett*, 16 C. B. N. S. 298; *Hayne* v. *Commings*, 16 C. B. N. S. 42; *Martin* v. *Smith*, L. R. 9 Ex. 50. A lease for less than three years is not required to be by deed, by reason of its containing a stipulation that at the end of the term the tenant shall have a right of renewal for a further term extending over more than three years: *Hand* v. *Hall*, 2 Ex. D. 355.

Contents of a lease by deed.

Formal parts of a Lease.]—A lease by deed usually consists of the following parts, viz.: 1. The *Premises*, which set forth the date of the instrument and the names, addresses, and descriptions of the parties thereto, contain the recitals (if any) and the operative words of demise, state the consideration, and specify the parcels or particulars of the property to be demised, and also any exceptions therefrom or reservations thereout; 2. The *Habendum*, which limits the duration of the term; 3. The *Reddendum*, or reservation of rent; 4. The *Covenants*; 5. The *Provisoes* qualifying the contract, *e.g.*, the usual proviso for re-entry for non-payment of rent or breach

(*a*) This statute does not apply to leases of tolls under the stat. 3 Geo. 4, c. 126: *Shepherd* v. *Hodsman*, 18 Q. B. 316. For a statutory form of lease provided by the stat. 8 & 9 Vict. c. 124, see *post*, Precedents.

of lessee's covenants, the proviso for determining the lease by notice before the expiration thereof, the clause giving the lessee the option of purchasing the reversion, &c., &c. See Woodf. L. & T. 129; Smith, L. & T. 103. The present chapter will deal with the first three of these parts, the consideration of the others being reserved for the two following chapters. The Premises.

2. The Premises.

Date, Parties, Recitals, Consideration.]—In stating the date of a lease care must be taken that such date is consistent with all references thereto in other parts of the instrument, and particularly with the *habendum:* as to this, see *post*, p. 139. The date.

The names, addresses, and descriptions of all parties should be fully and correctly stated at the commencement of the lease, in order that it may be clear on the face of the deed who are the persons entitled to sue upon the covenants, and otherwise enforce the contract. By the stat. 8 & 9 Vict. c. 106, sect. 5, however, it is enacted that— The parties.

"Under an indenture executed after the 1st day of October, 1845, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture."

The parties to a lease will in all cases include the lessor or lessors, and the lessee or lessees; where the property is in mortgage, it will sometimes be necessary to make the mortgagee a party as well as the mortgagor (see *ante*, p. 83); and where a mining lease is to be granted of property in settlement, the trustees should be made parties, and the portion of the rent to be set apart as capital money under the Settled Land Act, 1882 (46 & 47 Vict. c. 38), should be made payable to them: see sect. 11 of that Act. So also, where a lease of any settled property is granted by a tenant for life in consideration of a fine, the trustees of the settlement should be made parties to acknowledge the receipt of such consideration: see Settled Land Act, 1884 (47 & 48

The Premises.

Vict. c. 18), sect. 4. And a lease by trustees under a power in a settlement or will in all cases requires the consent of the tenant for life, if of full age, who should accordingly be made a party for the purpose of testifying such consent: see stat. 45 & 46 Vict. c. 38, sect. 56 (2), as amended by stat. 47 & 48 Vict. c. 18, sect. 6 (2).

The recitals.

It is seldom necessary to insert recitals in leases, except for the purpose of explaining how it happens that persons other than the lessor and lessee are made parties to the deed. A recital in a lease, as in any other deed, will operate by estoppel, that is to say, it will prevent the parties from afterwards denying the facts stated in the recital. See as to estoppel, *post*, tit. PURCHASES; see also the notes to the *Duchess of Kingston's Case*, 2 Smith's L. C. 801, and see *Ex parte Morgan*, 2 Ch. D. 72.

Estoppel by recital.

Recital operates as covenant.

A recital in a deed may operate as a covenant, if such appears to have been the intention of the parties: *Lay* v. *Mottram*, 19 C. B. N. S. 479; and an action may be maintained on such implied covenant: *Sampson* v. *Easterby*, 6 Bing. 644; *Farrall* v. *Hilditch*, 5 C. B. N. S. 840.

The consideration.

The lease should state the consideration for the demise. This will usually be the rent thereby reserved, any premium or fine paid on the execution of the lease, and the covenants on the part of the lessee to be observed and performed. A receipt for a fine in the body of a lease will operate by way of estoppel, so as conclusively to prevent the lessor from afterwards bringing any evidence to show that it was in point of fact not paid: *Baker* v. *Dewey*, 1 B. & C. 704; *Rowntree* v. *Jacob*, 2 Taun. 141. A receipt indorsed is also, as regards deeds executed after the 31st of December, 1881, in favour of a *subsequent purchaser without notice*, sufficient evidence of payment: see sect. 55 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41).

Receipt for consideration.

Operative words.

The Words of Demise.]—The usual words by which a lease is made are "lease," "demise," "grant," and "to farm let"; but any words which express an intention to grant a lease will be equally effectual.

The Premises.

Words of demise.

"Whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it for such a determinate time, such words, whether they run in the form of a licence, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years, as effectually as if the most proper and pertinent words had been made use of for that purpose; and, on the contrary, if the most proper and authentic form of words, whereby to describe and pass a present lease for years, are made use of, yet, if upon the whole deed there appears no such intent, but they are only preparatory or relative to a future lease to be made, the law will rather do violence to the words, than break thus the intent of the parties." Bac. Abr. *Leases* (K.). This well-known principle has been already illustrated, *ante*, pp. 99 *seq.*

Entry.

Interesse Termini.]—"At Common Law no lease for years, whether it were with or without any reservation of rent, was looked upon to be complete until an actual entry by the lessee; for, though the lessor had done all on his part to perfect the contract, so that he could not afterwards any way derogate from or avoid it, yet, till there was a transmutation of the possession, by the actual entry of the lessee, it wanted the chief mark and indication of his consent thereto, without which it might be unreasonable to adjudge him in actual possession to all intents and purposes, since it might so happen that such lease was made in his absence, and when he knew nothing of it, and perhaps might be greater than he would be willing to take, as the estate might be so incumbered as to bring a load upon him rather than any advantage. For these reasons (amongst others), the law would not cast the immediate and actual possession upon him, *nolens volens*, and therefore it was, that till actual entry, he could not maintain an action of trespass or ejectment, because these actions, complaining of an immediate violation of the possession, could not be proper for him who had no possession. But the lessor having done all that

Parcels.

Interesse Termini.

was requisite on his part to divest himself of the possession, and pass it over to the lessee, had thereby transferred such an interest to the lessee as he might at any time reduce into possession by an actual entry, as well after the death of the lessor as before, and such an interest as he might before entry grant over to another; or, if he died before entry, would go to his executors; or, if the grant were made to two jointly, to the survivor and his executors; any of whom might enter at their pleasure, and so reduce the contract to an actual execution." Bac. Abr. *Leases* (M.); *Saffyn's Case*, 5 Rep. 124. So that, until entry, the lessor's estate is not turned to a reversion; so that, upon a release to the lessee, his *interesse termini* will not merge in the freehold: see *Doe* d. *Rawlings* v. *Walker*, 5 B. & C. 111. It should seem to follow from the above remarks, that anything showing acceptance of the estate, as, the execution of the lease, &c., is equivalent to entry; but this conclusion would not be consistent with many of the authorities: see *Miller* v. *Green*, 8 Bing. 92.

Description of Parcels.—A demise of land includes not only the face of the earth, but everything under it or over it, *i.e.*, mines and minerals, woods, waters, and houses, as well as fields and meadows: 2 Bl. Com. 18.

Evidence to explain the description of parcels.

Where there is any *latent* uncertainty in the description of the property demised, evidence will be admitted to show the intention, and the construction will often depend upon the nature of the property, and the usages of the place in which it lies. Thus, where premises in Westminster, "late in the occupation of A.," particularly described, were demised, evidence was admitted to show that a vault, which was, at the date of the lease, in the occupation of B., another tenant of the lessor, was not intended to pass, although, *primâ facie*, it would pass: *Doe* d. *Freeland* v. *Burt*, 1 T. R. 701; see 3 Wms. Saund. 401. Generally, a demise "with the appurtenances," passes only such things as are actually enjoyed with it at the time of the demise: *Kerslake* v. *White*, 2 Stark. 508. But when the description is otherwise exact and clear, a general reference to

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the occupation will not restrain it: *Doe* d. *Smith* v. *Galloway*, 5 B. & Ad. 43; see *Doe* d. *Beach* v. *Jersey*, 1 B. & Al. 55; *Doe* d. *Ashforth* v. *Bowen*, 3 B. & Ad. 453; *Doe* v. *Meyrick*, 2 Cr. & J. 223; *Wilkinson* v. *Maling*, 2 Cr. & J. 636.

As to the construction of a demise of a stream of water for a mill, see *Blatchford* v. *Mayor of Plymouth*, 4 Scott, 444.

"Land," "wood," &c.

As to what is included under the general terms "land," "wood," "grange," &c., see Co. Litt. 4, 5; Shep. Touch. 91. A grant of "woods," or of a "wood," passes the soil, but not a grant of "trees." P. Shep. Touch. 10, 94: *Stanley* v. *White*, 14 East, 332. A grant of "water" passes nothing but the right of fishing: 2 Bl. Com. 18.

Hedge.

A hedge with a ditch on one side belongs *primâ facie* to the owner of the land in which the ditch is not. Where there is a ditch on each side, there is no *primâ facie* ownership of the hedge: *Doe* v. *Pearsey*, 7 B. & C. 308; *Guy* v. *West*, 2 Sel. N. P. 1287.

"House."

There is no distinction at the present day between house and messuage (*maison*), and either word will pass outhouses which belong to the house, although not attached to it, the curtilage and garden, orchard, and even land, which has been occupied therewith for several years: *Higham* v. *Baker*, Cro. Eliz. 16; *Scholes* v. *Hargreaves*, 5 T. R. 48; *Grosvenor* v. *Hampstead Junction Rail. Co.*, 1 De G. & J. 446; *Steele* v. *Midland Rail. Co.*, L. R. 1 Ch. A. 275. And see *Doe* d. *Norton* v. *Webster*, 12 A. & E. 442; *Cole* v. *London & Crystal Palace Rail. Co.*, 27 Beav. 242.

"Garden."

As to what is a garden, see *Gilbert* v. *Tomison*, 4 D. & R. 222; by a grant of a garden the buildings thereon will pass: *Burton* v. *Brown*, Cro. Jac. 648.

"Appurtenances."

A grant of a manor with the appurtenances passes an advowson appendant to the manor: *Higgins* v. *Grant*, Cro. Eliz. 18; *Loudon* v. *Southwell*, Hob. 304. See *Chapman* v. *Gatcombe*, 2 Scott, 738; 2 Bing. N. R. 516; *Att.-General* v. *Downshire*, 5 Pri. 269.

Ways.

As to what ways will pass under the general words in a lease, see *Kooystra* v. *Lucas*, 1 D. & Ry. 506; *Harding* v. *Wilson*, 3 D. & Ry. 287; *Crisp* v.

Exceptions and Reservations.

Price, 5 Taun. 548; *Curling* v. *Mills*, 6 Man. & Gr. 173.

Where the owner of several freehold houses and land, with a yard adjoining to them, which the tenants were in the habit of crossing to use a pump, &c., there, demised several of the houses by parol, it was held, that, *primâ facie*, the yard, &c., did not pass by the demise: *Herbert* v. *Thomas*, 1 Cr., M. & R. 801.

Lodgers.

Lodgers are, *primâ facie*, entitled to the use of the knocker, street-door bell, skylight, and water-closet: *Underwood* v. *Burrows*, 7 Car. & P. 26.

Distinction between an exception and a reservation.

Exceptions and Reservations.]—There is this distinction between an exception and a reservation: an exception relates to some existing component part of the thing demised, which is capable of being severed or distinguished from it. A reservation is properly of some right or profit to arise from the subject of the demise, which had previously no separate existence: see *Fancy* v. *Scott*, 2 M. & Ry. 335; *Doe* d. *Douglass* v. *Lock*, 2 A. & E. 743. Rent is therefore properly said to be "reserved," but if the lessor wishes to retain the timber or minerals they should be "excepted" from the demise.

Exception where void for repugnancy.

An exception of the whole thing granted, being repugnant to the grant, is void: *Dorrell* v. *Collins*, Cro. Eliz. 6; 4 Scott, 444; though there seems to be no ground for the doctrine sometimes laid down, that the exception may not comprise the *greater* part: Shep. Touch. 78.

The objection of repugnancy applies wherever the exception renders nugatory any part of the descriptive terms of the grant: thus, in a demise of a house and shops, an exception of the shops would be void, as contradicting the grant: *Horneby* v. *Clifton*, Dyer, 264 b; but not if the exception were of one only of several shops, leaving enough to satisfy the grant.

So, an exception which is essential to the thing granted, is void; as the lease of a manor, with the exception of the courts: *Browne* v. *Goldsmith*, Moore, 870; *Mabie's Case*, Winch. 23; *Acton's Case*, Dyer, 288 b; *Wyndham* v. *Way*, 4 Taun. 316. And see *Wheeler* v. *Twogood*, 1 Leon. 118; unless, it is said,

Exceptions and Reservations.

where the lease is granted by the king: *Acton's Case*, Dyer, 288 b. And so it seems of a manor, excepting the demesnes; though, of course, the exception may comprise part thereof.

Incidents of an exception.

Where anything is excepted, all things that are depending on it, and necessary for the obtaining of it, are excepted also; as, if a lessor except the trees, he may bring his chapman to view them, if he desire to sell them, who, or the vendor, may cut them and take them away: Shep. Touch. 100. As to the effect of an express liberty in restraining the liberties implied by an exception, see *Earl of Cardigan* v. *Armitage*, 2 B. & C. 137, 208; *Stukeley* v. *Butler*, Hob. 168. An exception of all coals, &c., with the right to get *the whole* of such coals, &c., does not authorize such a working as is dangerous to the surface: *Harris* v. *Ryding*, 5 M. & W. 60.

Sporting rights.

A reservation of hawking and hunting has been held not to extend to shooting: *Moore* v. *Earl of Plymouth*, 1 Moo. 346. Rights of sporting are not properly reservations or exceptions, but *profits à prendre*, or privileges granted to the lessor by the lessee (*b*), and do not constitute part of the "antient rents and reservations" in leases under powers, &c.: Harg. Co. Lit. 446; *Doe* v. *Loch*, 4 Nev. & M. 807. But if (as is not unusual in leases) such rights are "reserved" to the landlord, the reservation will ensue as a grant in his favour by the lessee: *Wickham* v. *Hawker*, 7 M. & W. 63: so also will a declaration in the lease "that the lessor may hold and enjoy" such rights: *Ewart* v. *Graham*, 7 H. L. C. 331 (*bb*).

The Ground Game Act, 1880.

The Ground Game Act, 1880 (43 & 44 Vict. c. 47), gives to tenants holding under leases made after the passing of that Act (*i.e.*, the 7th of September,

(*b*) A *profit à prendre* being an incorporeal hereditament can only be granted by deed, but it is well settled that a reservation of game, though of the nature of a grant of a *profit à prendre*, may be made by parol on a parol demise: *Jones* v. *Williams*, 36 L. T. 559. The Game Act (1 & 2 Will. 4, c. 32) in sect. 8, speaks of a right of entry for purposes of sporting "by lease or any written or parol demise or contract."

(*bb*) As to tenant's right to compensation for improper user by the landlord of reserved sporting rights, see *Farren* v. *Nelson*, 15 Q. B. D. 258.

Exceptions and Reservations.

1880), and to all tenants from year to year, a right to ground game concurrent with any right thereto reserved to the landlord in the contract of tenancy, and makes void all agreements, conditions, or arrangements to the contrary. The Act enacts as follows :—

Occupier to have a right inseparable from his occupation to kill ground game concurrently with any other person entitled to kill the same on land in his occupation.

Sect. 1. "Every occupier of land shall have, as incident to and inseparable from his occupation of the land, the right to kill and take ground game thereon, concurrently with any other person who may be entitled to kill and take ground game on the same land : Provided that the right conferred on the occupier by this section shall be subject to the following limitations :

"(1.) The occupier shall kill and take ground game only by himself or by persons duly authorized by him in writing :

"(a) The occupier himself and one other person authorized in writing by such occupier shall be the only persons entitled under this Act to kill ground game with fire-arms ;

"(b) No person shall be authorized by the occupier to kill or take ground game, except members of his household resident on the land in his occupation, persons in his ordinary service on such land, and any one other person *bonâ fide* employed by him for reward in the taking and destruction of ground game ;

"(c) Every person so authorized by the occupier, on demand by any person having a concurrent right to take and kill the ground game on the land or any person authorized by him in writing to make such demand, shall produce to the person so demanding the document by which he is authorized, and in default he shall not be deemed to be an authorized person.

"(2.) A person shall not be deemed to be an occupier of land for the purposes of this Act by reason of his having a right of common over such lands ; or by reason of an occupation for the purpose of grazing or pasturage of sheep, cattle, or horses for not more than nine months.

"(3.) In the case of moorlands, and uninclosed lands (not being arable lands), the occupier and the persons authorized by him shall exercise the rights conferred by this section only from the eleventh day of December in one year until the thirty-first day of March in the next year, both inclusive ; but this provision shall not apply to detached portions of moorlands or uninclosed lands adjoining arable lands, where such detached portions of moorlands or uninclosed lands are less than twenty-five acres in extent."

Exceptions and Reservations.

Occupier entitled to kill ground game on land in his occupation not to divest himself wholly of such right.

Sect. 2. "Where the occupier of land is entitled otherwise than in pursuance of this Act to kill and take ground game thereon, if he shall give to any other person a title to kill and take such ground game, he shall nevertheless retain and have, as incident to and inseparable from such occupation, the same right to kill and take ground game as is declared by section one of this Act. Save as aforesaid, subject as in section six (*b*) hereafter mentioned, the occupier may exercise any other or more extensive right which he may possess in respect of ground game or other game, in the same manner and to the same extent as if this Act had not passed."

All agreements in contravention of right of occupier to destroy ground game void.

Sect. 3. "Every agreement, condition, or arrangement which purports to divest or alienate the right of the occupier as declared, given, and reserved to him by this Act, or which gives to such occupier any advantage in consideration of his forbearing to exercise such right, or imposes upon him any disadvantage in consequence of his exercising such right, shall be void."

Saving clause.

Sect. 5. "Where at the date of the passing of this Act the right to kill or take ground game on any land is vested by lease, contract of tenancy, or other contract *bonâ fide* made for valuable consideration in some person other than the occupier, the occupier shall not be entitled under this Act, until the determination of that contract, to kill and take ground game on such land."

"For the purposes of this Act, a tenancy from year to year, or a tenancy at will, shall be deemed to determine at the time when such tenancy would by law become determinable if notice or warning to determine the same were given at the date of the passing of this Act.

"Nothing in this Act shall affect any special right of killing or taking ground game to which any person other than the landlord, lessor, or occupier may have become entitled before the passing of this Act, by virtue of any franchise, charter, or Act of Parliament."

As to non-occupier having right of killing game.

Sect. 7. "Where a person who is not in occupation of land has the sole right of killing game thereon (with the exception of such right of killing and taking ground game as is by this Act conferred on the occupier as incident to and inseparable from his occupation), such person shall, for the purpose of any Act authorizing the institution of legal proceedings by the owner of an exclusive right to game, have the same authority to institute such proceedings as if he were such exclusive owner, without prejudice nevertheless to the right of the occupier conferred by this Act."

(*b*) Sect. 6 prohibits night shooting, spring traps above ground, and use of poison.

Exceptions and Reservations.

Sect. 8. "For the purposes of this Act—
"The words 'ground game' mean hares and rabbits" (*c*).

Interpretation clause.

What included in an exception of trees.

An exception of "timber and other trees, woods, underwoods," &c., has been held not to include the soil on which the trees grow: *Legh* v. *Heald*, 1 B. & Ad. 622; though it is otherwise in an exception of all woods and underwoods. When it is said, that, by the exception of trees, the soil upon which they grow is excepted (*Smith* v. *Bole*, Cro. Jac. 459), it is meant so much only as gives nourishment to the trees; and the lessee is entitled to the underwood and herbage: *Liford's Case*, 11 Rep. 49 b; Dyer, 79 a, pl. 43. Where the exception extends to wood and underwood, and coppice, the whole soil is included: *Ive's Case*, 5 Rep. 11; *Whistler* v. *Paslow*, Cro. Jac. 487; though the coppice, &c., be described as growing in and upon "the premises:" *Hide* v. *Whistler*, Pop. 146; but where there was an exception of all saleable wood then growing, or which should grow thereafter, which had been usually sold by the lord off the premises, with power of entry, &c., for felling and carrying same away, it was held, that the soil in a close, which consisted of a wood, was not excepted: *Pincomb* v. *Thomas*, Cro. Jac. 524.

Fruit trees.

An exception of trees in general extends to trees useful for their wood only, and not to fruit-trees, which should therefore be named, where intended to be included: *Wyndham* v. *Way*, 4 Taun. 316. And this construction was held not to be negatived, where, to the exception of "all timber and other trees," was added, "but not the annual fruit thereof," the "fruit" being considered as referable to the fruit of such timber trees as produced fruit, as oak, elm, and walnut: *Bullen* v. *Denning*, 5 B. & C. 842; but, if the exception be of apple and other trees, it will extend to all trees commonly denominated fruit-trees: *Lord Zouch* v. *Moor*, 2 Roll. Rep. 280. And so would unquestionably an exception of trees in general, if there were no others.

Trees.

(*c*) Hares are, but rabbits are not "game" within the Game Act, 1831 (1 & 2 Will. 4, c. 32).

Exceptions and Reservations.

What is timber.

What species of trees constitutes timber is regulated by local custom, which is various, though some trees are timber-trees everywhere, as oak, elm, and ash. Beech, cherry, birch, and horse-chestnut, lime trees, and aspen; and blackthorn, yew, walnut, willow, crab, and hornbeam, are also timber in some places: *D. of Chandos* v. *Talbot*, 2 P. Wms. 606; *R.* v. *Minchinhampton*, 3 Burr. 1308; *Aubrey* v. *Fisher*, 10 East, 446; and see Woodf. L. & T. 590. Trees are not timber until they are of twenty years' growth: *Foster* v. *Lennard*, Cro. Eliz. 1.

Rights of parties where trees not excepted.

Where the trees are not excepted, and a power is not reserved to the lessor to enter and fell them, it is clear that he has no right to do so, as the lessee has an interest in their fruit and shade; 1 Ld. Raym. 552. But if by the act of the lessee, or by tempest, &c., they become severed, the lessee's interest is determined, and the lessor may enter to take them away: *Herlakenden's Case*, 4 Rep. 62 b. The lessee, having no interest, cannot maintain an action against third persons for removing trees: *Evans* v. *Evans*, 2 Camp. 491; but the action must be brought by the lessor, who may, if the trees have been cut down and carried away by a stranger, either bring an action of trespass against him, or take his remedy by action of waste against the lessee: *Berry* v. *Heard*, Cro. Car. 242. See same principle as to fixtures which are parcel of the inheritance: *Farrant* v. *Thompson*, 5 B. & Al. 826 (*d*).

Waste: estovers.

(*d*) As to waste, see Co. Litt. 53 a; 2 Roll. Abr. 813; Dyer, 37 a: *Leach* v. *Thomas*, 2 M. & W. 427; *Higson* v. *Mortimer*, 6 Car. & P. 616; and as to the tenant's right to estovers, *i.e.* his right to cut wood for house-bote, plough-bote, cart-bote, fire-bote, and hedge-bote, see 2 Roll. Abr. 817; Co. Litt. 53 b.; *Darcy* v. *Asquith*, Hob. 238; Hutt. 19; *Gorges* v. *Stanfield*, Cro. Eliz. 593; *Lile* v. *Martin*, Latch, 96; 3 Leon. 16, pl. 38; *Doe* v. *Wilson*, 11 East, 56; *Simmons* v. *Norton*, 5 Moo. & P. 645; see also *Lee* v. *Alston*, 1 Bro. C. C. 194, and Chamb. L. & T. 337; Woodf. L. & T. 664. Where the lessor's bailiff was to deliver to the lessee timber for house-bote, gate-bote, and bar-bote, it was held that the pointing out and marking a tree was a sufficient "delivery" to authorize the lessee to fell it: *Courtnay* v. *Fisher*, 12 Moo. 39. As the rule of law on the subject of estovers rarely comes into operation at this day, the rights of tenants in this respect being almost invari-

Exceptions and Reservations.

Protection of trees.

A lessee is not bound to provide fences to preserve trees excepted out of his lease from being bitten by his cattle, but the lessor should himself protect them: *Glenham* v. *Hanby,* 1 Ld. Raym. 739; *Clithero* v. *Higgs,* Sir W. Jo. 388.

Minerals.

An exception of minerals will include stone dug from quarries: *Micklethwait* v. *Winter,* 6 Ex. 644; see also *Bell* v. *Wilson,* L. R. 1 Ch. A. 303; also china clay: *Hext* v. *Gill,* L. R. 7 Ch. A. 699; and apparently flint: *Tucker* v. *Lingen,* 8 App. Cas. 508; and will also include the incidental right to work and get the minerals: *Cardigan* v. *Armitage,* 2 B. & C. 197. All well drawn leases, by which mines and minerals are excepted, contain a stipulation providing for or else excluding compensation for injuries to the surface by working. As to the construction put by the Courts on such stipulations, see *Musket* v. *Hill,* 5 Bing. N. C. 694; *Martyn* v. *Williams,* 1 H. & N. 817; *Moule* v. *Garrett,* L. R. 5 Ex. 132; 7 Ex. 101; *Aspden* v. *Seddon,* 1 Ex. D. 496. But in every demise of the surface, with an exception of mines, in the absence of any express stipulation to the contrary, a presumption arises that the lessee is entitled to a right to support, and that right will not be excluded by a provision that the mines shall be worked so as to do as little damage as possible to the soil: *Proud* v. *Bates,* 34 L. J. Ch. 406; and see *Smith* v. *Darby,* L. R. 7 Q. B. 716. Nor by an exception of all coals, &c., with the right to get the whole of such coals, &c.: *Harris* v. *Ryding,* 5 M. & W. 60. So in a demise of minerals it will be presumed that the lessor reserves to himself a right to support: *Dugdale* v. *Robertson,* 3 K. & J. 695. See further as to injuries to the surface by mining operations, Bainbridge on Mines, 260 *et seq.*

An agreement to lease a particular vein of coal under a farm was held to amount only to a licence to enter and search for the vein, but not to imply any warranty that such vein ran under the land: *Jefferys* v. *Fairs,* 4 Ch. D. 448.

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ably made the subject of express stipulation, it will be sufficient to refer to these sources of information.

3. The Habendum.

The Habendum.

Time of commencement of Term.]—When the *habendum* is from the date, or from the day of the date, that day is included or not in the term, according to the intention as gathered from the context: *Pugh* v. *Duke of Leeds*, Cow. 714; but the general rule is, that the day is not included: *Acland* v. *Lutley*, 9 A. & E. 879; *Wilkinson* v. *Gaston*, 9 Q. B. 137. Where the time of the commencement of the term is not stated with certainty, as, if the month but not the year is specified, the lease is void: 2 Keb. 656; *Lord Paget's Case*, 1 Leon. 227: *Anon.* 1 Mod. 180; *Enys* v. *Donnithorne*, 2 Burr. 1190. But where no time at all, or an impossible time, or the expiration of a former lease which does not exist or is mis-recited, is mentioned, the lease commences from the date of the delivery: Co. Litt. 46 b.; *Miller* v. *Mainwaring*, Cro. Car. 397; Sir W. Jo. 355; *Bishop of Bath's Case*, 6 Rep. 35.

Lease, how construed, in reference to the time of its execution.

Sometimes by the terms of the *habendum* the lease is to commence from the preceding quarter-day, and then the lease being inadvertently dated on such quarter-day, it is, upon the face of it, a lease to commence from the year before. In a case where this occurred, the *habendum* in the lease being from the 25th of March last, and the lease being dated on that day, though executed afterwards, the Court held that the term was to be computed from the 25th of March preceding the execution, and not preceding the date, *i.e.* from the day of the date, and not from that day in the year before, on the well-known principle that a deed operates from the execution and not from the date: *Steele* v. *Mart*, 4 B. & C. 272. This case shows the convenience of making the *habendum* from a day and year specified, instead of some day preceding the date, and which is liable to variation with the date. Another mode not unfrequently adopted, and which is still more objectionable, is to date the lease on the quarter-day from which the term is intended to be computed, and make it in terms a lease from the date. If the rule of construction just referred to were applied to such

Proper method of indicating commencement of term.

The Habendum.

a case, it is obvious that the intention of the parties would be defeated, as the term would be computed from the period of execution, and not from the date; and though it is probable that in such a case the Court would be disposed to read the *habendum* as if framed to take effect on that day, without reference to the date, in order to uphold the intention of the parties (*Styles* v. *Wardle*, 4 B. & C. 908), it is better not to raise the question.

"Feast of St. Michael."

The "Feast of St. Michael" means new Michaelmas-day, unless there is a custom to the contrary, as to which see *Farley* v. *Mayor, &c., of Canterbury*, 1 Esp. 198; but where the demise is not under seal, evidence is admissible to prove that old Michaelmas-day was meant: *Doe* d. *Spicer* v. *Lea*, 11 East, 312. See *Denn* d. *Peters* v. *Hopkinson*, 3 D. & Ry. 507; *Doe* d. *Hall* v. *Benson*, 4 B. & Al. 588; *Smith* v. *Walton*, 1 Moo. & Sc. 380.

Lease, concurrent or reversionary.

A lease may be so worded as to commence on one day in point of computation, and on another day in point of interest: Smith, L. & T. 114. Where, after reciting a lease for thirty-one years, the lessor proceeded, "Know that I, the aforesaid thirty-one years being completed, have demised and granted all, &c., to hold from the day of making these presents, the term aforesaid being finished, until," &c., it was held, as being most beneficial to the lessee, that the new term commenced upon the expiration of the former: *Anon.* Dyer, 261 b, pl. 28. See *Enys* v. *Donnithorne*, 2 Burr. 1190.

Lease to commence at expiration of prior lease does not carry the reversion.

A lease granted to commence at the expiration of a preceding lease, is a grant of a mere *interesse termini*, and does not disturb the reversion in the lessor, who may distrain upon the prior lessee, notwithstanding such second demise: *Smith* v. *Day*, 2 M. & W. 684. It is different, of course, where the second lease is by deed, and limited to commence immediately. Such a lease carries, as incident to the reversion, the right to the rent, &c., without attornment: Bac. Abr. *Leases* (N).

Term must be certain.

Duration of Term.]—A lease must have a certain determination; and therefore a lease without livery,

habendum for so many years as A. shall live, or shall hold a certain office, is void; but a lease for ninety years, if A. shall so long live, is, of course, good: Bac. Abr. *Leases* (L.) 3. *Id certum est quod certum reddi potest;* and, therefore, a lease during the minority of A., or a lease of a rent-charge until the lessee shall have received a certain sum, is good: Shep. Touch. 274. The Habendum.

A demise "until Michaelmas next and no longer," with liberty to use a part of the premises for certain purposes until the following Lady-day, expires as to the parts not included in the licence at Michaelmas: *Doe* d. *Waters* v. *Houghton,* 1 M. & Ry. 208.

Lease to Several.]—Leases granted to several persons are generally made to them as tenants in common, in order that each may take a share transmissible to his representatives, excluding survivorship; but if the lessees are partners in trade, and the lease forms part of their stock, there is no survivorship in equity, but the survivor (who takes the whole at law) is a trustee for the representatives of the deceased lessee, in respect of the share of such deceased partner; or, to speak more accurately, the lease constituting part of the partnership assets must be accounted for accordingly. Where the lessees take the legal and beneficial interest, as joint tenants, it should seem that the covenants entered into by them ought to be joint and not several, otherwise, on the death of one, his representatives will be bound by the covenants, though they take no beneficial interest, the property surviving to the other: *Enys* v. *Donnithorne,* Burr. 1190. As to lessees being tenants in common, or joint tenants.

4. Reservation of Rent.

Different kinds of Rents.]—A rent service is when the tenant holds of his lord to pay to him any certain rent: Litt. sect. 122; and is accompanied with fealty, or some other service; whence it derives its name, and upon which is founded the lord's right of distress. Litt. sect. 213. Such a rent may be reserved upon a demise for years, without deed. Litt. sect. 214. Thus it appears that, upon any alienation, a rent service Kinds of rent: rent service.

Reservation of Rent.

Fee-farm rent.

Quit-rent.

Rent of assize.

Rent seck.

Rent-charge.

Chief rent.

may be reserved, if the alienor retain a reversion. *Fee-farm* rents belong to this class, being rents in the nature of rack-rents (although the amount is unimportant), reserved, before the statute *Quia Emptores*, upon feoffments in fee. A *quit-rent* is a rent-service in lieu of all services. A *rent of assize* is a similar customary rent, *assized* or reduced to a certainty by the lord of the manor. Com. Dig. *Rents* (C.); *Laugher* v. *Humphrey*, Cro. Eliz. 524; *Bradbury* v. *Wright*, Doug. 627, n.; 5 M. & W. 261. A *rent seck*, or barren rent (*reditus siccus*), is a rent granted out of land by the owner, and such, since the statute *Quia Emptores*, is a rent reserved upon an alienation in fee. It is so called, because, at common law, it was not recoverable by distress. Such a rent, charged upon land by an express power of distress, becomes a *rent-charge:* Litt. sect. 217; of this kind are many of the *chief rents*, which are common in many parts of the country. The distinction between a rent seck and an annuity is, that the former binds the owner for the time being of the lands out of which it issues, but the latter is merely personal. As to the remedy at common law to recover a rent seck, see Co. Litt. 152 a. All rents are now recoverable by distress. 4 Geo. 2, c. 28, *infra*, p. 161 (*e*).

Rent cannot as a rule be reserved out of incorporeal hereditaments.

Out of what Property Rent issues.]—It is a general rule of law that "a rent cannot be reserved out of any incorporeal inheritance, such as advowsons, commons offices, corodie, mulctura of a mill, tythes, fayres, markets, liberties, priveledges, franchises, and the like; but if the leases of them be made by deed for years, it may be good by way of contract to have an action for debt, but distreine the lessor cannot:" Co. Lit. 47 a; see *Jewel's Case*, 5 Rep. 3; Bac. Abr. *Rent* (B.). The Sovereign may, however, reserve a rent out of an incorporeal hereditament, having the right to distrain on all the lands of a subject whereon situated: see *Knight's Case*, 5 Rep. 54.

(*e*) This remedy is now extended to annual sums charged on land, other than rents incident to the reversion, by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sect. 44, stated *ante*, Vol. I. p. 671 *seq.*

Reservation of Rent.

Where land and tithes were demised together, it was held that the rent should issue wholly out of the land in point of remedy, but in point of render out of both: *Doubiboste* v. *Courteene*, Cro. Jac. 452. If a lease is made of a reversion or remainder at a rent, the demise will be good, but the lessor's right to distrain will be suspended during the continuance of the particular estate: Bac. Abr. *Rent* (B.). So, if a lease for seven years to commence at once be made of land already in lease for the residue of an unexpired term of three years, the lessor's security for the rent reserved by the later lease will be merely personal until the expiration of the three years' term, when his right to distrain will revive. The demise in such a case should, of course, be made determinable by the notice of the lessor on non-payment of the rent.

As to rents reserved out of tithes.

It was at one time doubted whether a rent could be reserved out of tithes, being an incorporeal hereditament; but the affirmative was long since established. See *Dean and Chapter of Windsor* v. *Gower*, 2 Saun. 302; *Bally* v. *Wells*, 3 Wils. 25. This point is however of no practical importance since the Tithe Commutation Act: see the stat. 6 & 7 Will. 4, c. 71, as amended by numerous subsequent Acts.

Rent upon a lease of chattels with land.

A rent cannot be reserved out of chattels; and if an entire rent is reserved upon a demise of land with chattels, the rent issues out of the land exclusively: *Spencer's Case*, 5 Rep. 17 b; *Newman* v. *Anderton*, 2 Bos. & P. N. R. 224.

It is not essential to the creation of a tenancy that the rent should be ascertained at the time: *Denn* v. *Cartwright*, 4 East 29.

Terms in which rent may be reserved.

Mode of reserving Rent.]—Rent need not be reserved in the formal terms usually employed in framing the *reddendum;* for any expressions declaratory of the intention of the parties that a rent shall be payable, will have the same effect. Thus, where the lessee simply covenanted to pay an annual rent to the lessor, his heirs, executors, or administrators, it was held that this operated as a reservation, and the rent was incident to the reversion; and, therefore, that

Reservation of Rent.

an action on the covenant should have been brought by the heir (the lessor having been seised in fee) as the owner of the reversion, and not by the executor. *Drake* v. *Munday*, Cro. Car. 207. See also *Harrington* v. *Wise*, Cro. Eliz. 486; *Doe* v. *Kneller*, 4 Car. & P. 3. But where the assignee of a lessee entered into an agreement with the original lessor, that he should have the premises as mentioned in the lease, and "to pay £8 10s. over and above the rent, annually, towards the good-will already paid by" the assignee; it was held, that this was not a rent, but a sum in gross: *Smith* v. *Mapleback*, 1 T. R. 441.

Cannot be reserved to a stranger.

Rent cannot be reserved to a stranger: Co. Lit. 143 a; *Doe* v. *Lawrence*, 4 Taun. 23; and, therefore, where A., who was seised in fee, made a lease in which B. his heir-apparent joined, and the rent was limited after the death of A. to B., this was held to be a void reservation: *Oates* v. *Frith*, Hob. 130. It would have been otherwise, it seems, if the rent had been reserved to the heir *eo nomine*. Ib.

The doctrine, however, that rent cannot be reserved to a stranger, of course, does not prevent an annual sum from being granted to a third person, in consideration of a demise. It only means, that a sum so reserved, not being annexed to the reversion, has not the incidents of a rent service; therefore, the owner of it cannot distrain at common law: *Oates* v. *Frith*, Hob. 130; but, it is apprehended, the reservation would be binding as a contract; and accordingly if the money reserved is charged on the land or on the income of the land, the stranger might enforce payment thereof under sect. 44 of the Conveyancing and Law of Property Act, 1881: see *ante*, Vol. I., p. 671 *seq.* If the money is not so charged, an express power of distress should be given, and (which, indeed, is common in all cases) an express covenant for payment of the rent; though it is said that an action of covenant may be sustained on the words of reservation to the stranger: *Deering* v. *Farringdon*, 1 Mod. 113. But the covenantee of course should be a party to the deed: *Southampton* v. *Brown*, 6 B. & C. 718.

Reservation of rent must be certain.

The reservation of rent must be certain both as to the amount payable and as to the times of payment.

Reservation of Rent.

Gilb. Rents 9; see *Parker* v. *Harris*, 1 Salt. 262. As regards the amount, however, it is sufficient if, though not specified in the reservation, it is capable of being ascertained thereby: Co. Lit. 96 a., 142 a. So in *Daniel* v. *Gracie*, 6 Q. B. 145, a marl pit and brick mine were demised by parol agreement whereby the tenant agreed to pay, on the usual quarter days, 8d. per solid yard for all marl gotten, and 1s. 8d. per thousand bricks made; it was held that the rent was capable of being ascertained so as to entitle the landlord to distrain. See also *Orby* v. *Mohun*, 2 Vern. 531; *Pollitt* v. *Forrest*, 11 Q. B. 949; *Selby* v. *Greaves*, L. R. 3 C. P. 594.

Must be reserved at the time of the demise.

An agreement by a lessee, after the tenancy had commenced, to pay to the lessor a per-centage on his outlay for enlarging the buildings demised, was held to be a collateral contract that did not run with the land: *Lambert* v. *Norris*, 2 M. & W. 333. Such a contract, therefore, need not be signed by either party: *Donellan* v. *Read*, 3 B. & Ad. 899; *Hoby* v. *Roebuck*, 2 Marsh. 433. See *Preston* v. *Merceau*, 2 W. Bl. 1249; *M'Leish* v. *Tate*, Cow. 781.

Rent follows the reversion, notwithstanding error in terms of the reservation.

It is generally presumed that an annual sum, reserved in the nature of a rent, is intended to follow the reversion; and the reservation of it to a different class of representatives than those on whom the reversion will devolve, will not have the effect of severing it from the reversion, this being regarded as a mere slip or inaccuracy of expression; as if the *reddendum* in a lease, made by an owner in fee, be to him, his heirs, executors, or assigns, instead of to him, his heirs, and assigns, the word "executors" will be rejected, and the rent will go with the reversion, and belong to the heirs: *Sacheverell* v. *Frogatt*, 2 Lev. 13. See also Cro. Car. 290; and *Oates* v. *Frith*, Hob. 130.

So, if a lessee for years, on granting an underlease, reserve the rent to him and his heirs, or to him simply, without any words of limitation, it will nevertheless go with the reversion to his executors or administrators: *Darrell* v. *Wilson*, Cro. Eliz. 644; *Constable's Case*, cit. Cro. Car. 289; see also 2 Wms.'s Saund. 371 (n. 7). But it is sometimes laid down,

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that if a rent be reserved to a lessor (entitled in fee) and his assigns, or his executors, administrators, or assigns, it ceases at his death, and does not go to the heir. Dyer, 45 a; *Edwyn* v. *Wootten*, 12 Rep. 35. This doctrine (which is inconsistent with the liberality of construction that has generally prevailed in cases of this nature), it is probable, would not now be followed: at all events it has been decided not to apply where the reservation of rent is "during the term," in which case it will belong to the heir or devisee of the lessor, though limited to the executors or administrators: *Sacheverell* v. *Froggatt*, 2 Saun. 367.

Reservation in leases under powers.

But it is well established, that where a tenant for life, demising lands under a power (*f*), reserves the rent to him and his heirs and assigns, this will enure to the benefit of the person for the time being entitled to the reversion (*supra*, p. 16): see *Whitlock's Case*, 8 Rep. 71; *Sands* v. *Leger*, 2 Ld. Raym. 792; *Campbell* v. *Leach*, Amb. 740; *à fortiori*, where it is reserved to the lessor, his heirs and assigns, and to every person to whom the reversion shall belong during the term: *Whitlock's Case*, 8 Rep. 71. Many of the preceding cases show the soundness of the advice given in *Whitlock's Case*, to make the reservation in general terms, and not to any person or persons in particular, leaving the law to make the distribution; this would be found very convenient as a general rule, and should invariably be adopted, where there is any doubt as to the persons to whom the reservation is to be made. See also *post*, p. 233.

Propriety of a general reservation.

Persons claiming by a paramount title, not entitled to rent.

In order to entitle persons to the rent reserved upon a lease, they must claim under or in privity with the lessor, and not under a title paramount to his. On this principle, a surviving wife is not entitled to the rent reserved upon an underlease granted by her husband of her lands (see *ante*, p. 66); nor an administrator *de bonis non*, to a rent reserved to an executor (see *ante*, p. 75). This

(*f*) As to leases under powers, see *ante*, p. 8.

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doctrine was also, formerly, considered to exclude a mortgagee from claiming the rent reserved on a lease granted by the mortgagor, subsequently to the mortgage: *Alchorne* v. *Gomme*, 2 Bing. 54. But the rule in such cases is now different (see *ante*, p. 79).

Rent, when due.

Where a rent is reserved generally, and not as it usually is, by quarterly or half-yearly payments (*g*), nothing is due until the end of the year: see Latch, 264; 1 T. R. 445; and parol evidence is inadmissible to vary it by showing a different mode of payment by other tenants: *Carter* v. *Pryke*, Peake, 95. See *Turner* v. *Allday*, Tyr. & Gr. 819; *Mallam* v. *Arden*, 3 Moo. & Sc. 763.

Days of payment transposed, where.

Where the rent is to be payable annually during the term, on certain days, and the day which is first named is not the first which happens during the term, the local order of the words will be disregarded, and the rent will be payable on the first of the days occurring in point of time: *Hill* v. *Grange*, Plow. 171; Co. Litt. 217 b.

Where the lease was for seven years from the date, which was the 8th of September, 1835, at an annual rent, payable quarterly, the first payment to be made on the 25th of March following; it was held, that a quarter's rent only became due on that day. Per *Parke*, B.—"The last rent would become due at Christmas, 1842. The consequence is, that the lessor will lose his remedy by distress for that rent; he retains his remedy on the contract:" *Hutchins* v. *Scott*, 2 M. & W. 809.

As to rents payable in advance.

Rent is, properly speaking, a consideration for past enjoyment, but it is sometimes reserved to be paid in advance; in which case it seems to partake of the nature of a fine or foregift. See 1 Ld. Raym. 367. Where the rent is so intended to be reserved, it should be made clearly apparent whether the payment in advance is to be of the current quarter for the time being, during the whole term, or for the first payment only, as otherwise it may be held that the agreement for the advance was confined to

(*g*) Called "gales," from *gavel*, a rent; Spelm. Gl. voce *Gabellum*.

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the first quarter only: see *Holland* v. *Palmer*, 2 Star. 161; *Hopkins* v. *Helmore*, 8 A. & E. 463.

Rule, where rent is payable on several alternative days.

Formerly, it was much the practice to make the rent payable on two alternative days, as, on the usual feasts or quarterly days of payment, *or* within a certain number of days afterwards. This was held to give the lessee an option to pay it on either day, and if tendered on the first of the days, the lessor was bound to accept it: *Barwick* v. *Foster*, Cro. Jac. 227, 233: see also *Horn* v. *Barbar*, Cro. Car. 421. But it is not demandable by the lessor until the later day; and if he (supposing him to have the inheritance) die in the interval between the two days, it will belong to his heir and not to his executor: *Glover* v. *Archer*, 4 Leon. 247, pl. 403; *Clun* v. *Fisher*, Cro. Jac. 309; *Thompson* v. *Field*, Cro. Jac. 499.

This mode of reserving rent has properly fallen into disuse, for in modern leases, the rent is invariably reserved on one day certain, generally with a right of entry on non-payment within a definite period afterwards.

As to reserving rents in advance.

It is often a prudent precaution to make the last payment accrue at a short period before the determination of the lease. By this means, the landlord has the opportunity of distraining for it, while the lessee's property is or should be on the premises. For want of a power of this kind, the rent is sometimes lost, the lessor not being entitled to distrain until the last minute, *i.e.*, until midnight of the last day of the lease: *Duppa* v. *Mayo*, 1 Saun. 287; and then the exercise of the landlord's remedy is obstructed by the rule which requires distresses to be made in the day-time.

Leases under powers.

But rent cannot be thus reserved in advance in a lease made under a power. Thus a lease, in exercise of a power framed in the usual manner reserving the rent on the 6th of April and 11th of October in every year, except the last half-year's rent, which was made payable, not on the 11th of October, but on the 1st of August preceding, with a power of distraining for it if unpaid at that time, was held to be a bad execution of the power: *Rutland* v. *Doe* d. *Wythe*, 5 M. & W. 688. And the statutory powers

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conferred by the Settled Land Act, 1882 (45 & 46 Vict. c. 38) on limited owners do not appear to authorize such reservation of rent in advance.

Condition precedent to payment of rent.

Sometimes an act to be performed by the lessor is made a condition precedent to the payment of the rent. Thus, where a parol lease of a house was made, at a rent payable in advance from a future day, the lessor agreeing that the house should be suitably furnished, and the lessee entered, and the house was not duly furnished, it was held that the lessor could not distrain: *Mechelen* v. *Wallace*, 6 N. & M. 316. See *Regnart* v. *Porter*, 5 Moo. & P. 370; *Wright* v. *Newton*, 2 Cr. M. & R. 124.

Penal rents.

It is clear, that, under clauses reserving additional rents for ploughing pasture or meadow land, or any breach of the prescribed rules of husbandry, the lessor may maintain an action on the *reddendum*, or on the covenant to pay, and no relief can be obtained against the effect of such clauses in equity: *Farrant* v. *Olmius*, 3 B. & Al. 692; *Aylet* v. *Dodd*, 2 Atk. 238; *Benson* v. *Gibson*, 3 Atk. 396; *Rolfe* v. *Peterson*, 2 Bro. P. C. 436; *Jones* v. *Green*, 3 Y. & J. 298. The lessor having thus elected his remedy, no further damages can be recovered: *White* v. *Sealey*, 1 Doug. 49; and equity will not interfere by injunction to prevent the waste: *Woodward* v. *Gyles*, 2 Vern. 119; unless, as it would seem, the act amount to a forfeiture: see *Barrett* v. *Blagrave*, 5 Ves. 555.

Waiver.

A penalty for non-payment of rent is waived by acceptance of the rent; but a penal rent for ploughing, &c., is not waived by acceptance of the old rent after notice of the act: *Denton* v. *Richmond*, 1 Cr. & M. 734 (*h*).

Lessor's option to re-enter.

Where a penal rent is reserved in case of breach of a covenant, and there is also a proviso in the lease for re-entry on such breach, the lessor will have the option to re-enter in case of any breach, or to require the lessee to pay the penal rent: *Weston* v. *Managers of the Metropolitan Asylums District*, 9 Q. B. D. 404.

Penalty for not dealing with lessor.

(*h*) As to the validity of a penal rent in a publican's lease, for not dealing with the lessor, see *Holcombe* v. *Hewson*, 2 Camp. 391; *Cooper* v. *Twibill*, 3 Camp. 286, and *infra*.

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Construction of covenant not to plough for the last twenty years of the term.

In a case, where a clause of this kind underwent much discussion, it was decided, first, that a clause reserving an additional rent *per* acre for meadow land, which the lessee should plough, dig, break up, ear, or convert to tillage, during the last twenty years of the term, applied to land which was meadow at the commencement of the lease, and not merely to that which was in such a state previously to the twenty years, having been ploughed by the tenant before that period; secondly, that though the lessee had subsequently sown clover with the corn, and had taken two crops of hay from the clover, the land was to be considered as still in tillage; and thirdly, that even if laid down to permanent grass, the rent reserved did not cease on its restoration to pasture, but continued during the remainder of the term, though the clause did not in terms (as it generally does) provide for its continuance: *Birch* v. *Stevenson*, 3 Taun. 469. See *Howell* v. *Richards*, 11 East, 633.

Where the question is, what is ancient pasture, the neglect of the tenant to plough any portion of the land during his lease, however long that lease may be, cannot constitute it such as against him: *Goring* v. *Goring*, 3 Swan. 661.

Penal rent for suffering strangers to occupy.

When there was a stipulation for payment of an additional rent, at the rate of so much per acre, for land which the lessee should suffer to be occupied by any other person without the lessor's consent, and also a covenant by the tenant to use, occupy, dress, and manure the land, according to the custom of the country; and the tenant suffered persons to use small portions of the land for raising a potato crop, which it was the custom of the county to do, it was held that the additional rent was payable: *Greenslade* v. *Tapscott*, 1 Cr. M. & R. 55.

5. Apportionment of Rent.

Apportionment by act of law.

Apportionment in respect of the corpus *of the Lands.*—This arises where lands, which are demised at an entire rent (*i*), become divided among different

(*i*) As to where a reservation is of an entire, and where of several rents, see Gilb. on Rents, 26; *Tanfield* v. *Rogers*, Cro.

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persons ; as, where a person seised of lands of gavelkind tenure, and lands descendible at common law, demises the whole at one rent, and dies, the reversion, in part, descends to the gavelkind heirs, and the residue to the heir at common law. Dyer, 5 a ; Co. Litt. 148 a, 215 a ; 4 Rep. 120 b. So, where leaseholds and freeholds are let together, at an entire rent, an apportionment takes place at the death of the lessor, among the real and personal representatives : *Huntley* v. *Roper,* 1 And. 21.

By the act of the parties.

Rent may also become apportionable by the act of the parties ; as where the lessor disposes, by deed or will, of part of the lands in reversion to which the rent belongs, and the lessee attorns to such grantee : *West* v. *Lascelles,* Cro. Eliz. 851 ; *Collins* and *Harding's Case,* 13 Rep. 57 a ; or where the lessor devises specific portions of the rent to different persons : *Ard* v. *Watkin,* Cro. Eliz. 637. But the lessee is not bound by any apportionment made by the lessor without his concurrence, unless it is apportioned by a jury : *Bliss* v. *Collins,* 5 B. & Al. 876 ; or by a judge placed by agreement of the parties in the position of a jury : *Mayor, &c., of Swansea* v. *Thomas,* 10 Q. B. D. at p. 51.

Lessee when bound by apportionment.

Whether rent is apportionable upon the lessee's alienation.

Rent is apportionable by the lessee's alienation for some purposes. Thus where the lessee aliens part of the land, the alienee is liable to a proportional part of the rent : *Stevenson* v. *Lambard,* 2 East, 580 ; *Gaumon* v. *Vernon,* 2 Lev. 231. The lessee cannot, however, discharge himself from his liability upon his covenant, to any part of the rent, by the alienation of part of the lands : *Bff. of Ipswich* v. *Martin,* 1 Roll. Abr. 235, pl. 17 ; any more than he can exonerate himself from the whole rent by an assignment of all the lands : *Orgill* v. *Kemshead,* 4 Taun. 642. So, where an assignee (who is liable to the rent by privity of estate only, and not by contract) aliens part of the land, he and his assignee from that time are respectively liable, according to their respective parts in the land. The right of

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Eliz. 340 ; *Beare* v. *Woodley,* Cro. Car. 154 ; *Knight's Case,* 5 Rep. 54 b.

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distress for the whole rent, upon every part of the land, of course remains unimpeached: see *Curtis* v. *Spitty*, 1 Scott, 742.

Apportionment in case of eviction.

Where the lessee is evicted from part of the lands, by title paramount to that of the lessor, he is bound to pay a rateable proportion of the rent for the remainder. Co. Litt. 148 b; *Smith* v. *Malings*, Cro. Jac. 160; *Stevenson* v. *Lambard*, 2 East, 575. But where the eviction from part of the lands is by the lessor himself, the effect is not an apportionment but a suspension of the whole rent; the tenancy is not, however, thereby determined, but the tenant continues liable on all his covenants other than those relating to payment of rent: *Morrison* v. *Chadwick*, 7 C. B. 283; *Newton* v. *Allin*, 1 Q. B. 517. Where a person demised lands of which he was seised in fee, and lands of which he was tenant for life, with power of leasing at an entire rent, and the lease being void as to the lands intended to be demised by virtue of the power, the Court held that the rent might be apportioned: *Doe* d. *Vaughan* v. *Meyler*, 3 Moo. & Sc. 276, overruling *Rees* d. *Parkins* v. *Phillip*, Wight. 69. And where the eviction is a consequence of the lessee's own tortious act, as where he makes a feoffment of part, or commits waste in part, of the lands, or the lessor enters for the forfeiture (being specially authorized on the breach of a condition to enter upon part), the rent is apportioned, the lessee being liable to a proportion of the rent for the remainder. 1 Roll. Rep. 331; *Walker's Case*, 3 Rep. 22 b. And the principle applicable to the case of eviction obtains, where the lessee has never been in the enjoyment of part of the subject contracted for; and therefore, where a person entered, under an agreement for a lease of land with an exclusive right of sporting, and it turned out that the lessor had no power to grant such a privilege; it was held that a proportional deduction from the rent was to be made on that account: *Tomlinson* v. *Day*, 2 Br. & B. 680.

Where part of the subject of the lease fails.

In *Gardiner* v. *Williamson*, 2 B. & Ad. 336, upon a demise of a messuage and of tithes together, at one rent, which demise, being by parol, was void as

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to the tithes, it was held, that, as there was no valid demise of the whole subject-matter, and no distinct rent reserved for that part of it on which there might be a legal distress, there could be no distress for any part of the rent (*k*).

So, where a lessor of eight acres leased them, with ninety-two others, to another, for a term which would expire before the former term, and the second lessee never obtained possession of the eight acres, it was held, that the demise was void altogether as to the eight acres: and on the principle of *Gardiner* v. *Williamson*, as well as on the ground that here there was nothing analogous to eviction by title paramount, that the lessor could not distrain for any part of the rent: *Neale* v. *Mackenzie*, 1 M. & W. 747.

Rule, where lands and goods are let at an entire rent, and tenant is evicted from the goods only.

It is laid down in an early case, that where lands and goods are let at an entire rent, and the lessee is evicted from the goods, he is entitled to no allowance for the goods, as the rent issues out of the lands only: *Emott* v. *Cole*, Cro. Eliz. 255. See also *Farewell* v. *Dickenson*, 6 B. & C. 251; *Newman* v. *Anderton*, 2 Bos. & P. N. R. 224 (*l*). But see *Richards le Taverner's Case*, Dyer, 56 a. Upon this principle too, it has been held, that a judgment creditor is not entitled to a proportion of the rent, in respect of goods demised with lands at one rent; though if they are let at distinct rents, he may take the rent of the goods: *Cadogan* v. *Kennett*, Cowp. 432. The rule applicable to eviction extends also to the case of the destruction or extinguishment of part of the subject by the act of God, as by the overflowing of the sea; but as to fresh water, see 1 Roll. Abr. 236. The rule does not extend to destruction by fire: *Balfour* v.

(*k*) See *Doe* d. *Griffith* v. *Lloyd*, 3 Esp. 78. Of course, if there had been a valid demise of the tithes, although the whole rent would still have been charged upon the land, the distress would have been good: 2 Roll. Abr. 451; Cro. Jac. 452.

(*l*) As rent cannot issue out of goods, it is obvious that the case does not come within the principle of *Gardiner* v. *Williamson*, *supra*. It might be different if an intention were expressed on the face of the demise, that part of the annual payment should be made in respect of the goods, and the proportions were not specified: it being essential to a reservation of rent that the amount should be certain: Co. Litt. 142 a. See *Spencer's Case*, 5 Rep. 16.

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Western, 1 T. R. 310; *Baker* v. *Holtzapfell*, 4 Taun. 45; 18 Ves. 115.

Rent is apportioned, where the lessee surrenders part of the land to the lessor himself. See *Smith* v. *Malings*, Cro. Jac. 160. See also *Anon.*, Moore, 114. Such apportionable rent may be distrained for, and the tenant has the usual remedy if an excessive distress be made: 1 M. & W. 758. By the Settled Land Act, 1882 (45 & 46 Vict. c. 38), sect. 13, tenants for life are empowered to accept surrenders of part of lands comprised in any lease of the settled lands, and on such partial surrender the rent may be apportioned.

Apportionment of rent, &c., under statutes.

By the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), sect. 119, an apportionment of rent is to be made where part only of lands comprised in leases for terms of years is taken for the purposes of public undertakings under the Act. And by the stat. 17 & 18 Vict. c. 116, on the sale or exchange of part of lands belonging to bishops or capitular bodies, and comprised in any lease or copy of court roll, the rent is to be apportioned. Apportionments of rent may also be made under the stat. 12 & 13 Vict. c. 49, sect. 1, where part only of lands comprised in a lease is conveyed for sites for schools for the education of the poor under the stat. 4 & 5 Vict. c. 38. And as to apportionments of rents and other payments where part only of lands comprised in any lease or copy of court roll are sold or exchanged, see the Inclosure Act, 1853 (17 & 18 Vict. c. 97). And see as to apportionment generally of rent and of the benefit of lessee's covenants on severance of the reversion, the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sect. 10, *post*, p. 233.

Consequence of apportionment.

The general consequence of apportionment is, that the lessee is liable to several actions or distresses for the rent, by the respective owners of the several parts. Conditions of re-entry, the other usual remedy for the recovery of rent, being entire and indivisible, were formerly destroyed by a severance of the reversion: *Knight's Case*, 5 Rep. 54; *Winter's Case*, Dyer, 308, 309. But to this rule there were two

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exceptions: first, where the reversion became severed by the act of law, as where part descended to one heir and part to another, in which case "the reversion, rent, and condition are divided;" secondly, where the severance arose from the act and wrong of the lessee. See *Knight's Case*, 5 Rep. 54 b. But now as regards leases made since the 31st December, 1881, conditions of re-entry and other conditions in such leases are apportionable on severance of the reversion, or on cesser or avoidance of the term as to part of the demised lands: see stat. 44 & 45 Vict. c. 41, sect. 12, *post*, p. 264.

Representatives of tenant for life, when entitled to rent.

Stat. 11 Geo. 2, c. 19.

Apportionment in point of time.]—Before the stat. 11 Geo. 2, c. 19, where a tenant for life died in the interval between two days of payment, and the lease granted by him determined at his decease, the rent for the fractional period was irrecoverable: *Clun's Case*, 10 Rep. 127; *Jenner* v. *Morgan*, 1 P. Wms. 392. And see *Pilkinton* v. *Dalton*, Cro. Eliz. 575; 8 Ves. 311; 2 P. Wms. 176. But that statute, s. 15, provides:—

Representatives entitled on leases determining at the death of tenant for life.

"That where any tenant for life shall happen to die before or on the day on which any rent was reserved or made payable, upon any demise, or lease of any lands, tenements, or hereditaments which determined on the death of such tenant for life, the executors or administrators of such tenant for life shall and may, in an action on the case, recover of and from such under-tenant or under-tenants of such lands, &c., if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent, according to the time such tenant for life lived of the last year, or quarter of a year, or other time in which the said rent was growing due as aforesaid, making all just allowances, or a proportionable part thereof, respectively."

Under this statute, it is clear, that where a tenant for life grants a lease, or creates a tenancy, whether the lease or tenancy be limited to determine with his own life, or it be intended to have a larger operation by virtue of an express or statutory power, but is, for want of compliance with the requisitions of the power, in effect a lease for life only, the rent belongs to his representatives up to the day of his decease: *Clarkson* v. *Earl of Scarborough*, 1 Swan. 354, n.;

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Ex parte Smythe, 1 Swan. 337 ; *Symons* v. *Symons*, 6 Mad. 207. The statute applies whether the land is leased by the tenant for life *by deed* or by parol.

Statute applies to tenant in tail.

The statute under consideration has received a liberal construction (*m*) ; for it has been held to apply to tenants in tail, whose leases, by the failure of issue inheritable under the entail or otherwise, determine at their decease : *Whitfield* v. *Pindar*, Com. Pl. 1781, cit. 2 Bro. C. C. 662 ; even where the entire amount had been paid to the remainderman : see *Pagett* v. *Gee*, Amb. 198 ; also Mr. Swanston's note, 1 Swan. 347, on the case of *Vernon* v. *Vernon*, 3 Bro. C. C. 659. Estates *pur autre vie* are expressly brought within it by the statute 4 & 5 Will. 4, c. 22, stated *infra*.

4 & 5 Will. 4, c. 22.

Royal assent, June 16th, 1834.

Some ambiguities in the statute of Geo. 2 were removed, and its provisions extended to the apportionment of continuing payments by the statute 4 & 5 Will. 4, c. 22, which enacts :—

Rents reserved on lease determining on the death of the person making them (though not strictly tenant for life), or on the death of *cestui que vie*, to be considered as within the provisions of recited act.

Sect. 1. "That rents reserved and made payable on any demise or lease of lands, tenements, or hereditaments, which have been and shall be made, and which leases or demises determined or shall determine on the death of the person making the same (although such person was not strictly tenant for life thereof), or on the death of the life or lives for which such person was entitled to such hereditaments, shall, so far as respects the rents reserved by such leases, and the recovery of a proportion thereof by the person granting the same, his or her executors or administrators (as the case may be), be considered as within the provisions of the said recited Act" (*n*).

All continuing rents, annuities, and other pay-

Sect. 2. "That, from and after the passing of this Act, all rents service reserved on any lease (*o*) by a tenant in fee or for any life interest, or by any lease granted under any power, (and which

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Whether tithes are apportionable.

(*m*) In two cases the statute was treated as not applying to a lease of tithes made by the incumbent of a rectory : *Hawkins* v. *Kelly*, 8 Ves. 308 ; nor to a composition by a rector, in lieu of tithes. *Aynsley* v. *Wordsworth*, 2 Ves. & B. 331. Taxes and other charges are not apportionable under this Act : *Sutton* v. *Chaplin*, 10 Ves. 67.

(*n*) This clause is retrospective, the next clause is not. The "recited Act" is the 11 Geo. 2, c. 19.

Rent reserved upon parol leases.

(*o*) Parol lettings are not within the above clause : *Re Markby*, 4 My. & Cr. 484 ; 3 Jur. 767 : *Ex parte Smyth*, 1 Swan. 37 ; *Cattley* v. *Arnold*, 1 J. & H. 651.

leases shall have been granted after the passing of this Act), and all rents-charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description, in the United Kingdom of Great Britain and Ireland, made payable or coming due at fixed periods under any instrument (*p*), that shall be executed after the passing of this Act, or (being a will or testamentary instrument) that shall come into operation after the passing of this Act shall be apportioned so and in such manner that on the death of any person interested in any such rents, annuities, pensions, dividends, moduses, compositions, or other payments as aforesaid, or in the estate, fund, office, or benefice, from or in respect of which the same shall be issuing or derived, or on the determination by any other means whatsoever (*q*) of the interest of any such person, he or she, and his or her executors, administrators, or assigns, shall be entitled to a proportion of such rents, annuities, pensions, dividends, moduses, compositions, and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof respectively (as the case may be), including the day of the death of such person, or of the determination of his or her interest, all just allowances and deductions in respect of charges on such rents, annuities, pensions, dividends, moduses, compositions, and other payments being made; and that every such person, his or her executors, administrators, and assigns, shall have such and the same remedies at law and in equity for recovering such apportioned parts of the said rents, annuities, pensions, dividends, moduses, compositions, and other payments, when the entire portion of which such apportioned parts shall form part shall become due and payable and not before (*r*), as he, she, or they would have had for recovering and obtaining such entire rents, annuities, pensions, dividends, moduses, compositions, and other payments if entitled thereto, but so that the persons liable to pay rents reserved by any lease or demise, and the lands, tenements, and hereditaments comprised therein, shall not be resorted to for such apportioned parts specifically as aforesaid, but the entire rents of which such portions shall form a part shall be received and recovered by the person or persons who, if this Act had not passed, would have been entitled to such entire rents; and such portions shall be recoverable from

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ments coming due at fixed periods to be apportioned;

—subject to all just deductions.

Remedies for obtaining the apportioned parts.

(*p*) See *Mills* v. *Trumper*, L. R. 4 Ch. 320.

(*q*) These general words would seem to extend to a determination by forfeiture.

(*r*) The case of an annuity, &c., which determines on the death of the *cestui que vie*, seems to be excluded by these words, but the construction is doubtful.

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such person or persons by the parties entitled to the same under this Act in any action or suit at law or in equity."

Act not to apply to certain cases.

Sect. 3 provides that the Act shall not apply to any case in which it shall be expressly stipulated that no apportionment shall take place, or to annual sums made payable in policies of assurance of any description (*s*).

Death of tenant for life, &c., on the day the rent becomes due.

If a tenant for life, or in tail, died on the day on which the rent is made payable (whether before or after sunset), the remainderman or reversioner, and not his own representatives, was entitled, for the rent, though demandable at sunset (*t*), is not due until midnight: *Earl of Stafford* v. *Lady Wentworth*, Pr. Ch. 555; 9 Mod. 21; *Lord Rockingham* v. *Oxenden*, Salk. 578; *S. C.* nom. *Lord Rockingham* v. *Penrice*, 1 P. Wms. 177; *Norris* v. *Harrison*, 2 Mad. 268. But if the lessee have actually paid the rent to the tenant for life or in tail, on the day on which it becomes due (*Lord Rockingham* v. *Penrice*, 1 P. Wms. 177), or even before the day, provided the lessor live to that day (*S. C.* from Reg. Lib. 1 Swan. 346, n.), the lessee will be discharged; though if the lessor subsequently die before the end of the day, the remainderman might have recovered it from the representatives of the tenant for life.

Apportionment Act, 1870.

By the Apportionment Act, 1870 (33 & 34 Vict. c. 35), the law as to apportionment of rents and other periodical payments has been much extended. This Act in substance enacts (*u*) that from and after the passing thereof all rents, &c., are to be considered as accruing from day to day, and to be apportionable in respect of time; the apportioned part of any rent is to be payable when the next entire portion shall have become due; all persons are to have the same reme-

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(*s*) The act for the commutation of tithes (6 & 7 Will. 4, c. 71, s. 86), subjects rent-charges payable under it to the provisions of the above Act.

(*t*) *i.e.* to entitle the lessor to take advantage of a condition for forfeiture, &c.: see *Duppa* v. *Mayo*, 1 Saun. 287; *Tinckler* v. *Prentice*, 4 Taun. 549.

(*u*) The enactments above referred to are set out in full, *ante*, sub tit. ANNUITIES, Vol. I. p. 687.

dies for recovering apportioned parts of rent when payable as they would have had for the entire rent, with a proviso similar to that in sect. 2 of the stat. 4 & 5 Will. 4, c. 22, sect. 2 (*ante*, p. 156), restraining resort to the tenant in respect of the apportioned part. The Act is not to apply to policies of insurance, nor where excluded by express stipulation. Apportionment of Rent.

This Act applies to a specific no less than to a residuary devise: *Hasluck* v. *Pedley*, L. R. 19 Eq. 271. Notwithstanding an *obiter dictum* of Lord *Selborne*, C., to the contrary, in *Jones* v. *Ogle*, L. R. 8 Ch. A. at p. 195, it seems to be settled that the Act is restrospective in its operation: *Capron* v. *Capron*, L. R. 17 Eq. 288; *Re Cline*, L. R. 18 Eq. 271; *Hasluck* v. *Pedley*, *supra*; *Constable* v. *Constable*, 11 Ch. D. 681. It has been held, that as between landlord and tenant the Act applied where the trustee of a liquidating debtor assigned over the residue of a lease during the current quarter: *Swansea Bank* v. *Thomas*, 4 Ex. D. 94. Also where a company in liquidation continued in possession of leasehold premises for the purpose of carrying on their business, it was held that the rent must be apportioned under this Act so that the landlord was entitled to prove jointly with other creditors for the part of the rent which accrued up to the date of the presentation of the winding-up petition, and to distrain for the full rent after that date: *Re South Kensington Co-operative Stores*, 17 Ch. D. 161.

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), sched. 2, para. 19, it is provided that—

"Where any rent or other payment falls due at stated periods, and the receiving order is made at any time other than one of those periods, the person entitled to the rent or payment may prove for a proportionate part thereof up to the date of the order, as if the rent or payment grew due from day to day."

6. Recovery of Rent.

Limitations of Landlord's Right to distrain for Rent.]—By the stat. 3 & 4 Will. 4, c. 27, sect. 42 (stated at length, *ante*, Vol. I. p. 20), no arrears What arrears of rent are recoverable by distress.

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of rent are now recoverable by distress but within six years next after the rent shall have become due, or "next after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same was payable or his agent." But the right to distrain for arrears to this extent is not apparently lost by mere non-payment of rent during any number of years of the term granted by a lease: *Doe* d. *Davey* v. *Oxenham*, 7 M. & W. 131, and Sugd. R. P. Stat. c. 1, sect. 11. But if there is no lease in writing, then the right to recover the land, and consequently the right to distrain for arrears of rent, is lost on the expiration of twelve years from the time when payment of the rent ceased: stat. 38 & 39 Vict. c. 57, sect. 1. See further on this question, Smith, L. & T. 208.

Effect of bankruptcy on right to distrain.

The remedy by distress is not taken away by the bankruptcy of the tenant, with this limitation, that if the distress is levied after the commencement of the bankruptcy, it is available only for one year's rent: see *infra*, p. 167.

When second distress for same rent allowed.

Another rule limiting the landlord's right to distrain is, that if a distress for rent has been made no second distress can be made in respect of the same rent, unless the value of what was taken, or might with due diligence have been taken under the first distress, was insufficient to cover the amount due; nor can a second distress be made if the first has been abandoned: *Dawson* v. *Cropp*, 1 C. B. 961; *Smith* v. *Goodwin*, 4 B. & Ad. 413; *Lear* v. *Caldecott*, 4 Q. B. 123. A second distress, however, will be lawful if the first is withdrawn at the tenant's request, or if there is a mistake as to the value of the goods taken in the first distress, which afterwards proves to be insufficient: *Bagge* v. *Shawby*, 8 Ex. 641; see *Hutchins* v. *Chambers*, 1 Burr. 579. So also if the landlord is induced to withdraw the first distress by a false representation of the tenant: *Woollaston* v. *Stafford*, 15 C. B. 278; or is prevented from realising the distress by the tenant's misconduct: *Lee* v. *Cooke*, 3 H. & N. 203.

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Agricultural Holdings Act, 1883.

An important change in the law as regards the limitation of the landlord's right of distress in point of time is effected by the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), sect. 44, which enacts that—

Limitation of distress in respect of amount and time.

"After the commencement of this Act it shall not be lawful for any landlord entitled to the rent of any holding to which this Act applies (*x*) to distrain for rent, which became due in respect of such holding, more than one year before the making of such distress, except in the case of arrears of rent in respect of a holding to which this Act applies existing at the time of the passing of this Act, which arrears shall be recoverable by distress up to the first day of January one thousand eight hundred and eighty-five to the same extent as if this Act had not passed.

"Provided that where it appears that according to the ordinary course of dealing between the landlord and tenant of a holding the payment of the rent of such holding has been allowed to be deferred until the expiration of a quarter of a year or half a year after the date at which such rent legally became due, then for the purpose of this section the rent of such holding shall be deemed to have become due at the expiration of such quarter or half year as aforesaid, as the case may be, and not at the date at which it legally became due."

Of course this enactment does not affect the personal liability of the tenant for the arrears of rent, or the landlord's remedies, other than by way of distress for the recovery thereof. This section applies only to distress for rent; the old law still applies to distress for anything except rent.

Rent may be recovered by distress, when.

The right of distress is at the common law incident to a rent service: but to have constituted a rent charge, a power of distress must have been expressly given by the deed; Bac. Abr. *Rent* (K); by the common law, no distress was incident to a rent seck; but the stat. 4 Geo. 2, c. 28, s. 5, extends the remedy to rents seck, rents of assize, and chief rents. And by the Conveyancing and Law of Property Act,

(*x*) The Act applies only to holdings "either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden": see sect. 54 of the Act.

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1881 (44 & 45 Vict. c. 41), sect. 44, it is further extended to all annual payments charged on land or the income of land.

It seems that nothing is distrainable within 4 Geo. 2, c. 28, s. 4, but what would have been at least a rent seck at common law.

Who may Distrain.]—At common law, it was not every reservation, though nominally of rent, which constituted a rent, properly so called; and, therefore, nothing is distrainable within the statute of Geo. 2, which is not such a reservation as would have been at least a rent seck at the common law. Thus, in replevin, the defendant avowed under a distress for rent due from the plaintiff to him, upon an assignment of a lease for years to the plaintiff, in which assignment there was no clause of distress; it was held that this was not a rent for which a distress lay, there being no reversion in the defendant: ——— v. *Cooper*, 2 Wils. 375; *Parmenter* v. *Webber*, 8 Taun. 593; *Price* v. *Corrie*, 2 Moo. & P. 57; *Pascoe* v. *Pascoe*, 3 Bing. N. C. 898; *Smith* v. *Maplebach*, 1 T. R. 443. These cases decide, that an annual sum reserved upon a chattel in which the lessor has no reversion, is not a rent within the statute of Geo. 2, but a mere annuity. They do not at all apply to any reservation or grant of rent during an estate of freehold, which was unquestionably a rent at the common law, and as such is distrainable as a rent seck within the statute, without a clause of distress. Nor do they apply to a reservation, or grant of a rent out of a term for years, when there is a clause of distress expressly given by the deed: *Butt's Case*, 7 Rep. 23. Nor to a reservation of rent upon an underlease by a termor, which a lease from year to year by a lessee from year to year, is considered to be: *Pike* v. *Eyre*, 9 B. & C. 909; *Curtis* v. *Wheeler*, M. & Mal. 493.

A rent cannot issue out of a term for years, so as to authorise a distress, unless there be a reversion in the distrainor, or an express clause of distress.

Reversioners.

The right of distress for rent service (*y*) arises

(*y*) It has been already seen that every annual payment that is properly a rent may be distrained for although there is no reversion in the owner, by virtue of the stat. of 4 Geo. 2, c. 28, and even at common law, a rent granted for equality of exchange or partition carried with it a right of distress. And now all annual payments charged on land or the income of land, not being rent incident to the reversion, are recoverable by distress under the

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upon a reservation of rent to the reversioners; and, therefore, the first requisite to a distress is, that there shall be a legal demise (*z*), and a certain rent: *Hegan* v. *Johnson*, 2 Taun. 148; *Dunk* v. *Hunter*, 5 B. & Al. 322; *Knight* v. *Benet*, 11 Moo. 227; *Smith* v. *Day*, 2 M. & W. 684; *Risely* v. *Ryle*, 11 M. & W. 16; *Hancock* v. *Austin*, 14 C. B. N. S. 634. Such a reversion arises upon a tenancy from year to year, or at will if a yearly rent is reserved: see *Morton* v. *Woods*, L. R. 4 Q. B. 293; and a tenancy at a weekly rent will entitle a landlord to distrain: *Yeoman* v. *Ellison*, L. R. 2 C. P. 681. If the lessor has repudiated the relation of landlord and tenant, as by treating the tenant as a trespasser, in ejectment, &c., although merely for the purpose of establishing a derivative title to the freehold from the original lessor; or, it seems, after the expiration of a notice to quit, he cannot exercise the rights arising out of such relation: *Bridges* v. *Smith*, 2 Moo. & P. 740; *Jenner* v. *Clegg*, 1 M. & Rob. 213; but see *Zouch* v. *Willingale*, 1 H. Bl. 311. Eviction by title paramount, followed by re-entry, under permission of the party evicting, destroys the reversion of the original lessor, and consequently his right to distrain: *Hopcroft* v. *Keys*, 2 Moo. & Sc. 760; *Neave* v. *Moss*, 8 Moo. 389.

Tenant by elegit; guardians.

Tenant by elegit or statute has the reversion in him sufficiently to enable him to distrain on the debtor's tenants: see *Pool* v. *Neil*, 2 Sid. 29; *Cubit's Case*, 4 Rep. 7. Guardians of infants may distrain for rent reserved on leases by them: *Shopland* v. *Ryoler*, Cro. Jac. 55, 98.

Joint tenants, &c.

Joint-tenants and coparceners can only make a joint distress, which any one of them may do with-

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Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sect. 44.

(*z*) A mere licence will not support a distress, as where there was a permission to place lace machines in a factory and to work them by means of steam-power supplied by the owner of the factory: *Hancock* v. *Austin*, 14 C. B. N. S. 634. But whether or not the grant of onstand amounts to a demise and so gives a right to distrain, is a question of fact: *Selby* v. *Greaves*, L. R. 3 C. P. at p. 602.

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out the express authority of the others; but tenants in common, and, therefore, coparceners after partition, must make separate distresses, unless one distrains for himself, and as bailiff for the others: Bac. Abr. *Replevin*, K.; 3 Rep. 22 b; 3 Rep. 223 b; *Harrison* v. *Barnby*, 5 T. R. 246; *Pullen* v. *Palmer*, 5 Mod. 72; *Page* v. *Stedman*, Carth. 364; *Leigh* v. *Sheppard*, 2 Br. & B. 465; *Robinson* v. *Hoffman*, 1 Moo. & P. 474; *Whitley* v. *Roberts*, 1 M'Clel. & Y. 107. But since the passing of the Judicature Acts, questions as to mis-joinder or non-joinder of parties have ceased to hold their former importance: see Rules of the Supreme Court, Ord. XVI. rr. 1, 2, 11.

Corporations.

The right of corporations to distrain was formerly subject to some limitations, which have been removed by the express words of the stat. 4 Geo. 2, c. 28, s. 5: see *Wood* v. *Tate*, 2 Bos. & P. N. R. 247.

Parish officers.

The churchwardens and overseers of the poor are by the stat. 59 Geo. 3, c. 12, sect. 17, constituted a *quasi* corporation, and they are empowered to make leases of parish lands vested in them as such, and any one of them may authorize a distress for rent: *Smith* v. *Atkins*, 8 M. & W. 362; *Gouldsworth* v. *Elliott*, 11 M. & W. 337.

Receivers and agents.

Receivers appointed by the High Court in the name of the person legally entitled, may distrain: *Pitt* v. *Snowden*, 3 Atk. 750; *Brandon* v. *Brandon*, 5 Mad. 473; *Hughes* v. *Hughes*, 3 Bro. C. C. 87; *Darien* v. *Hastings*, 12 Moo. 34. As to bailiffs, see Wms. n. 1 Saun. 347 c, (4); *Begbie* v. *Hayne*, 2 Scott, 193; *Trevellian* v. *Pine*, 11 Mod. 112; *Ward* v. *Shew*, 2 Moo. & Sc. 756.

Distress by executors, &c.

At the common law, the remedy by action of debt extended only to rents reserved on leases for years, but did not affect freehold rents, on account, it is said, of the more permanent nature of the security in the latter case: Bac. Abr. *Rent*, K. 6. On the determination of a freehold rent, the owner, or his personal representative, might bring debt for the arrears, his real security being gone; but, on the death of the owner of the rent, if the rent continued (as in the case of a rent in fee, or *pur autre vie*), his

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executor could not sue for the arrear, unless he succeeded to the rent as special occupant: *Ib.* Where executors could sue in debt for arrears of a rent, they had no remedy by distress until the stat. 32 Hen. 8, c. 37, authorized "the executors or administrators of tenants in fee-simple, tenants in fee-tail, and tenants for term of lives, of rent services, rent charges, rent secks, and fee farms," to bring actions of debt and to distrain (while the land remains in the seisin or possession of the party liable to pay, or those claiming under him), for arrears of rent due at the time of their testator's or intestate's death. Sect. 3 gives a like remedy to a husband seised in right of his wife, for arrears due at her death (*zz*); and sect. 4 gives a like remedy to tenants *pur autre vie* of rents, after the death of *cestui qui vie*. Copyholds are not within the Act: *Appleton* v. *Doily*, Yelv. 135.

Stat. 32 Hen. 8, c. 37, empowering executors to distrain for arrears of freehold rents.

Husbands.

Tenants *pur autre vie.*

To what rents the Act extends.

The Act applies to cases where the representative, &c., might have sued in debt at common law, as well as to those where he had no remedy: *Hool* v. *Bell*, 1 Ld. Raym. 172. It applies to all rent services of freehold, *e.g.*, to rent reserved upon a lease for life, or a gift in tail: Co. Litt. 162; Bull. N. P. 57; but, if a tenant for life or in fee reserve rent upon a lease for years, although the rent follows the reversion, and therefore, the owner cannot be said to hold it for years, yet he is not tenant of it, in fee or for life, in such manner as the statute requires: *Prescott* v. *Boucher*, 3 B. & Ad. 849; *Jones* v. *Jones*, 3 B. & Ad. 967.

Executors of lessors may distrain for arrears due in his lifetime.

Now, however, the 3 & 4 Will. 4, c. 42, enacts—

Sect. 37. "That it shall be lawful for the executors or administrators of any lessor or landlord to distrain upon the lands demised for any term or at will, for the arrearages of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime."

(*zz*) The husband may distrain for arrears accrued before or during marriage: *Ognel's Case*, 4 Rep. 51 a; but not for arrears accrued afterwards, unless he is tenant by the curtesy: *Howe* v. *Scarratt*, 4 H. & N. 723; he may distrain after her death for arrears due to her as executrix or administratrix: *Ankerstein* v. *Clarke*, 4 T. R. 617; *Parry* v. *Hindle*, 2 Taunt. 18.

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Distress may be made after the lease has expired.

Sect. 38. "That such arrearages may be distrained for after the end or determination of such term or lease at will, in the same manner as if such term or lease had not been ended or determined; Provided that such distress be made within the space of one calendar month after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due: Provided also, that all and every the powers and provisions in the several statutes made relating to distresses for rent, shall be applicable to the distresses so made as aforesaid."

Of course, the executor of a lessor, having the reversion in him, may distrain for arrears of rent upon an underlease due either in his testator's lifetime or afterwards: 1 Roll. Abr. 672, 32. An executor may distrain before probate: *Whitehead* v. *Taylor*, 10 A. & E. 210.

A distress may be made under a power, although not demanded on the day it becomes due

Demand of Rent.]—In the absence of stipulation, no previous demand is requisite to support a distress for rent reserved on a lease. A distinction is taken between a power to re-enter, or a *nomine pœnæ*, and a power to distrain; as where a rent is granted payable, &c., and in default of payment, if it be demanded, the grantee may distrain. In this case it is not necessary to make a demand on the day the rent becomes due (as in the case of re-entry, or a *nomine pœnæ*, where the contrary is not stipulated), but he may demand the rent at any time after, to enable him to distrain: Co. Litt. 202 a., 144 a.; *Maund's Case*, 7 Rep. 28 b; *Foster* v. *Windlass*, 7 T. R. 119; 1 Wms. Sau. 287 b; Gilb. Rents, 73, 79, 83; even although the land should be in the possession of a stranger: *Umphrey* v. *Damyon*, 1 Buls. 181. Where rent is reserved, payable quarterly or half-quarterly if required, notice is requisite to support a distress for a half-quarter's rent: *Mallam* v. *Arden*, 3 Moo. & Sc. 793. If the lease provides that the landlord may distrain, "after demand" of the rent, or "the rent being demanded off the land," or "of the tenant personally," a demand is necessary before the distress can be made; but if the power of distress is exercisable, "if the rent is not paid, being lawfully demanded," no previous demand need be made, the

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distress being itself a lawful demand: Smith, L. & T. 242; see *Browne* v. *Daveney*, Hob. 208.

Taking a bond or promissory note or other security does not, it seems, suspend the right to distrain: *Davis* v. *Gyde*, 4 N. & M. 462: see *Parrott* v. *Anderson*, 7 Ex. 93; and 1 Roll. Abr. *Dett, Extinguishment* (A.) pl. 2, p. 605. Nor does an agreement by the tenant to pay interest on rent in arrear: *Skerry* v. *Preston*, 2 Chitt. 245.

Power to landlord to distrain for rent.

Bankruptcy of Tenant.]—By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), sect. 42, it is enacted:—

"(1.) The landlord or other person to whom any rent is due from the bankrupt may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation, that if such distress for rent be levied after the commencement of the bankruptcy it shall be available only for one year's rent accrued due prior to the date of the order of adjudication, but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the surplus due for which the distress may not have been available.

"(2.) For the purposes of this section the term 'order of adjudication' shall be deemed to include an order for the administration of the estate of a debtor whose debts do not exceed fifty pounds, or of a deceased person who dies insolvent."

The landlord may distrain after the receiver has taken possession: *Ex parte Till, Re Mayhew*, L. R., 16 Eq. 97. There must be an actual distress to support the landlord's right against the trustee: *Gethin* v. *Wilkes*, 2 Dowl. 189; and the right may be forfeited by leaving the goods in the order and disposition of the debtor: *Ex parte Shuttleworth*, 1 Dea. & C. 224.

A distress may be made for all rent accruing after the order of adjudication, so long as the tenancy continues: *Briggs* v. *Sowry*, 8 M. & W. 729; *Ex parte Hale*, 1 Ch. D. 285.

A landlord may distrain for rent payable in advance by custom or under an agreement: *Buckley* v. *Taylor*, 2 T. R. 600; *Ex parte Dyke, Re Morish*, 22 Ch. D. 410. A company, having statutory powers to recover money due to them by the same

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means as a landlord may recover rent in arrear, are "landlords" within the meaning of this clause: *Ex parte Birmingham, &c., Gas Co., Re Fanshaw*, L. R., 11 Eq. 615.

Distress and proof are not allowed for the same rent: *Ex parte Grove*, 1 Atk. 105. But the landlord may prove for so much of the rent as is not covered by the distress, and if having the right to distrain, he accepts the rent due in consideration of waivers thereof, the tenant or his trustee cannot recover it: *Moon* v. *Croome*, 1 Bing. 261.

When distress may be made.

When distress may be made.]—The distress cannot be made until after the rent has become actually due, *i.e.*, at midnight of the day on which it is made payable by the lease: *Cutting* v. *Derby*, 2 W. Bl. 1077; see *Leftley* v. *Mills*, 4 T. R. 170. And as a distress must not be made before sunrise nor after sunset, it follows that there can be no distress until the day after the rent becomes due: *Duppa* v. *Mayo*, 1 Wms. Saun. 282; and see Gilb. Dist. 50; Co. Litt. 476, 142 a; *Nixon* v. *Freeman*, 5 H. & N. 647.

Landlord may distrain after the expiration of demise.

Formerly, a landlord's right of distress ceased at the expiration of the lease; but the stat. 8 Anne, c. 14, ss. 6, 7, enabled him to distrain for six calendar months afterwards, provided his title continued, and the distress were made during the tenant's possession; which possession, it has been decided, may be with the lessor's permission, and of part only of the demised lands: *Nuttall* v. *Staunton*, 4 B. & C. 51. Where, by the custom of the country, or by agreement, the tenant is entitled to the use of the barns for a certain period after the expiration of the lease, to house the last year's crop, the crops are distrainable, though the lease has expired more than six months: *Bevan* v. *Delahay*, 1 H. Bl. 5; *Griffiths* v. *Puleston*, 13 M. & W. 358. So also, where a tenant holds on during the current year, under stat. 14 & 15 Vict. c. 25 (*ante*, p. 7): *Haines* v. *Welch*, L. R. 4 C. P. 91. And the fact of the landlord having by injunction prevented the removal of the corn, does not vary the rule: *Knight* v. *Benett*, 11 Moo. 227. The possession of

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the tenant's personal representative is the possession of the tenant: *Braithwaite* v. *Cooksey*, 1 H. Bl. 465. See *Deacon* v. *Cartwright*, 4 East, 29; *Taylorson* v. *Peters*, 7 A. & E. 110.

Distress where lands in several occupations, &c.

What may be distrained.]—If a rent-charge issue out of land, which is in the hands of several men, and a distress may be levied on any part of the demised premises, a distress may be taken for the whole rent upon the possession of one; for all the rent issues out of every part. 1 Roll. Abr. 671, pl. 12: *Woodcock* v. *Titterton*, 12 W. R. 685. So, if the lands lie in several counties, a distress for the whole may be taken in one county. Id. pl. 10. See *Wright* v. *Rumball*, 1 Ld. Ray. 55.

A distress may be made only on the demised premises, except in the case of the Sovereign, who may distrain upon all the lands of a Crown tenant wherever situate: Com. Dig. *Distress*, A. (3); and in case of fraudulent removal of goods, see *infra*, Stat. 11 Geo. 2, c. 19.

Barges moored by ropes to piles supporting a wharf in respect of which the rent was due, were held not to be on the demised premises, and consequently not liable to distress: *Capel* v. *Buszard*, 6 Bing. 150; *S. C.* 3 Y. & J. 344.

A power of distress over premises other than those comprised in the demise may be given by express stipulation which will bind an assignee of the lease who has notice thereof: *Daniel* v. *Stepney*, L. R. 9 Ex. 185.

Distress on common appurtenant.

The stat. 11 Geo. 2, c. 19, s. 8, authorizes distress of cattle or stock belonging to the tenant, upon any commons appendant or appurtenant, or any ways belonging to the premises (*a*). Sect. 1 enacts,—

Fraudulent removal of distresses.

"That, where any tenant, or lessee for life or lives, for years, at will, sufferance, or otherwise, of hereditaments, upon the holding of which rent is payable, shall fraudulently or clandestinely remove from such premises his goods and chattels, to prevent the landlord from distraining the same for arrears of the rent, the landlord, or any person by him empowered, may, within thirty days after such

(*a*) This statute does not apply to a distress in respect of a rent-charge: Bull, N. P. 126.

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removal, take the goods as distresses, wherever they may be found unless previously sold *bonâ fide* and for valuable consideration."

See as to the effect of this Act, *Parry* v. *Duncan*, 7 Bing. 243; *John* v. *Jenkins*, 1 Cr. & M. 227; *Rand* v. *Vaughan*, 1 Scott, 670; *Opperman* v. *Smith*, 4 D. & Ry. 33; *Ashmore* v. *Hardy*, 7 Car. & P. 501; *Back* v. *Meats*, 5 Mau. & S. 200; *Gray* v. *Stait*, 11 Q. B. D. 668. An under-tenant's goods are not within the Act: *Thornton* v. *Adams*, 5 Mau. & S. 38. See 2 & 3 Vict. c. 47, s. 67, as to the Metropolitan Police District.

Generally speaking all chattels found on the demised premises and whether belonging to the tenant or to a third person are distrainable for rent: Gilb. Dist. 33; 3 Bl. Com. 7. But to this rule there are certain exceptions.

Things exempted from distress.

There are eight sorts of things which, at common law, were not distrainable:—1. Fixtures, or things annexed to the freehold; 2. Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed, in the way of his trade or employ; 3. Cocks or sheaves of corn; 4. Things in actual use; 5. Animals *Feræ naturæ;* 6. Things in the custody of the law; 7. Beasts of the plough, and instruments of husbandry; 8. The instruments of a man's trade or profession. The first six sorts were absolutely free from distress, and could not be distrained, even though there were no other goods besides. The last two are only exempt *sub modo*, that is, upon a supposition that there is a sufficient distress besides. Co. Litt. 47, a. b.; 2 Ins. 132; see *Simpson* v. *Hartopp*, Willes, 512.

Fixtures.

1. Fixtures, such as kitchen ranges, grates, coppers, and stoves, are exempt from distress, notwithstanding that they are removable by the tenant during the term: *Clarke* v. *Calvert*, 3 Moo. 96; *Darby* v. *Harris*, 1 Q. B. 895 (*b*).

The ground on which this rule is founded is thus stated by *Willes*, J.: "Things annexed to the free-

(*b*) The difference in this respect exists between distress and execution, for fixtures, if removable by the tenant, may be seized under a *fi. fa.*: see *Poole's Case*, 1 Salk. 368.

hold, as furnaces, millstones, chimney pieces, and the like cannot be distrained because they cannot be taken away without doing damage to the freehold, which the law will not allow:" see *Simpson* v. *Hartopp*, Willes, 512. Another ground is that fixtures are liable to be damaged in the removal, so as not to be capable of being restored in the same condition in which they were seized: Co. Lit. 47 a. What amounts to sufficient annexation to the freehold to constitute a fixture has been the subject of much contention. In *Gorton* v. *Faulkner*, 4 T. R. 567, it was held that an anvil in a smith's shop and a millstone are privileged, because they are annexed to the freehold, and that a temporary removal for the purpose of cleaning them is not sufficient to destroy that privilege. A lime-kiln affixed to the freehold is not distrainable: *Niblet* v. *Smith*, 4 T. R. 504. Rails fixed on sleepers which were imbedded in ballast spread on the surface of a railway line were held to be fixtures: *Turner* v. *Cameron*, L. R. 5 Q. B. 306. But in *Trappes* v. *Harter*, 2 Cr. & M. 177, it was held that the screwing of a stocking frame to the floor to keep it steady did not make it a fixture. So a mill sunk into a stone floor and secured by molten lead was held not to be a fixture, but to be liable to distress: *Hellawell* v. *Eastwood*, 6 Ex. 295; see also the remarks of *Blackburn*, J., in *Holland* v. *Holland*, L. R. 7 C. P. at p. 337. Curtains, carpets, and looking-glasses slightly attached to the walls are not fixtures: *Hellawell* v. *Eastwood*, 6 Ex. 295.

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2. Goods deposited with an auctioneer for sale are privileged: *Adams* v. *Grane*, 1 Cr. & M. 390: *Brown* v. *Arundell*, 10 C. B. 54; *Williams* v. *Holmes*, 8 Ex. 861; but the exemption only extends to goods actually on the auctioneer's premises: *Lyon* v. *Elliott*, 1 Q. B. D. 210. The following are other instances of exemption of goods delivered to persons in trade. Goods standing for sale on the premises of factors: *Gilmore* v. *Elton*, 3 Br. & B. 75; or of commission agents: *Findon* v. *M'Laren*, 6 Q. B. 891; beasts sent to a butcher to be slaughtered: *Brown* v. *Shevill*, 4 N. & M. 277; goods deposited with wharfingers: *Mathers* v. *Mesnard*, 2 Car. & P.

Stranger's goods.

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353; corn sent to a mill to be ground: Co. Lit. 47 a.; silk sent to a weaver to be manufactured: *Wood* v. *Clark*, 1 Cr. & J. 314; *Gibson* v. *Ireson*, 3 Q. B. 39; furniture stored with warehousemen: *Miles* v. *Furber*, L. R. 8 Q. B. 77; goods deposited with pawnbrokers as security for an advance: *Swire* v. *Leach*, 18 C. B. N. S. 479; goods of guests at an inn: *Crosier* v. *Tomkinson*, 2 Ld. Ken. 439; but horses and carriages standing at livery are distrainable: *Francis* v. *Wyatt*, 1 W. Bl. 483; *Parsons* v. *Gingell*, 4 C. B. 545; and so are brewers' casks left with a publican to be returned when the beer is consumed: *Joule* v. *Jackson*, 7 M. & W. 450; and boats sent to salt works and left at a wharf to be loaded with salt: *Muspratt* v. *Gregory*, 3 M. & W. 677. As to other exemptions, see *Storey* v. *Robinson*, 7 T. R. 138; *Baynes* v. *Smith*, 1 Esp. 206.

Distinctions as to distraining a stranger's cattle which escape:

It seems, that where a stranger's cattle escape into another's land, by breaking the fences, or, if the tenant of the land where the distress is taken is not bound to repair the fences, though there is a defect in them, the cattle may be distrained for rent, immediately before they are *levant* and *couchant*. Yet if the landlord chase the cattle upon the land liable to his distress, then levancy and couchancy is material. *Kemp* v. *Crews*, 1 Ld. Raym. 170. But if the cattle escape through the defect of fences which the tenant is bound to repair, they cannot be distrained by the landlord for rent, reserved upon a lease for years, though they have been *levant* and *couchant*, unless the owner of the cattle, after notice that they are on the land, neglect or refuse to drive them away: *Poole* v. *Longueville*, 2 Saund. 289.

Equity will sometimes grant relief in favour of a stranger, when his cattle are distrained.

It has been held, that cattle going to London, and put into a close, with the consent of the landlord and leave of the tenant, to graze for a night, might be distrained by the landlord for rent: *Fowkes* v. *Joice*, 3 Lev. 260; 2 Vent. 50; 2 Lutw. 1161, English ed. 472. But the owner of the cattle was afterwards relieved in equity, on the ground of fraud in the landlord, who had consented to the cattle being put into the close; and he was decreed to pay all the costs. And in one case it was held that cattle

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belonging to a drover being put into a ground, with the consent of the occupier, to graze only one night, in their way to a fair or market, were not liable to the distress of the landlord for rent: *Tate* v. *Glead*, 2 Wms. Saun. 290, (7). See *Horsford* v. *Webber*, 1 Cr., M., & R. 696.

3. Cocks, and sheaves of corn are distrainable by the stat. 2 W. & M. c. 5, and must be sold within five days, if not replevied. See *Piggott* v. *Butler*, 1 M. & W. 441.

The stat. 11 Geo. 2, c. 19, sect. 8, authorizes the landlord to distrain corn, grass, or other product (*c*), and when ripe, to lay the same up in barns or other proper place on the premises, or as near as may be, and in convenient time to sell the same; notice is to be given to the tenant within one week where the distress is lodged; and if the tenant tender the rent and costs before the corn or other product is cut, it is to be delivered up. By the stat. 56 Geo. 3, c. 50, sect. 6, landlords are not to distrain on corn, hay, or other produce severed from the soil, nor on turnips whether growing or drawn, if sold by the sheriff according to the provisions of that Act. And by the stat. 14 & 15 Vict. c. 25, growing crops seized and sold under an execution are distrainable for subsequent rent. Growing crops being thus distrainable by statute are not a "sufficient other distress" to exempt from distress articles which are only exempt *sub modo*: *Piggott* v. *Butler*, 1 M. & W. 441. As to growing crops after seizure by the sheriff, see *infra*, p. 174.

4. Things in actual use, such as the horse a man is riding, or the tools with which he is working, are exempted from distress, in order to avoid the breach of the peace which might ensue on an attempt to distrain them, even if there is no other distress: *Simpson* v. *Hartopp*, Willes, 512. See *Field* v. *Adams*, 12 A. & E. 649.

5. Animals in a wild state, *feræ naturæ*, wherein

(*c*) As to what are products within the Act, see *Clark* v. *Gaskarth*, 8 Taun. 431; *Owen* v. *Leigh*, 3 B. & Al. 470; *Glover* v. *Coles*, 7 Moo. 231; *Proudlove* v. *Twemlow*, 1 Cr. & M. 326.

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no valuable property is in any person, are not distrainable; such are deer in a forest, game, wild rabbits, and cats: Co. Lit. 47, 1 Roll. Abr. 666; but the privilege does not extend to deer in a park: *Davies* v. *Powell*, Willes, 46; see also *Morgan* v. *Earl of Abergavenny*, 8 C. B. 768. Birds kept in cages, and pheasants, or partridges in coops would seem to be distrainable inasmuch as they may be the subject of larceny: Woodf. L. & T. 409; and see *R.* v. *Cory*, 10 Cox, C. C. 23; *R.* v. *Shickle*, L. R. 1 C. C. R. 158. Lord *Coke* has said that dogs are not distrainable: Co. Lit. 47 a.: but the better opinion seems to be that they are: *Davies* v. *Powell*, Willes, 46; see also 2 Bl. Com. 391 (*d*).

Goods in the custody of the law.

6. Cattle or goods in the custody of the law, as, if taken *damage feasant*, or under an execution, cannot be distrained: *Hanwell* v. *Barwell*, W. Jo. 456. But if goods remain on the premises after a fictitious sale of them under an execution, they are liable: *Smith* v. *Russell*, 3 Taun. 400. And by the stat. 14 & 15 Vict. c. 25, growing crops seized and sold by the sheriff under an execution are distrainable for the rent which accrues due after the sale, if there is no other sufficient distress.

Landlord's claim to one year's rent out of proceeds of execution (*e*).

The stat. 8 Anne, c. 14, s. 1, gives to landlords an important right against execution-creditors, by providing that no goods shall be liable to be taken in execution, unless the party at whose suit the same is sued out, shall, before the removal of the goods, pay to the landlord the rent due at the time of the taking, provided the arrears do not amount to more than one year's rent; and in case the arrears exceed one year's rent, then the party, paying one year's rent, may proceed to execute his judgment, and the sheriff is empowered and required to levy and pay to the plaintiff, as well the money so paid for rent as the execution-money. By sect. 8, it is provided

Stat. 8 Anne, c. 14.

(*d*) Although dogs cannot be the subject of larceny, the theft of them is punishable by the stat. 8 Vict. c. 47, s. 2.

(*e*) For similar enactments relating to executions under a County Court warrant, see the County Court Act, 1856 (19 & 20 Vict. c. 108), sect. 75; and as to executions under Admiralty process, see the Admiralty Court Act, 1861 (24 Vict. c. 10), sect. 16.

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that the act shall not prejudice the Crown. Upon this statute, the following points have been decided:—

Points decided upon the stat.

(a.) That it extends to executions by *either* party, as well that of the defendant as the plaintiff, and therefore to an execution taken out by a defendant for the costs of a nonsuit: *Henchett* v. *Thompson*, 2 Wils. 140. In an early case, where goods were seized under a *capias utlagatum* at the suit of a party, it was ordered that a year's rent should be paid to the landlord out of the moneys in the hands of the sheriff: *Greaves* v. *D'Acastro*, Bunb. 194. See also *St. John's College* v. *Murcott*, 7 T. R. 264. The Court has ordered payment to a landlord of *two* years' rent out of the funds in court under a sequestration: *Dixon* v. *Smith*, 1 Swan. 457. This of course was independently of the statute.

To what executions it extends.

Sequestration.

As to under-tenants.

(b.) That the statute does not extend to the claim of a superior landlord; and therefore the ground landlord cannot claim a year's rent under an execution issued against an under-tenant: *Ex parte Bennett*, 2 Stra. 787. A lessee and under-tenant of apartments are within the statute: *Thurgood* v. *Richardson*, 7 Bing. 428.

Rent reserved in advance.

(c.) That rent stipulated by the lease to be paid in advance is rent within the statute: *Harrison* v. *Barry*, 7 Pri. 690; *Duck* v. *Braddyll*, 13 Pri. 455. The statute of course only applies where the sum claimed is rent. Where the question was, whether, A. having by articles contracted for the sale of certain premises to B., and to assign them on payment of the purchase-money, which agreement contained a stipulation, that, in the meantime, B. should pay and allow to A. "at the rate of £100 per annum from the time of taking possession of the premises, until the completion of the purchase, in equal half-yearly payments," this annual payment was rent, so as to entitle the landlord to one year's amount against an execution-creditor; it was decided in the affirmative: *Saunders* v. *Musgrave*, 5 B. & C. 524; see *Anderson* v. *Midland Rail. Co.*, 3 E. & E. 614. The landlord may claim the full rent, though he has been used to remit part: *Williams* v. *Lewsey*, 1 Moo. & Sc. 92.

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Trustees of terms, &c.

(d.) That mortgagees, and other persons claiming the rents as the legal owners of the immediate reversion, are entitled to the benefit of the statute: *Colyer* v. *Speer*, 2 Br. & B. 67; 4 Moore, 473.

Several executions.

(e.) That where there are several executions, the landlord having received a year's rent on one, is not entitled to a year's rent on the other or others: *Dod* v. *Saxby*, 2 Stra. 1024.

Rent to what period payable.

(f.) That the landlord can only claim the rent due at the time of the seizure, and not that which accrues during the sheriff's possession: *Hoskins* v. *Knight*, 1 Moo. & Sc. 245; *Reynolds* v. *Barford*, 7 Man. & Gr. 449. This rule formerly applied to growing crops seized under an execution and being in the custody of the sheriff: *Guillian* v. *Barker*, 1 Pri. 227: but now such crops are liable to distress for rent accrued due after the seizure: see stat. 14 & 15 Vict. c. 25, sect. 2.

Landlord's remedy against sheriff.

(g.) That the sheriff paying over the money to the person at whose suit the execution is levied, after notice, will be liable to an action founded on the statute: *Colyer* v. *Speer*, 2 Br. & B. 67; which may be brought by the landlord or his personal representatives: *Palgrave* v. *Windham*, 1 Stra. 212; see *Waring* v. *Dewberry*, 1 Stra. 97; *Calvert* v. *Joliffe*, 2 B. & Ad. 418; or to a summary application to the Court or a judge in chambers to compel the sheriff to pay the arrears, not exceeding one year's rent, and the costs of the application: *Armitt* v. *Garnett*, 3 B. & Al. 440; *Yates* v. *Ratledge*, 5 H. & N. 249; but not to an action for money had and received: *Green* v. *Austin*, 3 Camp. 259.

Notice requisite.

(h.) That the sheriff is not bound to pay the year's rent without notice: *Waring* v. *Dewberry*, 1 Stra. 97; *Palgrave* v. *Windham*, 1 Stra. 212; *Smith* v. *Russell*, 3 Taun. 400; but notice before the sale, though after the removal of the goods, will be sufficient: *Armitt* v. *Garnett*, 3 B. & Al. 440. It is no answer to the landlord's claim, that the sheriff has left goods on the premises sufficient to satisfy the rent: *Colyer* v. *Speer*, 2 Br. & B. 67; 4 Moore, 473. No specific form of notice is necessary: Ib.

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(i.) That the sheriff is not entitled to poundage on the year's rent: *Gore* v. *Gofton*, 1 Stra. 643.

Sheriff's poundage.

(k.) The acceptance by the landlord of the undertaking of the sheriff's bailiff or auctioneer for the year's rent, has been held to discharge the sheriff: *Rotherey* v. *Wood*, 3 Camp. 24.

Sheriff how discharged.

Consequence where execution fails.

(l.) That if the execution is bad, the landlord's claim to the rent out of the proceeds fails with it; and therefore, where an execution was levied after an act of bankruptcy, and a commission followed within two months, the assignees were held to be entitled to recover from the sheriff, not only the amount levied under the execution, but the year's rent, which he had paid over to the landlord. It is material, however, to observe that the Court laid much stress on the fact, that the payment was made before notice of the commission: *Lee* v. *Lopes*, 15 East, 230.

The notion that bankruptcy was an execution within the statute has long been exploded: *Ex parte Plummer*, 1 Atk. 103; and see *Lee* v. *Lopes*, 15 East, 232. As to its effect upon the landlord's right of distress now, *vide ante*, p. 167.

Exception as to extents, embraces extents in aid.

(m.) That the exception in the statute in favour of extents from the Crown applies also to extents in aid: *R.* v. *De Caux*, 2 Pri. 17; see also *R.* v. *Hill*, 6 Pri. 19. And if an extent be issued after a distress made by the landlord, but before the expiration of the five days allowed for sale, even though it be not levied, the extent will take precedence of the distress, the goods being, by the act of distraining, merely placed in the custody of the law, and the property in them not changed; whereas an extent binds the property from the *teste*: *R.* v. *Cotton*, 2 Ves. sen. 288; see also *R.* v. *Hodder*, 4 Pri. 313. The landlord, too, has no claim to receive out of the property extended the rent accruing since the seizure; but if the sheriff remain in possession an undue length of time, his remedy is by action on the case against him: *R.* v. *Hill*, 6 Pri. 19.

There must be a subsisting tenancy.

(n.) That the statute only applies where there is an existing tenancy; and therefore where, subsequently to a *fieri facias* being levied, the landlord

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recovered the possession by virtue of a writ of *hab. fac. pos.* under a demise laid prior to the issuing of the *fi. fa.*, it was held that, as the tenant was a trespasser from that period, the landlord was not entitled to a year's rent: *Hodgson* v. *Gascoigne*, 5 B. & Al. 88. On the same ground, namely, that the tenant was a wrong-doer, and not, in the proper sense of the word, a tenant, it was held that the sheriff could not take the growing crop, under the execution, as his property.

Lastly, that the statute does not apply where the execution is taken out by the landlord himself: *Taylor* v. *Lanyon*, 4 Moo. & P. 316.

The remaining two classes of things which are at common law privileged as regards distress, are only so privileged conditionally upon its appearing that there is other sufficient distress available. These two classes are as follows:—

7. Beasts of the plough and instruments of husbandry. The rule of the common law with regard to these received statutory confirmation by the stat. 51 Hen. 3, st. 4, which enacted that no man should "be distrained by his beasts that gain his land, nor by his sheep, while there is another sufficient distress to be found, except for *damage feasant.*" Cart colts and young steers not broken in are not within the exemption: *Keen* v. *Priest*, 4 H. & N. 236. Cattle in actual use cannot be distrained even *damage feasant: Field* v. *Adams*, 12 A. & E. 649; *Bunch* v. *Kennington*, 1 Q. B. 679.

Agisted and espassing tock.

Agisted cattle are distrained for rent: Roll. Abr. 669; so also cattle put, even with the landlord's consent, on land to graze for a night: *Fawkes* v. *Joyce*, 3 Lev. 260; unless, as it would seem, they are on their way to a market or fair: *Tate* v. *Gleed*, 2 Wms. Saun. 290, n. 7. Beasts trespassing on land are distrainable: Co. Lit. 47 a; *Kemp* v. *Cruwes*, 2 Lutw. 1577; if, however, the trespass is owing to neglect on the part of the tenant or his landlord to repair the fences, they are not distrainable until they have been levant and couchant for a night and a day, nor until after notice to the owner to remove them and his default to comply therewith: *Kemp* v. *Longue-*

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ville, 2 Wms. Saun. 289. The owner must remove cattle that have strayed within a reasonable time: *Goodwin* v. *Chevely*, 4 H. & N. 631; what is a reasonable time is a question for the jury: *Singleton* v. *Williamson*, 7 H. & N. 410.

Agricultural Holdings Act, 1883.

Stock agisted on agricultural or pastoral holdings cannot, however, now be distrained for rent if there is any other distress on the premises sufficient to meet the landlord's claim; and even if there should be no such distress they are only distrainable for the amount due for their agistment, and on payment by the owner of the amount due at the time of the seizure for agistment, they must be delivered to him. The Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), sect. 45, enacts on this point as follows:—

Limitation of distress in respect of things to be distrained.

"Where live stock belonging to another person has been taken in by the tenant of a holding to which this Act applies to be fed at a fair price agreed to be paid for such feeding by the owner of such stock to the tenant such stock shall not be distrained by the landlord for rent where there is other sufficient distress to be found, and if so distrained by reason of other sufficient distress not being found, there shall not be recovered by such distress a sum exceeding the amount of the price so agreed to be paid for the feeding, or if any part of such price has been paid exceeding the amount remaining unpaid, and it shall be lawful for the owner of such stock, at any time before it is sold, to redeem such stock by paying to the distrainer a sum equal to such price as aforesaid, and any payment so made to the distrainer shall be in full discharge as against the tenant of any sum of the like amount which would be otherwise due from the owner of the stock to the tenant in respect of the price of feeding: Provided always, that so long as any portion of such live stock shall remain on the said holding the right to distrain such portion shall continue to the full extent of the price originally agreed to be paid for the feeding of the whole of such live stock, or if part of such price has been *bonâ fide* paid to the tenant under the agreement, then to the full extent of the price then remaining unpaid."

Agricultural machinery and animals for breeding purposes.

The same section absolutely exempts from distress for rent agricultural and other machinery hired by the tenant of an agricultural holding or of a market garden, and also animals being on the premises for breeding purposes. This enactment is as follows:—

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"Agricultural and other machinery which is the *bonâ fide* property of a person other than the tenant, and is on the premises of the tenant under a *bonâ fide* agreement with him for the hire or use thereof in the conduct of his business, and live stock of all kinds which is the *bonâ fide* property of a person other than the tenant and is on the premises of the tenant solely for breeding purposes, shall not be distrained for rent in arrear."

Instruments of trade.

8. The instruments of a man's trade or profession. These are absolutely privileged, if in actual use: *supra.* Lord *Coke* says that the books of a scholar would be conditionally privileged from distress: Co. Lit. 47 a; and Mr. Smith thinks that the privilege would extend to the law library of a barrister or solicitor: Smith, L. & T. 227.

Lodger's goods.

In addition to the things exempted from distress by the common law as above stated, other species of property are similarly privileged by virtue of statutory enactments. Thus the general rule that all chattels found on the demised premises, whether belonging to the tenant or to a third person, are distrainable by the landlord, has been qualified in favour of lodgers by the stat. 34 & 35 Vict. c. 79, which, after reciting that "lodgers are subjected to great loss and injustice by the exercise of the power possessed by the superior landlord to levy a distress on their furniture, goods, and chattels for arrears of rent due to such superior landlord by his immediate lessee or tenant," enacts as follows:—

Lodger, if distress levied, to make declaration that immediate tenant has no property in goods distrained.

Sect. 1. "If any superior landlord shall levy or authorize to be levied a distress on any furniture, goods, or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff or other person employed by him to levy such distress, with a declaration in writing made by such lodger, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained or threatened to be distrained upon, and that such furniture, goods, or chattels are the property or in the lawful possession of such lodger; and also setting forth whether any and what rent is due and for what period from such lodger to his immediate landlord; and such lodger may pay to the superior landlord, or to the bailiff or other person employed by him as aforesaid, the rent, if any, so due as last aforesaid, or so much thereof as shall be sufficient to discharge

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the claim of such superior landlord. And to such declaration shall be annexed a correct inventory, subscribed by the lodger, of the furniture, goods, and chattels referred to in the declaration; and if any lodger shall make or subscribe such declaration and inventory, knowing the same or either of them to be untrue in any material particular, he shall be deemed guilty of a misdemeanour."

Penalty.

Sect. 2. "If any superior landlord, or any bailiff or other person employed by him, shall, after being served with the beforementioned declaration and inventory, and after the lodger shall have paid or tendered to such superior landlord, bailiff, or other person, the rent, if any, which by the last preceding section such lodger is authorized to pay, shall levy or proceed with a distress on the furniture, goods, or chattels of the lodger, such superior landlord, bailiff, or other person, shall be deemed guilty of an illegal distress, and the lodger may apply to a justice of the peace for an order for the restoration to him of such goods; and such application shall be heard before a stipendiary magistrate, or before two justices in places where there is no stipendiary magistrate, and such magistrate or justices shall inquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods or otherwise as to him or them may seem just, and the superior landlord shall also be liable to an action at law at the suit of the lodger, in which action the truth of the declaration and inventory may likewise be inquired into."

Proviso as to payments by lodger to superior landlord.

Sect. 3. "Any payment made by any lodger pursuant to the first section of this Act shall be deemed a valid payment on account of any rent due from him to his immediate landlord."

Meaning of term "lodger."

As to who is a lodger within the meaning of this Act, see *Phillips* v. *Henson*, 3 C. P. D. 26, whereby it would appear that if the mesne landlord continue in occupation of any part, however small, of the demised house, such occupation will be sufficient to constitute his sub-tenant a lodger within the meaning of this Act. The declaration required by the Act must be served after the particular distress has been actually levied or authorised to be levied: *Thwaites* v. *Wilding*, 12 Q. B. D. 4.

Railway rolling stock.

By the Railway Rolling Stock Protection Act, 1872 (35 & 36 Vict. c. 50), sect. 3, it is enacted that:—

Rolling stock protected from

"Rolling stock being in a work shall not be liable to distress for rent payable by a tenant of the work (*f*), if such rolling stock is

(*f*) By sect. 2 of the Act "rolling stock" includes "wagons,

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distress or sale in certain cases.

not the actual property of such tenant, and has upon it a distinguishing metal plate affixed to a conspicuous part thereof, or a distinguishing brand or other mark conspicuously impressed or made thereon, sufficiently indicating the actual owner thereof."

This Act does not protect any interest of the tenant in the rolling stock, but such interest may be distrained by the landlord: see sect. 5 of the Act.

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trucks, carriages of all kinds, and locomotive engines used on railways"; a "work" includes "any colliery, quarry, mine, manufactory, warehouse, wharf, pier or jetty, in or on which there is a railway siding"; and "tenant" includes a "lessee, sub-lessee, or other person having an interest in a work under a lease or agreement, or by use and occupation, or being otherwise liable to pay rent in respect of a work."

CHAPTER IV.

COVENANTS.

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1. Construction of Covenants.

Construction of Covenants.

No particular words necessary.]—Although in preparing covenants it is prudent to adhere to the forms which practice has sanctioned, yet no particular words are necessary to make a covenant. Any expressions from which the intention of the parties can be collected are sufficient for the purpose. Where persons, therefore, in an instrument under seal engage or "agree" (without the word covenant) to do an act, this amounts to a covenant: *Pordage* v. *Cole*, 1 Wms. Saun. 319; and even where a deed recites that it is "intended" that an act shall be done, this amounts to a covenant to do it: see *Holles* v. *Carr*, 3 Swan. 648; *Sampson* v. *Easterby*, 9 B. & C. 505; see also *Stevenson's Case*, 1 Leon. 324. So, the words "and the lessee shall repair," &c., constitute a covenant: *Brett* v. *Cumberland*, 1 Roll. Abr. 518 (C), pl. 1. See

Covenant held to be created by informal expressions.

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also Shep. Touch. 162; Com. Dig. *Covenant* (A 2); and *Courtney* v. *Taylor*, 6 Man. & Gr. 851; *Rigby* v. *Great Western Rail. Co.*, 14 M. & W. 811; *Smith* v. *Mayor of Harwich*, 2 C. B. N. S. 651; *Treloar* v. *Biggs*, L. R. 9 Ex. 151; *Brookes* v. *Drysdale*, 3 C. P. D. 52.

If a lease be granted to B., on condition that he shall acquit the lessor of charges, ordinary and extraordinary, and shall keep and leave the houses at the end of the term in as good a plight as he found them, and he does not leave them in good repair at the end of the term, covenant will lie: 1 Roll. Abr. 518 (C), pl. 5.

Again (in a case which is often cited), where a lessee covenanted to plough, sow, manure, and cultivate the demised premises (except the rabbit-warren and sheep-walk) in a due course of husbandry, it was held that an action of covenant was maintainable against him for ploughing the sheep-walk; Lord *Ellenborough* observing, "by whatever words we collect an agreement that the thing should not be done, we collect enough to make an action of covenant maintainable for the doing it:" *Duke of St. Albans* v. *Ellis*, 16 East, 352.

So, a covenant by a lessee to pen and fold his flock of sheep, which he should keep upon the demised premises, upon such parts where the same had been usually folded, was considered to amount, by implication, to a covenant to keep a flock of sheep: *Webb* v. *Plummer*, 2 B. & Al. 746; see also *Earl of Shrewsbury* v. *Gould*, 2 B. & Al. 487.

As to covenants arising by implication of law.

Covenants implied by Law.]—Actions, too, may be maintained for the breach of quiet enjoyment upon the words of the demise, and for the rent upon the *reddendum:* 1 Roll. Abr. 519, pl. 10; *Giles* v. *Hooper*, Carth. 135; but though these have been sometimes ranked among express covenants inartificially expressed (*Porter* v. *Sweetman*, Sty. 406, 431), yet it may be doubted whether they are not rather to be regarded as covenants which the law implies from certain expressions, independently of intention, and not as words declaratory of the intention of the

parties (*a*). As to implied covenants by the lessor for title and quiet enjoyment, see *post*, p. 212. Construction of Covenants.

Thus, in *Burnett* v. *Lynch*, 5 B. & C. 589, it was held, that where a lease was assigned to a person under and subject to the payment of the rents thereby reserved, and to the performance of the covenants therein contained on the part of the lessee to be performed, an action might be maintained against the assignee for neglecting to perform the covenants, whereby the assignor sustained damage. Now, this decision could only have been made on the ground, that these words did not contain a covenant on the part of the assignee to perform the covenants; for it is well settled that an action cannot be maintained on an implied contract when there is an express contract on the subject: *Randall* v. *Lynch*, 12 East, 179; see also *Schenckler* v. *Moxsy*, 5 D. & Ry. 747. In *Hancock* v. *Caffyn*, 1 Moo. & Sc. 521, it was decided that the assignees in bankruptcy of a sub-lessee, under a sealed agreement which was held to amount to a lease, were entitled to sue the lessor on the case for damages accruing from non-payment of the rent by him to the superior landlord.

Although a covenant to pay rent on which an action may be maintained by the lessor in case of non-payment, is implied in the *reddendum* or reservation of rent in a lease, it is nevertheless the usual practice to insert in leases an express covenant by the lessee to pay the rent reserved. Other covenants by the lessee and lessor respectively which are ordinarily inserted in leases, will be considered in the following section of this chapter.

It is a general rule of law that all implied covenants run with the land, as to which see *post*, p. 228.

Joint and Several Covenants.]—In preparing a covenant entered into with several persons, it should As to joint and several covenants.

(*a*) That they are not express covenants was in effect decided in *Smith* v. *Pocklington*, 1 Cr. & J. 445, where it was held, that upon a demise by A., the legal owner, and B., *cestui que trust*, B. could not be sued in covenant for an eviction: see *Wolveridge* v. *Steward*, 3 Moo. & Sc. 561.

Construction of Covenants.

be made distinctly apparent whether it is intended to be a separate covenant with each covenantee, as well as a joint covenant with the whole; though it has been held, that if the interests of covenantees be several, they may maintain several actions, notwithstanding that the language of the covenant is that of a joint covenant: *James* v. *Emery*, 2 Moore, 195; *Withers* v. *Birchman*, 3 B. & C. 254; but see *Anderson* v. *Martindale*, 1 East, 497.

Question, whether the words "and every of them," made a covenant several.

A covenant with several persons, and to and with every of them, is joint. "It is urged," said Sir *J. Mansfield*, "that 'to and with every of them,' means with each of the two separately; but it would be very strange if it were so: it means with every of the receivers, and the persons entitled, jointly:" *Southcote* v. *Hoare*, 3 Taun. 87. See further as to the construction of covenants, Com. Dig. *Covenant* (A 2); 1 Sel. N. P. 449; Com. L. & T. 158; *Lee* v. *Nixon*, 1 A. & E. 201; *Copland* v. *Laporte*, 3 A. & E. 517; *Simpson* v. *Clayton*, 6 Scott, 469; and the cases cited in *Lady Saltoun* v. *Houston*, 8 Moore, 546; 1 Bing. 443.

Where there are joint covenantees, they must all be joined in the action, though all have not executed, unless it be shewn that they have disclaimed: *Petrie* v. *Bury*, 5 D. & Ry. 152; 3 B. & C. 353; see *Lane* v. *Drinkwater*, 1 Cr. M. & R. 599.

Where several persons bind themselves severally, the representatives of each are bound; but the liabity upon a joint covenant survives: *Enys* v. *Donnithornê*, 2 Burr. 1190; *Towers* v. *Moore*, 2 Ver. 99; see *Summer* v. *Powell*, 2 Mer. 30.

Judicature Acts.

The question of the non-joinder or mis-joinder of parties has, however, since the Judicature Act came into operation, lost much of its former importance, as all persons may now be joined as plaintiffs or defendants by or against whom a claim to relief can be shown to exist, whether jointly, severally, or in the alternative, and no action is to be defeated by reason of the mis-joinder of parties: see stat. 36 & 37 Vict. c. 77, sect. 16; and the Rules of the Supreme Court, Ord. XVI., rr. 1, 2, 11.

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Parol Evidence to explain construction.]—It may be here noticed, that parol evidence is admissible to shew that words in a covenant bear locally and technically a meaning different from their ordinary meaning; that, for instance, in a covenant to get coal within certain limits, "not deeper than the level of" a certain mine, the word level means a line drawn through the bottom of the mine at right angles to the dip of the strata, and that "depth" means position with reference to one side or the other of this line: *Clayton* v. *Gregson*, 6 N. & M. 690; a case which may be consulted as to the construction of technical words which bear a different meaning in different districts.

Technical terms.

Discharge of covenants.

Covenants cannot be discharged before breach, otherwise than by deed; and, therefore, a parol licence or agreement dispensing with or changing the terms of such obligation, cannot be pleaded in bar to an action on the covenant: *Littler* v. *Holland*, 3 T. R. 599; *White* v. *Parkin*, 12 East, 583; *Thomson* v. *Brown*, 1 Moore, 358; *Sellers* v. *Bickford*, 1 Moore, 460; *Harris* v. *Goodwin*, 2 Man. & G. 405; *West* v. *Blakeway*, 2 Man. & Gr. 729. The Judicature Acts do not appear to make any difference in this respect.

A release of covenants to renew, &c., by a mortgagee, is void: *O'Reilly* v. *Fetherstone*, 4 Bli. 161.

2. Covenant to pay Taxes, Rates, and Outgoings.

Whether covenant to pay taxes extends to future taxes.

In the absence of express stipulation the general rule is that rates and taxes are payable by the tenant: Woodf. L. & T. 528. But leases usually contain covenants or provisions whereby the liability to make such payments is thrown either entirely on the tenant or partly on the landlord and partly on the tenant; such stipulations will be construed according to the apparent intention of the parties: see *Graham* v. *Wade*, 16 East, 29.

According to the doctrine of several early cases, a covenant to pay taxes in general, extends to such taxes only as were in being, or at least are of the same nature as those in being when the lease was

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granted, and not to future taxes: *Davenant* v. *Salisbury,* 2 Lev. 68; 1 Vent. 223; and, therefore, it was held, that if a new and extraordinary tax, not known before, was imposed by Parliament, a covenant, though referring to future taxes, did not extend to it; but, otherwise, if the tax was of the same nature as any of those in existence when the covenant was entered into: *Brewster* v. *Kitchin,* 1 Ld. Ray. 315; *Brewster* v. *Kidgell,* 12 Mod. 167. See *Count Arran* v. *Crisp,* 12 Mod. 55.

But in *Giles* v. *Hooper,* Carth. 135, a reservation of rent "free from all and all manner of taxes, charges, and impositions," was held to extend to "any old or new charge or imposition whatsoever;" and, therefore, to a parliamentary land-tax subsequently imposed. In *Watson* v. *Atkins,* 3 B. & Al. 647, it was held that where the lessor covenanted to pay all taxes then chargeable upon the premises, or the rent, or any part thereof, and the lessee to pay all fresh taxes, the latter covenant extended not only to taxes newly imposed, but to such additions to the former taxes as were occasioned by the improved value of the premises. See also *Graham* v. *Wade,* 19 East, 29; *Hurst* v. *Hurst,* 4 Ex. 571. But where a lessor covenants to pay a particular rate or tax, or such rate or tax is excepted from the lessee's covenant, and the value of the premises is afterwards increased by new buildings or otherwise, the lessor is not liable to pay the additional rate or tax in respect of the improved value: *Smith* v. *Humble,* 15 C. B. 321; *Weston* v. *Home,* 7 B. & C. 285; and see as to land-tax the cases cited *infra.* Where the tenant has to pay a rate or tax for which, as between himself and the landlord, the latter is liable, he may deduct the amount from his rent in the absence of stipulation to the contrary: *Payne* v. *Burridge,* 12 M. & W. 727; *Hurst* v. *Hurst,* 4 Ex. 571. But he is not entitled to make the deduction until he has actually paid the rate or tax: *Ryan* v. *Thompson,* L. R. 3 C. P. 144.

Covenant to pay fresh taxes, how construed.

Poor-rate when not included.

What is parliamentary tax.

A covenant to pay taxes affecting land does not include poor-rate, which is a personal charge: *Theed* v. *Starkey,* 8 Mod. 314. A parliamentary tax is

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one that is imposed directly by Act of Parliament, and, therefore, will not include a sewers rate: *Palmer* v. *Earith*, 14 M. & W. 428. But an agreement to pay all outgoings whatsoever, rates, taxes, scots, &c., whether parochial or parliamentary, then, or thereafter to be charged on the premises, was held to extend to an extraordinary sewers rate, for a work of permanent benefit to the land: *Waller* v. *Andrews*, 3 M. & W. 312. See *R.* v. *Scott*, 3 T. R. 602; *Bennett* v. *Womack*, 7 B. & C. 627; *Dawson* v. *Linton*, 1 D. & Ry. 117; *Barraud* v. *Archer*, 2 R. & My. 751. A county rate would seem to be a parochial tax: *R.* v. *Inhabitants of Aylesbury*, 9 Q. B. 261.

Whether land-tax included in tenant's agreement to pay taxes generally.

In the absence of stipulation to the contrary, the liability to pay land-tax falls on the lessor. But it has often been decided, and is now clear, that an agreement to pay taxes generally extends to land-tax: *Hopwood* v. *Barefoot*, 11 Mod. 237; *Anfield* v. *White*, 1 Ry. & M. 246. See also *Bradbury* v. *Wright*, Dou. 624; *Governors of Christ's Hospital* v. *Harrild*, 2 Man. & Gr. 707 A covenant to pay "parliamentary taxes" will include land-tax: *Manning* v. *Lunn*, 2 Car. & K. 13. Where the land-tax is excepted out of the lessee's covenant to pay all taxes, or the lessor expressly covenants to pay the land-tax, and save the lessee harmless therefrom, he is only bound to pay the land-tax assessed in respect of the rent received by him, and not that which is payable on an improved value of the premises: *Yaw* v. *Leman*, 1 Wils. 21; *Hyde* v. *Hill*, 3 T. R. 377; *Barnfather* v. *Lee*, 3 T. R. 379 n.; *Whitfield* v. *Brandwood*, 2 Star. 143. And where a lease of a piece of ground, in which the lessee was restrained from building without licence, contained a covenant on the part of the lessor to pay all taxes, "already charged, or to be charged, upon or in respect of the said demised piece or parcel of ground," it was held that this covenant did not oblige the lessor to pay taxes for the improved value occasioned by the lessee's building on the ground, by virtue of a licence from the lessor: *Watson* v. *Horne*, 7 B. & C. 285; see *R.* v. *Scott*, 3 T. R. 602; *Smith* v. *Humble*, 15 C. B. 321. So, where a house was let on

Lessor not bound to pay land-tax on improved value.

Tenant, under

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a beneficial lease, liable for his proportion of land-tax.

a repairing lease in consideration of a premium, at one-third of the annual value, and the lessor afterwards redeemed the land-tax; he was held entitled to an increase in the rent to the amount of two-thirds of the tax redeemed: *Ward* v. *Const*, 5 M. & Ry. 402.

Property-tax.

Property-tax is by law payable by the tenant, who is entitled to deduct the amount paid by him from the rent, and the landlord is bound to allow the deduction, any covenant or agreement to the contrary being void: see stat. 5 & 6 Vict. c. 35, and see *post*, p. 246.

Tithe rent-charge.

A tenant paying tithe rent-charge is also entitled to make a deduction accordingly from his rent: see *post*, p. 245. A covenant by a lessee to pay "all taxes and assessments whatsoever" will not render him liable to pay tithe rent-charge: *Jeffery* v. *Neale*, L. R. 6 C. P. 243. *Secus*, where the covenant was to pay "all taxes, rates, assessments, or charges whatsoever:" *Lockwood* v. *Wilson*, 30 L. T. 761. So, where an agreement for a lease stipulated that the rent should be paid "free of all outgoings" it was held that the tenant must pay land-tax and tithe rent-charge: *Parish* v. *Sleeman*, 1 De G. F. & J. 326.

Rates for paving and improvements.

Numerous Acts of Parliament, general and local, empower municipal and other local authorities, by notice, to require owners or occupiers to execute drainage and other works and improvements on their respective premises, or to pave and keep in proper repair and condition the streets and roads adjoining thereto, and, in case of default of any owner or occupier to comply with such notice, to execute the prescribed works themselves and to recover the cost from the defaulting owner or occupier (*b*). Where the property is in lease, the primary liability to execute

(*b*) By the Public Health Act, 1875 (38 & 39 Vict. c. 55) the urban authority is empowered to levy "private improvement rates" upon the occupier who, in the absence of any stipulation with his landlord to the contrary, is authorised to deduct from his rent three-fourths, or such proportion of three-fourths of the rate as his rent bears to the rack-rent: see sects. 213, 214, 226 of the Act, and *Smith* v. *Humble*, 15 C. B. 321.

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such works, or to pay the expenses thereof, is, by most of the statutes referred to, thrown upon the tenant or occupier, but as regards the ultimate liability, as between the owner and occupier, any existing contract between the parties is not interfered with. The question has therefore not unfrequently arisen whether, on the construction of covenants to pay taxes, rates, and assessments, the terms employed were sufficiently wide to include such liabilities. Though some of the decisions are based upon somewhat nice distinctions, and may, perhaps, at first sight appear conflicting, the uniform principle underlies them, that the question must in each case be determined by the intention of the parties to be collected from the expressions used in the particular instrument of demise. So in *Rawlins* v. *Briggs,* 3 C. P. D. 368, the tenant's covenant in a lease was to pay "all taxes, rates, charges, assessments and impositions whatsoever, (except land-tax and landlord's property-tax)" charged "by authority of Parliament or otherwise howsoever," it was held that the landlord could not recover the cost of certain works executed by him to abate a nuisance on the demised premises in pursuance of a notice from the sanitary authority under sect. 94 of the Public Health Act, 1875, in order to prevent proceedings against himself. But in a subsequent case where the tenant was bound by his covenant in the lease to bear, pay, and discharge "all taxes, rates, duties, and assessments whatsoever, whether parliamentary, parochial or otherwise," it was held that the landlord was entitled to recover from the tenant the cost of works executed by him in pursuance of a similar notice: *Budd* v. *Marshall,* 5 C. P. D. 481. So also a covenant to pay "all taxes, parochial or parliamentary," will not comprise an improvement rate levied by commissioners under a local Act: *Guardians of Bedford Union* v. *Bedford Improvement Commissioners,* 7 Ex. 777; but where a tenant covenanted to pay rent "free and clear from all manner of parliamentary, parochial and other rates, taxes, and assessments, deductions, or abatements whatsoever," it was held that the tenant was liable for the cost of a

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paving rate levied by commissioners under a local Act: *Payne* v. *Burridge*, 12 M. & W. 727. See also *Sweet* v. *Seager*, 2 C. B. N. S. 119; *Thompson* v. *Lapworth*, L. R. 3 C. P. 149; *Crosse* v. *Row*, L. R. 9 Ex. 209; *Allum* v. *Dickenson*, 9 Q. B. D. 632.

Poor rates under Rating Act, 1874.

By the Rating Act, 1874 (37 & 38 Vict. c. 54), sect. 8, lessees of mines other than coal mines, which had been previously exempt from poor-rate, may deduct from their rent one-half of the poor-rate paid by them in respect of such mines, unless they have "specifically contracted to pay such rate in the event of the abolition of the said exemption." As to what will amount to a specific contract within this section, see *Duke of Devonshire* v. *Barrow Steel Co.*, 2 Q. B. D. 286; *Chaloner* v. *Bolckow*, 3 App. Ca. 933. The same Act also renders liable to poor-rate lands used for plantations or woods and rights of sporting where severed from the occupation of the land: see sects. 3, 5, 6.

3. Covenant to repair, &c.

Obligation of tenant to make repairs.

The relation of landlord and tenant, whether created by deed or parol, raises an implied obligation on the tenant to keep the premises in repair. The cases do not lay down any precise rule as to the extent of this obligation, but it may be stated generally, that the tenant is bound to deliver up the premises in as good a condition as he found them, reasonable wear and tear only excepted; and this rule, it is clear, does not oblige him to make good any substantial part of the building, which has, by the natural progress of decay during his occupancy, become out of repair. Upon this subject, Lord *Kenyon* has stated the rule to be, that "a tenant from year to year is bound to commit no waste, and to make fair and tenantable repairs, such as putting in windows or doors that have been broken by him so as to prevent waste and decay of the premises:" but his Lordship held, that the landlord was not entitled to recover a sum for putting a new roof on an old worn-out house: *Fergusson* v. ——, 2 Esp. 590. See also *Countess of Salop* v. *Crompton*, Cro. Eliz. 777, 784; *Anworth* v. *Johnson*, 5 Car. & P.

Rule as to covenants from year to year, where there is no express agreement.

239; *Torriano* v. *Young*, 6 Car. & P. 8; *Woods* v. *Pope*, 6 Car. & P. 782; *Leach* v. *Thomas*, 7 Car. & P. 328. A tenant at will or from year to year is bound to keep the house wind and water tight, and to use the premises in a husbandlike manner: the law implies this duty and no more; he is not liable for general repairs: *Horsefall* v. *Mather*, Holt's N. P. 7; *Anworth* v. *Johnson*, 5 Car. & P. 239; *Leach* v. *Thomas*, 7 Car. & P. 327. **Covenant to Repair.**

But in leases by deed, the limits of the lessee's obligation in regard to the preservation and repair of the demised premises, are almost invariably defined by express covenants. On the construction of such covenants, many points have arisen. It has been held, that a general covenant to repair extends to all buildings erected by the lessee during the term, as well as to the buildings demised: *Dowse* v. *Cole*, 2 Vent. 126; *S. C.* nom. *Dowse* v. *Earle*, 3 Lev. 264. Express covenants as to repairs.

A covenant by the lessor, in case the premises should be burned down, to replace them in the same state as they were before the fire, was held not to apply to additions erected by the lessee: *Loader* v. *Kemp*, 2 Car. & P. 375. Lessor's covenant to rebuild does not extend to lessee's erections.

A covenant to repair and yield up repaired all buildings that may be erected during the term, will extend to buildings erected for the purposes of trade (though favoured, as we shall see, by the general rule in regard to fixtures), if let into the soil: *Thresher* v. *E. Lon. Water Works Co.*, 2 B. & C. 608; but not such as merely rest upon blocks or pattens: *Naylor* v. *Collinge*, 1 Taun. 19. A verandah fixed in the ground has also been held to be within the terms of such a covenant: *Penry* v. *Brown*, 2 Star. 403. Where such covenant extends to buildings for the purposes of trade.

The breaking of a door-way through the wall of a demised house into an adjoining house, is a breach of the general covenant to repair: *Doe* d. *Vickery* v. *Jackson*, 2 Star. 293. So it has been determined of breaking up pavement, carrying away locks and keys, breaking the glass of the windows, carrying away a shelf: *Ryot* v. *Lady St. John*, Cro. Jac. 329; and permitting the racks in a stable to go to decay: What amounts to a breach of covenant to repair.

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Anon., 2 Vent. 214; see also *Mark* v. *Noyes*, 1 Car. & P. 265; *Doe* v. *Bird*, 6 Car. & P. 195; *Doe* v. *Jones*, 4 B. & Ad. 126. As to what are substantial repairs, see *Mark* v. *Noyes*, 1 Car. & P. 265; *Brown* v. *Trumper*, 26 Beav. 11; habitable repair, see *Belcher* v. *M'Intosh*, 8 Car. & P. 720. Under the ordinary covenant to repair, a tenant is not bound to render up the premises in a better state than they were when he took them: see *Gutteridge* v. *Maynard*, 7 Car. & P. 129; *Saward* v. *Leggett*, 7 Car. & P. 613; *Young* v. *Mantz*, 6 Scott, 277; *Burdett* v. *Withers*, 2 N. & P. 122. But a covenant to "put the premises into habitable repair," binds the tenant to make whatever repairs are necessary for that purpose, without regard to the state of the premises at the commencement of his tenancy: *Belcher* v. *M'Intosh*, 8 Car. & P. 720; see also *Brown* v. *Trumper*, *supra*.

"Substantial repair."

"Habitable repair."

Reasonable time allowed.

If a man covenant to repair a house, and it become ruinous by accident, the covenant will not be broken till after a covenient time for its reparation has elapsed: *Griffith's Case*, Moor. 69, pl. 187; Shep. Touch. 173. But a covenant to repair and keep in repair, in the usual terms, is broken by the lessee permitting the buildings to be out of repair at any time during the term, unless by inevitable accident (*infra*), and an action may be maintained against him before its expiration: *Luxmore* v. *Robson*, 1 B. & Al. 584; *Smith* v. *Peat*, 9 Ex. 161; see also *Maine's Case*, 5 Rep. 21 (*c*). But if the covenant be to leave the buildings in as good a state as he found them, he will be guilty of no breach of covenant during the term, though he pull them down, for he may rebuild them; therefore, no action will lie till the end of the term: Shep. Touch. 173. But it would, it seems, be otherwise as to cutting trees;

Covenant broken by non-repair, during the term;

—unless it be simply to leave, &c.

Lessor's right of entry to repair, &c.

(*c*) The landlord cannot, without an express stipulation, enter the premises during the term, for the purpose either of repairing or of inspecting their condition: *Barker* v. *Barker*, 3 Car. & P. 557; see *Neale* v. *Wyllie*, 5 D. & Ry. 442. A covenant that the lessor may enter to see the state of repair at "convenient times," is not broken by refusal to admit him into certain rooms, if he has given no notice of his coming: *Doe* v. *Bird*, 6 Car. & P. 195.

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"because, for them it is impossible that the covenant should be performed:" Fitz. N. B. 145 k; Com. Dig. *Covenant* (A 2); *Maine's Case*, 5 Rep. 21 a.

Where, in a lease of four messuages for ninety-nine years, the lessee covenanted within two years to put them in good repair, and keep them in repair during the term; and further, within the first fifty years of the term, to take down the messuages as occasion might require, and in the place thereof to erect four new brick messuages; the Court expressed an opinion that if, within the fifty years, the houses should be so repaired as to make them completely and substantially as good as new houses, the "occasion" on which the new houses were to be built did not arise: *Evelyn* v. *Raddish*, 7 Taun. 411.

Effect of general covenants to repair, and particular covenants to repair upon notice.

Where there is a general covenant to repair, with a particular covenant to repair upon notice, it should be made clearly apparent (if such be the intention), that these covenants are intended to be distinct and independent; for, from a want of clearness in this respect, it has frequently been a question, whether the requisition of notice applies exclusively to the covenant with which it is connected by juxtaposition or qualifies the whole.

In *Horsefall* v. *Testar*, 7 Taun. 385, the lessee covenanted to repair the premises at all times, as occasion should require, and at farthest within three months after notice of any decay or want of reparation, and it was held that this was one entire covenant, and not separate independent covenants, the former part being qualified by the latter; and the plaintiff (the lessor) was nonsuited for not setting out that part of the covenant. For cases in which the same kind of question arose on the construction of a covenant for the payment of rent, see *Sicklemore* v. *Thistleton*, 6 Mau. & S. 9; and, on a proviso for re-entry on non-payment of rent, *Doe* d. *Rudd* v. *Golding*, 6 Moo. 231.

But where the lessee of a house covenanted that he would from time to time during the term, after three months' notice, sufficiently repair, and at the

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end of the term leave it sufficiently repaired, it was held that he was bound to leave the premises repaired, without notice, the latter part of the covenant being distinct: *Harflet* v. *Butcher*, Cro. Jac. 644.

So, where the lessee covenanted to repair the premises when occasion should require, and the same so repaired to deliver up to the lessors; and also that it should be lawful for the lessor to enter into and view the condition of the premises, and give notice in writing of any want of reparations to the lessee within six months; it was held that these were separate covenants, and that it was not necessary to set out the latter covenant in the declaration: *Wood* v. *Day*, 1 Moore, 389; see also *Roe* d. *Goatly* v. *Paine*, 2 Camp. 520; *Doe* d. *Morecroft* v. *Meux*, 4 B. & C. 606; *Baylis* v. *Le Gros*, 4 C. B. N. S. 537; *Few* v. *Perkins*, L. R. 2 Ex. 92.

Whether giving notice to repair waives a forfeiture previously incurred, in certain cases.

Another question which has arisen is, whether assuming the covenants in question to be distinct, the lessor has precluded himself from taking advantage of the forfeiture consequent on the breach of the one covenant, by giving notice to the lessee to repair in pursuance of the requirement of the other. The distinctions on this point deserve attention.

In *Roe* d. *Goatly* v. *Paine*, 2 Camp. 520, a lease contained a general covenant to keep the premises in repair, with a clause of re-entry for a breach of covenant, and a further covenant that the tenant should, within three months after notice from the landlord, repair all defects therein specified; and the lessor gave notice to repair forthwith, but, before the expiration of the notice, brought an ejectment; and it was held that the lease was forfeited by breach of the first covenant, and that the notice was no waiver of the forfeiture: see also *Few* v. *Perkins*, L. R. 2 Ex. 92, where the notice was to repair "in accordance with the covenants." But in *Doe* d. *Morecraft* v. *Meux*, 4 B. & C. 606, where a lease contained a covenant by the lessee to keep the premises in repair, and also to repair three months after notice, and there was a clause of re-entry for breach of any of the covenants, and the premises being out of

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repair, the lessor gave notice to the lessee to repair within three months: it was held, that this was a waiver of the forfeiture incurred by breach of the former general covenant to repair, and that the lessor could not bring ejectment until after the expiration of the three months, though he might have brought an action upon the former covenant notwithstanding the notice. In this case the Court distinguished the case of *Roe* d. *Goatly* v. *Paine*, on account of the notice in that case being to repair forthwith. In *Doe* v. *Meux*, the lessor had also received rent due after the giving of the notice. The circumstances and decision were substantially the same in *Doe* d. *Rankin* v. *Brindley*, 1 N. & M. 1. In a more recent case, where there were both general and special covenants, the lessor gave six months' notice to repair, stating that if the repairs were not then completed, he would perform them, and charge the lessee with the expenses. The repairs were not done within the time, but negotiations went on; and after the expiration of the time, the lessor gave notice to the tenant, that, if he did not agree to certain terms within three days, he would hold him to his covenant. The lessee not having agreed to those terms, it was held that the lessor had bound himself by electing to perform the repairs and distrain on the lessee for the amount; and that he could not revive his right to re-enter: *Doe* d. *De Rutzen* v. *Lewis*, 5 A. & E. 277. See *Doe* d. *Kensington* v. *Brindley*, 12 Moore, 37; *Doe* d. *Pitman* v. *Sutton*, 9 Car. & P. 706. See also as to the suspension of notice to repair by pending negotiations: *Hughes* v. *Metropolitan Rail. Co.*, 2 App. Cas. 439.

It was decided, in an early case, that a covenant by the lessee, that he would, after the repair of the messuages by the lessor, repair them during the term and leave them repaired, imposed no obligation on him to make repairs of a dove-house, part of the premises, until it had been once repaired by the lessor, though it was in good repair at the beginning of the term: *Slater* v. *Stone*, Cro. Jac. 645. See also *Neale* v. *Ratcliffe*, 15 Q. B. 916; *Coward* v. *Gregory*, L. R. 2 C. P. 153.

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Specific performance cannot be enforced.

It remains only to be noticed, that the Court will not decree the specific performance of a general covenant to repair: see *Mosely* v. *Virgin*, 3 Ves. 185; *Hill* v. *Barclay*, 16 Ves. 405; *Paxton* v. *Newton*, Sm. & Cliff, 437; though it is otherwise as to a covenant to build: *City of London* v. *Nash*, 3 Atk. 515; *Franklyn* v. *Tuton*, 5 Mad. 469. So equity will not decree the specific performance, or an account for the non-performance, of husbandry covenants: *Rayner* v. *Stone*, 2 Eden, 128.

At common law, lessees were not answerable for accidental fires.

At the common law, lessees were not answerable to landlords for accidental or negligent burning; for, as to fires by accident, it is expressed in Fleta, that *fortuna ignis vel hujusmodi eventûs inopinati omnes tenentes excusant;* Fleta, lib. 1, cap. 12, sect. 20; and *Lady Shrewsbury's Case*, 5 Rep. 13, is a direct authority that lessees for life or years were equally excusable for fires by negligence.

Stat. 6 Anne, c. 31.

By the 6 Anne, c. 31 (made perpetual by 10 Anne, c. 14, sect. 1), as to waste by buildings being destroyed by fire, provided that no action should lie against any person in whose house or chamber any fire should accidentally begin, subject to any contract or agreement made between landlord and tenant to the contrary. This provision was adopted in the Building Act, 14 Geo. 3, c. 78, sect. 86 (which repealed the stat. 6 Anne, c. 31), whereby it is enacted that—

> "No action, suit, or process whatever shall be had, maintained, or prosecuted against any person in whose house, chambers, stable, barn, or other building, or on whose estate any fire shall accidentally begin. . . . Provided that no contract or agreement made between landlord and tenant shall be hereby defeated or made void."

This section has been held to be of general application, and not to be confined to the districts which are within the other sections of the Act: *Filliter* v. *Phippard*, 11 Q. B. 347. See further as to the construction of this section: *Moore* v. *Clark*, 5 Taun. 90; *Robinson* v. *Lewis*, 10 East, 227; *Pizey* v. *Rogers*, 1 Ry. & M. 357. The section does not extend to cases where a fire is caused by malice or negligence:

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Filliter v. *Phippard*, 11 Q. B. 347; *Vaughan* v. *Menlove*, 4 Scott, 244.

Tenants liable for waste under an express agreement.

If the tenant stipulates with his lessor to be responsible for fire by negligence, or for other permissive waste, an action will lie on such express agreement. Therefore, where the covenant is to repair generally (not saying that damage by fire, &c., is to be excepted (*d*)), it is of no use to attempt a defence on the ground that the house was burnt by accident; Wms. Saun. 422 (2) n. 2, *Walton* v. *Waterhouse*. So, if a lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet is he bound to repair it within a reasonable time: Bro. Abr. *Covenant*, pl. 4: *Paradine* v. *Jane*, Al. 27; Sty. 47; 18 Vin. 515, pl. 10; Yearbook, 40 Edw. 3, 6, a; *Poole* v. *Archer*, 2 Show. 401; Skin. 210; *Compton* v. *Allen*, Sty. 162; *Pym* v. *Blackburn*, 3 Ves. 34. What shall be reasonable time, the justices are to determine: Com. Dig. *Temps* (D). So where, by deed indented, a lease for years was made of a meadow, by which the river Exe runs; and the lessee covenanted to sustain and repair the banks, to prevent the water from overflowing, upon pain of forfeiture of ten pounds: and afterwards, by reason of a flood, the banks were decayed and perished: it was held, that the lessee was excused from the penalty; as if it were of an house which was burnt by lightning, or overturned by the wind, because it is the act of God, which cannot be resisted; but that still he was bound to restore the thing in convenient time: Dyer, 33 a (10); *Griffith's Case*, Moore, 69. So where a bridge was destroyed by a flood: *Brecknock Co.* v. *Pritchard*, 6 T. R. 750. So where, in covenant against tenant for life, who had covenanted to repair the house during his life, and so leave the same at his death, the defendant's plea that three-fourth parts of the house was burned down, and that he repaired it until it was burnt, and had repaired the residue, was held to be no answer

Tenant covenanting to repair generally, is liable to rebuild if the house be burnt, &c.

(*d*) See as to such an exception *Bennett* v. *Ireland*, E.B. & E. 326. It has been held not to be "usual": *Sharp* v. *Milligan*, 23 Beav. 419.

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to it: *Earl of Chesterfield* v. *Duke of Bolton*, Com. Rep. 627. And as to a lessee for years, the same point was determined: *Bullock* v. *Dommitt*, 6 T. R. 650, on the authority of the last-mentioned case.

Liability of tenant, who holds over, to repair.

Where, at the expiration of his term a tenant holds over, he impliedly holds over subject to all the covenants in the lease, which are applicable to his new situation, and, among the rest, to a covenant to repair; and a mere agreement for an advance of rent will make no difference. *Digby* v. *Atkinson*, 4 Camp. 275: see *Torriano* v. *Young*, 6 Car. & P. 8; *Beale* v. *Sanders*, 5 Scott, 58; *Richardson* v. *Gifford*, 3 N. & M. 325. The implied liability of a tenant holding over, to the agreements in the former lease, only applies to the new tenancy, and, therefore, a tenant holding over after the expiration of a lease containing a general covenant to repair, is not liable for not executing repairs which became necessary before the lease expired; if he deliver up the premises in as good a state as they were in when his lease expired, he is not liable under the implied contract arising out of the new tenancy; although, of course, the lessor may have his remedy upon the covenants in the lease: *Johnson* v. *St. Peter*, 6 N. & M. 106; see also *Kinlyside* v. *Thornton*, 2 W. Bl. 1111; *Burchell* v. *Hornsby*, 1 Camp. 360; *Beale* v. *Sanders*, 5 Scott, 58. And where there is, besides a covenant to repair, a covenant by the lessee to insure the premises from fire for a certain sum, and the premises are burnt, the lessee's liability to rebuild is not limited to the amount of the sum for which he covenanted to insure: *Digby* v. *Atkinson*, 4 Camp. 275 (*e*).

Covenant to insure in a certain sum, does not limit responsibility for tenant to repair.

(*e*) By the stat. 14 Geo. 3, c. 78, s. 86, insurance offices are authorized and required, upon the request of any person interested in, or entitled to houses and buildings insured and burnt down or damaged by fire, or upon any grounds for suspicion, to cause the insurance monies to be laid out in restoring the property. Such notice must be distinct and explicit in its terms: *Simpson* v. *Scottish Union Insurance Co.*, 1 H. & M. 618. It has been decided that a neglect to renew a policy by payment of the premium within the fifteen days usually allowed by insurance offices beyond the yearly day of payment, was a breach of a lessee's covenant to insure the demised premises, though the office afterwards received

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Exception, in a general covenant to repair, of accidents by fire and tempest:

—such exception is no discharge of rent while the premises are uninhabitable.

It was this unlimited liability of the tenant to rebuild, that probably occasioned an exception, now frequently introduced into leases, of casualties by fire, and, sometimes, by wind and tempest. But even then, the lessee is bound to pay the rent during the term, although the house should be burnt or blown down, if there be an express covenant for payment of the rent, for the same reason that he is bound to repair; namely, because he has bound himself by an express covenant to do so. And it is no answer to say, that the house was burnt or blown down, and that, therefore, he is not bound to pay the rent: *Monk* v. *Cooper*, 2 Ld. Ray. 1477; 2 Str. 763; *Belfour* v. *Weston*, 1 T. R. 310, 710. Therefore, it appears, that though the premises be consumed by fire, the lessee will be liable, under an express covenant, to pay rent for them, notwithstanding their ruinous condition; although the lessor, being liable to repair them, should have neglected to rebuild: *Pindar* v. *Ainsley*, cit. 1 T. R. 312; *Hare* v. *Groves*, Anst. 687. And where the premises have been consumed by fire, and the landlord, having insured them, has recovered the insurance money, the tenant cannot compel him to rebuild; for the houses being insured by the landlord is nothing to the tenant: *Pindar* v. *Ainsley*, cit. 1 T. R. 312; see also *Leeds* v. *Cheetham*, 1 Sim. 146; *Paris* v. *Gilham*, G. Coop. 56; *Lofft* v. *Dennis*, 1 E. & E. 474. And it seems that the lessor is not bound to rebuild, though he

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the premium, as, during the interval the landlord was unprotected by any insurance. The lessor, therefore, was held to be entitled to recover the premises under the usual clause of re-entry for breach of covenant. *Doe* d. *Pitt* v. *Shewin*, 3 Camp. 134; *Thompson* v. *Guyon*, 4 Sim. 65. But see *Doe* v. *Laming*, 4 Camp. 73; and see *Doe* v. *Rose*, Ry. & M. 343. It may be observed, that in ejectment for breach of covenant to insure, the lessor must prove the breach, and the non-production of the policy and receipts at the trial, after notice, is not *primâ facie* evidence of such breach. *Doe* d. *Bridger* v. *Whitehead*, 3 N. & P. 557. Hence the utility of the usual provision, that the lessee shall produce the policy and receipts when required. A lessee who has sold the lease and received the purchase-money cannot recover the insurance monies on a policy effected before the sale, for damage done after the sale, and before conveyance: *Castillian* v. *Preston*, 11 Q. B. D. 380.

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may insist on the payment of the rent during the whole term: *Pindar* v. *Ainsley*, cit. 1 T. R. 312; *Pomfret* v. *Ricroft*, 1 Saun. 320; *Weigall* v. *Waters*, 6 T. R. 488; see also *Baker* v. *Holtzapfel*, 4 Taun. 45.

Damages recovered by a tenant for life for breach of covenant to repair, must be laid out on the estate: *Noble* v. *Cass*, 3 Sim. 343.

4. Covenants in Restraint of Trade.

Covenants not to carry on certain Trades.]—The construction of a general covenant not to carry on any offensive trade or business, will depend much upon the locality of the premises, and the condition of them at the time of the demise. Generally, a trade which was carried on in the premises at the time of the demise, would not be within such a covenant: *Gutteridge* v. *Maynard*, 7 Car. & P. 129.

The business of a licensed victualler held not to be an offensive trade.

In *Jones* v. *Thorne*, 1 B. & C. 715, there was a condition for re-entry, if the lessee should suffer any person to carry on certain specified businesses, or any other trade or business that might be, or grow, or lead to be offensive, or any annoyance or disturbance to any of the tenants of the lessor; the letting the house to a licensed victualler was held not to be a breach of the condition.

Schoolmaster.

In the construction of covenants of this nature, it has been held, that the occupation of a schoolmaster is "a trade or business;" *Doe* d. *Best* v. *Keeling*, 1 Mau. & S. 95; *Wickenden* v. *Webster*, 6 E. & B. 387; *German* v. *Chapman*, 7 Ch. D. 271. A covenant not to carry on the business of a butcher was held to be broken by selling meat, though no beasts were slaughtered: *Doe* d. *Gaskill* v. *Spry*, 1 B. & Al. 617.

Butcher.

But when the covenant was not to carry on certain "trades or businesses" particularly mentioned, "or any offensive trade" on the demised premises, it was held that a private lunatic asylum was not within the prohibition: *Doe* d. *Wetherall* v. *Bird*, 2 A. & E. 161.

Brewer.

Carrying on the business of a retail brewer (under

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stat. 4 Geo. 4, c. 52), was held to be no breach of a covenant not to carry on the business of a common brewer or retailer of beer. *Simons* v. *Farren*, 4 Moo. & Sc. 672; 1 Scott, 105. And the opening of a grocer's shop at which an auxiliary business of selling beer to be drunk off the premises is carried on is not a breach of covenant not to use the demised premises as a public-house, tavern, or beer house: *Holt* v. *Collier*, 16 Ch. D. 718; see also *Pease* v. *Coats*, L. R. 2 Eq. 523; *London and North-Western Railway Co.* v. *Garnett*, L. R. 9 Eq. 26; *Jones* v. *Bone*, L. R. 9 Eq. 674. But it would have been otherwise if the covenant had been not to use the premises as a "beer-*shop*:" *Bishop of St. Albans* v. *Battersby*, 3 Q. B. D. 359; *London and Suburban Land, &c., Co.* v. *Field*, 18 Ch. D. 645; *Nicoll* v. *Fenning*, 19 Ch. D. 258. A covenant not to use a house "for the sale of spirituous liquors" was held not to forbid the sale of wine in bottle by a grocer: *Fielden* v. *Slater*, L. R. 7 Eq. 523.

Effect of naming a particular business.

A stipulation, that the premises shall not be converted into a school, will not be construed to imply a restriction against the carrying on of other trades: *Van* v. *Cooper*, 3 My. & K. 269.

A covenant not "to affix or permit any outward mark or show of business" to be affixed on the demised premises was held to be broken by blinds in the windows, and a brass plate on the area railings inscribed with the name of a trading firm: *Evans* v. *Davis*, 10 Ch. D. 747. Putting a blind inscribed "Coal office" was held to be a breach of a covenant to use a house as a private dwelling-house only: *Wilkinson* v. *Rogers*, 2 De G. J. & S. 62. Whether letting lodgings would amount to a breach of covenant not to use the premises for the purposes of a trade or business does not seem to have been determined: see Woodf. L. & T. 634.

The owner of property may make it a condition, on the sale of the inheritance of part of it, that such part shall not be occupied in such a manner as to interfere with the enjoyment of the remainder, as, by setting up an hotel, &c., and persons having notice of such agreement will be bound by it: *Whatman* v.

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Gibson, 9 Sim. 196. See *D. of Bedford* v. *British Museum*, 2 My. & K. 552; *Keppell* v. *Baily*, 2 My. & K. 517. As to the lessee's rights under similar stipulations, see *Rankin* v. *Huskisson*, 4 Sim. 13; *Squire* v. *Campbell*, 1 My. & Cr. 459.

Waiver.

Forfeiture for breach of such a covenant is not waived by mere neglect to enforce it for several years; unless the lessor has been allowed to expend money in improvements, in which case the question of waiver will be left to a jury: *Doe* d. *Shepherd* v. *Allen*, 3 Taun. 78.

As to covenant by publican-lessee to purchase liquors of lessor.

Covenant to deal with particular Persons.]—Sometimes, in the lease of a public-house, is added a covenant by the lessee to purchase liquors of the lessor. It has been held that the lessee is only bound by a covenant of this nature to purchase so long as the liquors are of a good marketable quality: *Holcombe* v. *Hewson*, 2 Camp. 391; *Cooper* v. *Twibill*, 3 Camp. 286, n. If it be expressed that the covenant shall only be binding in case the beer furnished be good, it should be specifically stated whether any one instance of failure on the part of the lessor is to discharge the lessee *in toto* from his contract, or whether he is only entitled to resort to third persons, after every particular instance in which the lessor has failed to execute his order. If the lessor is unable to satisfy the extra demand of the lessee, the latter can only go elsewhere for the deficiency: *Wight* v. *Dickson*, 1 Dow, 141.

A covenant to purchase beer from the landlord is not broken by the purchase by the tenant through an agent, without the landlord's knowledge, of beer made by the landlord: *Edwick* v. *Hawkes*, 18 Ch. D. 199.

Whether such covenants bind the assignee has not been decided; it seems to be the better opinion, that they do not: see *Hartley* v. *Pehall*, 1 Peake, 131; *Keppell* v. *Bailey*, 2 My. & K. 545. It is clear that they cease to be binding after the lessee has assigned his business, and the assignee has removed to a different place; the particular trade being then at an end: *Doe* d. *Calvert* v. *Reid*, 10 B. & C. 849.

5. Covenants not to Assign or Under-let.

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Provisoes restrictive of alienation.

Where it is intended to prevent the lessee from parting with the premises without the consent of the lessor, which is now a frequent stipulation, this is accomplished either by a condition giving the lessor a right of entry on alienation without consent, or by a covenant against alienation, the observance of which is enforced by the general proviso authorizing re-entry on breach of the covenants; a covenant unless so enforced affords no sufficient protection against an act of this nature, which does not admit of compensation in damages.

In framing such provisions, two points require attention: that they be framed so as, *first*, to embrace assignments by operation of law; and *secondly*, to extend to under-letting as well as assigning.

It has long been held, that expressions simply restraining assignment do not extend to assignments by operation of law.

Effect of assignment under execution.

Thus, in *Doe* d. *Mitchenson* v. *Carter*, 8 T. R. 57, a sale by the sheriff under an execution was held not to violate a condition that the lessee should not "let, assign, transfer, or make over," the indenture or premises; Lord *Kenyon* stating the distinction to be between acts voluntary and acts *in invitum*. A clause of re-entry, if the premises shall be extended or taken in execution, is good against a seizure under an inquisition at the suit of the crown: *R.* v. *Topping*, M'Clel. & Y. 544. An assignment by marriage is no forfeiture: *Anon.*, Moor. 21.

Whether bankruptcy a forfeiture.

Though the validity of a provision for forfeiture on bankruptcy has been long established (*f*), yet it has been repeatedly determined, that a lease upon condition not to assign is not forfeited by bankruptcy,

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(*f*) See *Roe* d. *Hunter* v. *Galliers*, 2 T. R. 133, and *Davis* v. *Eyton*, 4 Moo. & P. 820, where it was decided, that the assignees could not claim emblements or fixtures. A condition for re-entry on the bankruptcy of the lessee, his executors, administrators, or assigns, was held to take effect on the bankruptcy of a surviving executor: *Doe* d. *Bridyman* v. *David*, 6 Car. & P. 614. See also *Rouch* v. *Great Western Railway Co.*, 1 Q. B. 51; *Doe* d. *Wyndham* v. *Carew*, 2 Q. B. 317; *Doe* d. *Lloyd* v. *Ingleby*, 15 M. & W. 465

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being an assignment by operation of law; and the assignees are not bound by the condition: *Goring* v. *Warner*, 7 Vin. Ab. 85, pl. 9; 2 Eq. Ab. 100, pl. 3; *Philpots* v. *Hoare*, Amb. 480; 2 Atk. 219; *Wadham* v. *Marlow*, 4 Dou. 54; 8 East, 314, n.; *Lord Anglesey* v. *Rugeley*, 6 Q. B. 107; *Croft* v. *Lumley*, 6 H. L. C. 672; though in terms it extend to the lessee, his executors, administrators, and assigns: *Doe* d. *Goodbehere* v. *Bevan*, 3 Moo. & S. 353. And where, by a subsequent assignment from the assignee of the assignees, the bankrupt himself again became possessed of the lease, it was held that he was not bound by the condition: *Doe* d. *Cheere* v. *Smith*, 5 Taun. 795; *Batty* v. *Wills*, 3 Wils. 33; but it was held otherwise, where the lease was granted for twenty-one years, if the lessee, his executors, &c., should so long continue to inhabit the premises: *Cox* v. *Clarke*, 8 East, 185.

Whether assignees in certain cases bound to give effect to equitable mortgage.

But this power of alienation, it was considered by Sir *W. Grant*, could only operate for the benefit of the creditors generally, and not of third persons; and that, therefore, the assignees were not compellable to exercise it in favour of a creditor, to whom the lessee had agreed to assign the lease as a security: *Wetherall* v. *Geering*, 12 Ves. 504. This *dictum*, however (for the case did not call for the determination of the point), has been overruled by several subsequent cases. Thus, in *Ex parte Whitbread, re Shaw*, referred to 3 Moo. & Sc. 354, where the lessee had deposited the lease, which contained a clause restrictive of alienation, as a security for money borrowed, Lord *Eldon* directed the assignees to sell for the benefit of the equitable mortgagee. See also *Ex parte Baglehole*, 1 Rose, 432; *Ex parte Sherman*, 1 Buck, 462; *Ex parte Cocks*, 2 Dea. 14; *Ex parte Goldney*, 3 Dea. 570.

An assignment subsequently avoided by bankruptcy, no forfeiture.

An assignment, which amounted to an act of bankruptcy, inasmuch that it comprehended the whole of the assignor's property, and which was subsequently avoided by a commission before any proceedings taken by the lessor, was held not to be a forfeiture of a condition in a lease against alienation, the effect of the bankruptcy being to avoid the

deed *ab initio: Doe* d. *Lloyd* v. *Powell*, 5 B. & C. 312.

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Where a railway company serves a notice under the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), to take land held under a lease containing a proviso against assignment without the lessor's consent, the necessity for such consent is done away with by the operation of the Act: *Slipper* v. *Tottenham, &c., Rail. Co.*, L. R. 4 Eq. 112.

Deposit, by way of security, no forfeiture.

The depositing of the lease, as a security for money advanced, has also been decided not to be a breach of a condition, that the lessee should not under-let, or "alien, sell, assign, transfer, and set over, or otherwise part with the lease or premises, without the licence of the lessor:" *Doe* d. *Pitt* v. *Hogg*, 4 D. & Ry. 226; see also *Doe* d. *Goodbehere* v. *Bevan*, 3 Mau. & S. 353. So it has been held that nothing short of what would be an actual assignment or underlease, if there were no condition to the contrary, amounts to a forfeiture: *Gourlay* v. *D. of Somerset*, 1 Ves. & B. 68; *Jones* v. *Wyse*, 2 Kee. 285; see *Doe* v. *Payne*, 1 Star. 86. But the law in this respect must be regarded as altered by the operation of the Judicature Act, 1873 (36 & 37 Vict. c. 66), sect. 24. As to the mode of effecting a security upon a lease subject to a condition against alienation, *vide infra*, tit. MORTGAGES. A condition in a bequest of a leasehold to A., "not to dispose of or sell it, and if A. refused to dwell there himself, or keep it in his own possession," then over, was held to be broken, A. having deposited the lease as a security, and the premises having been subsequently sold to the depositee under an execution upon a judgment confessed by A.: *Doe* v. *Hawke*, 2 East, 480; see *Doe* d. *Lockwood* v. *Clarke*, 8 East, 185.

Whether restrictions on alienation extend to *underleases*.

That clauses, restrictive of alienation generally, do not extend to underleases, has been determined in several cases. Thus, where the lessee was not to "assign, transfer, or set over, or otherwise do or put away" the lease or premises, an underlease was held to be no breach of the proviso: *Crusoe* d. *Bleacoe* v. *Bugby*, 2 W. Bl. 766; 3 Wils. 234; see also *Kinnersley* v. *Orpe*, Dou. 58; 15 Ves. 265; 4 D. & Ry. 229. But

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contra, where the condition was not to "set, let, or assign over" the premises: *Roe* d. *Gregson* v. *Harrison*, 2 T. R. 425; *Roe* v. *Sales*, 1 Mau. & S. 297. So, a proviso for re-entry, if the lessee, his executors or administrators, assigned or otherwise parted with the lease or premises for the whole or any part of the term, was held to be broken by an underlease: *Doe* d. *Holland* v. *Worsley*, 1 Camp. 20. An underlease of the whole term is equivalent to an assignment: *Beardman* v. *Wilson*, L. R. 4 C. P. 57.

Whether restrictions on under-letting extend to assignments.

The converse of the proposition is equally true, namely, that a restriction on under-letting is not broken by an assignment; and this distinction is by no means unreasonable, for, as an assignee subjects himself to the lessee's covenants, which run with the land, and an under-lessee does not, a lessor may choose to restrain the latter species of alienation only. But a covenant not to let, set, or demise for the whole or any part of the term, has been held to extend to an assignment: *Greenaway* v. *Adams*, 12 Ves. 395.

As to taking lodgers.

It seems, in one instance, to have been decided, where a lessee covenanted not to "grant any underlease or leases for any term or terms whatsoever, or let, assign, transfer, set over, or otherwise part with the premises, or any part thereof," without the consent of the lessor, that the covenant was not broken by the lessee admitting a lodger into the exclusive possession of a room for upwards of a twelvemonth: *Doe* d. *Pitt* v. *Laming*, 4 Camp. 77. But the decision seems to rest on no satisfactory ground, and the ruling has not been followed in later cases: *Roe* d. *Dingley* v. *Sales*, 1 Mau. & S. 297; *Greenslade* v. *Tapscott*, 1 Cr. M. & R. 59. It is clear that the advertising the premises to be let is no breach of a proviso not to under-let: *Gourlay* v. *D. of Somerset*, 1 Ves. & B. 68.

Whether condition not to alien is broken by a bequest.

Whether a covenant not to alien is broken by a bequest of the property, seems to have been *vexata quæstio* at an early period. In *Berry* v. *Taunton*, Cro. Eliz. 331, a condition not to "demise" was adjudged to be broken by a devise; and in *Dumper* v. *Syms*, Cro. Eliz. 816, a proviso not to "alien"

received a similar construction. But in *Fox* v. *Swann*, Sty. 483, it is laid down that a bequest is not a breach of a covenant not to assign, and it is probable that the doctrine of the latter case would now be followed; for since the lessee might clearly cause the premises to devolve upon whom he pleased, by appointing him an executor, and a bequest, whether general or specific, is nothing more than the imposition of a trust upon the legal representative, subject to debts, it seems to be difficult to say, that it cannot be bequeathed. At all events, where the condition is not to "demise," as in *Berry* v. *Taunton*, it would clearly not now be held to be broken by a testamentary disposition: see *Doe* d. *Goodbeheere* v. *Bevan*, 3 Mau. & S. 353.

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But a condition not to devise, except to certain persons, is clearly broken by bequeathing to other persons, though the executor do not assent to the bequest: *Barton* v. *Horton*, 1 Roll. Abr. 428 (V), pl. 1.

Sometimes the restriction on assigning is qualified by an exception as to certain persons, which raises the question whether the restriction extends to prevent alienation by them. In *Whichcot* v. *Fox*, Cro. Jac. 398, a lessee covenanted that he would not alien or assign the term, or any part thereof, to any other but to his wife, during her life, and the residue of the term to her children, or one of his youngest brethren, upon pain of forfeiture. He assigned to his brother; and the Court held that the condition did not extend to the brother, who might alien to whom he pleased.

Exception as to certain persons.

Whether such persons bound by the restriction.

But in *Anon.*, Dyer, 152 a, where the lease provided that neither the lessee nor his executors nor assigns should alien or grant over the term to any person or persons, without the licence of the lessor, but to the wife, or to one of the children of the lessee, and the lessee dying, his executors granted the term to one of the sons; three of the judges against two thought that the son could not assign to a stranger without licence.

In this case it is observable that the restriction expressly extended to the assigns. So, in *Lloyd* v.

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Crispe, 5 Taun. 249, where a power of re-entry was reserved to the lessor, on breach of the lessee's covenants, and one of those covenants was that he, his executors, administrators, or assigns, should not assign or otherwise part with the lease or premises without licence, the court assumed (though the case did not directly raise the point) that the assignee of the lessee's executors was not released from the necessity of obtaining the lessor's licence.

In *Williams* v. *Earle*, L. R. 3 Q. B. 739, it was expressly held that a covenant not to assign or sublet without licence was a covenant running with the land; but in *West* v. *Dobb*, L. R. 4 Q. B. 634, *Blackburn*, J., pointed out that in the former case the assigns were mentioned in the covenant, and that the decision in *Williams* v. *Earle* must not be taken to have decided more than that the covenant would bind an assignee, assigns being mentioned.

As to naming *assigns* in the condition.

It is laid down, in an early case, that the extension of the condition against alienation without consent, to assigns, is repugnant: see *Strickley* v. *Butler*, Hob. 170; but the answer now given to this objection is, that it imports such assignees as the lessee may lawfully have, namely, assignees with consent, or by operation of law: *Dennis* v. *Loring*, Hard. 427; *Wetherall* v. *Geering*, 12 Ves. 511.

Licence to assign or sublet extends only to permission actually given.

In *Dumpor's Case*, 4 Rep. 119, the rule was laid down that if a lease were granted subject to a condition not to alien without licence, the granting of such licence operated as a waiver of the condition, so that in all future alienation the licence might be dispensed with. This decision, though regarded with much disapprobation, was never expressly overruled (*g*). But now, by the stat. 22 & 23 Vict. c. 35, sect. 1, it is enacted that:—

Restriction on effect of licence to alien.

"Where any licence to do any act which, without such licence would create a forfeiture, or give a right to re-enter, under a condition or power reserved in any lease heretofore granted or to be hereafter granted, shall at any time after the passing of this Act

(*g*) For remarks on *Dumpor's Case*, see Vol. IV. of the last edition of this Work, p. 375 *et seq.*, and the notes in 1 Smith L. C. 41 *et seq.*

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be given to any lessee or his assigns, every such licence shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, under-lease or other matter thereby specifically authorized to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such licence); and all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, underlease, or other matter not specifically authorized or made dispunishable by such licence, in the same manner as if no such licence had been given; and the condition or right of re-entry shall be and remain in all respects as if such licence had not been given, except in respect of the particular matter authorized to be done.

Restricted operation of partial licences.

Sect. 2. "Where in any lease heretofore granted or to be hereafter granted there is or shall be a power or condition of re-entry on assigning or underletting or doing any other specified act without licence, and a licence at any time after the passing of this Act shall be given to one of several lessees or co-owners to assign or underlet his share or interest, or to do any other act prohibited to be done without licence, or shall be given to any lessee or owner, or any one of several lessees or owners, to assign or underlet part only of the property, or to do any other such act as aforesaid in respect of part only of such property, such licence shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees, or owner or owners, of the other shares or interests in the property, or by the lessee or owner of the rest of the property (as the case may be) over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such licence."

Waiver of forfeiture.

The lessor will be precluded from taking advantage of the forfeiture incurred by breach of a covenant or condition against assignment or subletting by acceptance of rent, with knowledge of the alienation, from the assignee or from the lessee: *Whichcot* v. *Fox*, Cro. Jac. 398; *Goodright* d. *Walter* v. *Davids*, Cowp. 803; *Roe* d. *Gregson* v. *Harrison*, 2 T. R. 424; *Harvey* v. *Oswald*, Cro. Eliz. 572. So the forfeiture will be waived by a subsequent notice

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to quit: see *Doe* d. *Scott* v. *Miller*, 1 Car. & P. 348. And see *ante*, p. 166, and *post*, p. 252.

By the stat. 23 & 24 Vict. c. 38, sect. 6, it is enacted that:—

Restriction of effect of waiver.

"Where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor, or his heirs, executors, administrators or assigns, shall be proved to have taken place after the passing of this Act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear."

As to licence by parol.

Where the licence to assign is required to be in writing, a parol licence is clearly inoperative: *Roe* d. *Gregson* v. *Harrison*, 2 T. R. 425; *Litler* v. *Holland*, 3 T. R. 590; *Mease* v. *Mease*, Cowp. 47. And such a licence was not sufficient in equity any more than at law, unless used under circumstances which amounted to a fraud: *Richardson* v. *Evans*, 3 Madd. 218. A lessor cannot take advantage of a forfeiture against a purchaser, whom, after the forfeiture, he had advised to purchase the lease: *Doe* v. *Eykins*, 1 Car. & P. 154.

Death of lessor, &c.

A licence is not affected by the death of the lessor, Co. Litt. 52 b, or by his having aliened the reversion before the assignment by the lessee: *Walker* v. *Ballomie*, Cro. Jac. 102.

Who bound to obtain licence.

On an agreement for assigning a lease, in which there is a condition restraining assignment without the landlord's consent, the vendor is bound to procure such consent: *Lloyd* v. *Crispe*, 5 Taun. 249; and the purchaser is not bound, in the absence of any stipulation, to take a new lease with such a condition: *Mason* v. *Corder*, 7 Taun. 12; and see *ante*, Vol. II. tit. Conditions of Sale, p. 714.

6. Covenant by Lessor for Title and Quiet Enjoyment.

Implied warranty of title.

In every demise, whether by deed or parol, the law creates an implied warranty on the part of the lessor, that the lessee shall be secured in the peace-

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able and quiet enjoyment of the property demised to him, unless the implication be negatived by the context of the instrument: *Williams* v. *Burrell*, 1 C. B. 429; and see as to demises by parol, *Bandy* v. *Cartwright*, 8 Ex. 913, and *Hall* v. *City of London Brewery Co.*, 2 B. & S. 737. And it has long been held, that an action of covenant will lie upon a demise without any more explicit covenant for quiet enjoyment: *Style* v. *Hearing*, Cro. Jac. 73; *Nokes's Case*, 4 Rep. 80; *Tisdale* v. *Essex*, Hob. 34; *Pomfret* v. *Ricroft*, 1 Saun. 391; *Schlencker* v. *Moxsy*, 7 D. & Ry. 747; see also *Iggulden* v. *May*, 9 Ves. 330; *Smith* v. *Pocklington*, 1 Cr. & J. 445. Upon the same principle an action of covenant has been maintained by the lessor against the lessee for the interruption of a way reserved to him through the demised premises, upon the mere words of reservation: *Bush* v. *Calis*, 1 Show. 388.

So, also, a demise in writing is deemed to imply a covenant by the lessor for a good title. "The meaning of a contract to demise is not only that a certain form of words shall be put on paper, but that the party assuming to demise shall have a title to demise:" *per Parke*, B., in *De Medina* v. *Norman*, 9 M. & W. 820; see also *Sutton* v. *Temple*, 12 M. & W. 64; *Hart* v. *Windsor*, 12 M. & W. 85.

The implied warranty has been held not to be created by a mere agreement for a lease: *Gwillim* v. *Stone*, 3 Taun. 433; see also *Messent* v. *Reynolds*, 3 C. B. 194; but the case of *Roper* v. *Coombes*, 6 B. & C. 534, put an end to that distinction: see *Souter* v. *Drake*, 5 B. & Ad. 992; *Stranks* v. *St. John*, L. R. 2 C. P. 376; *Anthony* v. *Brecon Market Co.*, L. R. 2 Ex. 167.

Covenants not implied against equitable owner.

The action on the implied covenant must be brought against all the lessors, and against them only: *Smith* v. *Pocklington*, 1 Cr. & J. 445.

Controlled by express covenants for quiet enjoyment.

In leases, the warranty resulting by implication of law from the words of the demise, may be, and usually is, superseded by an express covenant for title and quiet enjoyment, agreeably to the rule *expressum facit tacitum cessare: Noke's Case*, 4 Rep. 80; see also *Gervis* v. *Peade*, Cro. Eliz. 615; *Broughton* v. *Con-*

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way, Dyer, 240 a; *Brown* v. *Brown*, 1 Lev. 57; *Merrill* v. *Frame*, 4 Taun. 329; *Smith* v. *Pocklington*, 1 Cr. & J. 445; *Woodhouse* v. *Jenkins*, 2 Moo. & Sc. 599; *Line* v. *Stephenson*, 1 Bing. N. S. 183; *S. C.*, 7 Scott, 69; *Stannard* v. *Forbes*, 6 A. & E. 572; and as such covenants are commonly confined to the acts of persons claiming under the lessor, they operate in favour of the lessor, by narrowing the liability which would, by the rule of law, attach to him in the absence of such express covenant; and such covenants are consequently always inserted for the benefit of the lessor; see *Messent* v. *Reynolds*, 3 C. B. 194. Where a lessee pays a premium or contemplates the expenditure of money in improvements upon the property, he should if the lessor's title be not disclosed, make it the subject of express stipulation that the enjoyment shall be absolutely warranted to him. Express covenants for quiet enjoyment extend to easements included in the demise: *Potts* v. *Smith*, L. R. 6 Eq. 311; *Leech* v. *Schweden*, L. R. 9 Ch. A. 463. But such covenants extend only to acts and omissions after the lease has been granted. So, where a lease of a ground floor and basement contained a covenant by the lessor for quiet enjoyment, and after the granting of the lease a service-pipe connected with a cistern which had been placed by lessor at the top of the house before the granting of the lease, burst, whereby the lessee's goods in the basement were damaged; it was held that, the bursting of the pipe not being attributable to any negligence of the lessor, there was no breach of the covenant for quiet enjoyment: *Anderson* v. *Oppenheimer*, 5 Q. B. D. 602. An injunction interfering not with the title and possession, but only with a particular mode of user and enjoyment of the land, is not a breach of the covenant for quiet enjoyment. So, where a person holding land subject to a restrictive covenant against particular trades demised part of the premises with a covenant by the lessee not to carry on such trades, and also a covenant on his own part for quiet enjoyment, and the lessee assigned to the plaintiff without

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notice of the restrictive covenant, it was held that no breach of the covenant for quiet enjoyment was committed by reason of the lessor having obtained an injunction restraining the plaintiff from carrying on a prohibited trade: *Dennet* v. *Atherton*, L. R. 7 Q. B. 316. As to the effect of a covenant for quiet enjoyment where premises are let for a purpose subsequently made illegal: *Newby* v. *Sharpe*, 8 Ch. D. 39.

Extent of implied warranty.

Implied warranties in other cases than those of exchanges and partitions, do not extend beyond the life of the granting party; and, therefore, the executors of a tenant for life who leased for years without expressly covenanting for quiet enjoyment, were held not liable for an eviction after his death by the remainderman: *Bragg* v. *Wiseman*, Brownl. 22; *Penfold* v. *Abbott*, 32 L. J. Q. B. 67.

Whether warranty or covenant extend to wrongful evictions.

The warranty resulting by implication of law from a demise is confined to lawful, and does not extend to wrongful claims and evictions: *Tisdale* v. *Essex*, Hob. 34; *Andrew's Case*, Cro. Eliz. 214; and the same rule has long been decided to apply to express covenants (*Brocking* v. *Cham*, Cro. Jac. 425; *Hamond* v. *Dod*, Cro. Car. 5; *Dudley* v. *Folliott*, 3 T. R. 584; *Foster* v. *Pierson*, 4 T. R. 617; see also *Tisdale* v. *Essex*, Hob. 34), whether such covenants be general, extending to all persons, or be confined to the acts of the persons claiming under the lessor: *Hayes* v. *Bickerstaff*, Vaugh. 118; and though the covenant expressly refer to any particular species of incumbrances, as tithes: *Lanning* v. *Lovering*, Cro. Eliz. 916.

But a contrary rule prevails where the covenants apply to the claims of a designated individual, these being held to include as well the wrongful as the rightful acts of such person: *Nash* v. *Palmer*, 5 Mau. & S. 374; see also *Foster* v. *Mapes*, Cro. Eliz. 212; *Fawle* v. *Welsh*, 1 B. & C. 29. And where the lessor is himself the disturber, an action may be maintained on his covenant though it be general in its terms, and his disturbance wrongful: *Corus* v. ——, Cro. Eliz. 544; *à fortiori*, where his covenant expressly and exclusively refers to his own acts: *Penning* v. *Platt*, Cro. Jac. 383.

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Effect of restrictive words in one covenant upon subsequent covenants.

As to the restraining effect of particular, upon general covenants, see *Browning* v. *Wright*, 2 Bos. & P. N. R. 13; *Hind* v. *Marshall*, 1 Br. & B. 319; *Blatchford* v. *Mayor of Plymouth*, 4 Scott, 444. As to when restrictive words in one covenant extend to the covenants which follow, see *Smith* v. *Compton*, 3 B. & Ad. 189; *Stannard* v. *Forbes*, 1 N. & P. 633, and cases there cited.

Construction of covenant for quiet enjoyment.

Where lands were limited in strict settlement, reserving to the tenant for life a power of leasing, it was held that, the lessee being evicted by the tenant in tail in remainder, in consequence of the lease not being granted according to the power, this eviction came within the terms of the covenant for quiet enjoyment: *Evans* v. *Vaughan*, 4 B. & C. 261; 6 D. & Ry. 349. See also *Hurd* v. *Fletcher*, Doug. 243. It was attempted to be argued, in *Evans* v. *Vaughan*, that the covenant being for quiet enjoyment during the term, and the term having, in fact, ceased on the death of the tenant for life, the covenant was at an end; but the Court held that, according to the obvious intention of the parties, the covenant was to be construed as extending to the term purported to be granted, and not merely to the actual continuance of the estate.

It has been decided, that the non-disclosure, by a lessor granting an under-lease, of a condition contained in the original lease, giving the original lessor a right of entry if the premises were used as a shop, and which the sub-lessee violated in ignorance of the prohibition, and was evicted, was no breach of the sub-lessor's covenant for quiet enjoyment, which was limited to the acts of persons claiming under him, or through his or their acts, means, right, title, forfeiture, privity, or procurance: *Spencer* v. *Marriott*, 1 B. & C. 457.

A lessee for ninety-nine years, whose lease had been granted by a tenant for life and the remainderman in tail, under-leased, covenanting against eviction by any person claiming under him, or by his acts, neglect, or default. The sub-lessee being evicted by the ultimate remainderman, it was held, that the mesne lessor's omission to require his lessors to join

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in barring the remainder when he took his lease, was no breach of the covenant, it not appearing that he had the right to insist on their doing so: *Woodhouse* v. *Jenkins*, 2 Moo. & Sc. 599. Where the lessor had procured the estate to be conveyed to himself and his wife, and the heirs of himself, an eviction by the wife surviving, was held to be within a covenant similarly worded: *Butler* v. *Lady Swinerton*, Cro. Jac. 656; *Bryan* v. *Cawson*, 2 Roll. Rep. 286. See *Lady Cavan* v. *Pulteney*, 2 Ves. J. 558; *Brookes* v. *Humphreys*, 6 Scott, 756. A contract by an incumbent, to lease part of the benefice for years, is broken by his resigning the living. *Price* v. *Williams*, 1 M. & W. 6. There can be no breach of the covenant until the time for the commencement of the term arrives: *Ireland* v. *Bircham*, 2 Scott, 207.

Covenant for quiet enjoyment not subject to condition precedent.

A lessor's covenants for quiet enjoyment are usually framed in such a manner as to appear to be conditional on the lessee's paying the rent, and performing the covenants on his part; but, it has been held, that the allegation that the rent was in arrear, and that the lessee had otherwise failed to perform his covenants, was no defence to an action for breach of the covenant in question: *Dawson* v. *Dyer*, 2 N. & M. 559. See *Strickland* v. *Maxwell*, 2 Cr. & M. 539; *Porter* v. *Shephard*, 6 T. R. 665; *infra*, *Thompson* v. *Guyon*, 4 Sim. 65.

Statutory covenants for title.

The statutory covenants for title implied by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sect. 7, where a person is expressed to "convey as beneficial owner" do not extend to and cannot be imported into ordinary leases, inasmuch as in this section the term conveyance does not include a demise by way of lease at a rent; see sub-sect. (5) of that section.

7. Covenant for Renewal.

Covenants for renewal, how construed.

In framing and construing covenants for renewal, one of the first points suggested to our attention is, whether the renewed lease is or is not to contain a similar covenant; or, in other words, whether the right of renewal is to be perpetual, or *pro hâc vice* only; for, as the covenant of renewal to be inserted

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in the renewed lease must be executed in the same manner, it is obvious, that the introduction of such a covenant in the next lease involves a right of renewal for ever. The leaning of the courts, however, is against perpetual renewals; and therefore, in order to establish this construction, the intention must be unequivocally expressed; and a proviso, in general terms, that the lease to be granted shall contain the same covenants and agreements as the lease containing the covenant, has been repeatedly held not to extend to the covenant for renewal: *Tritton* v. *Foote*, 2 Bro. C. C. 636; see also *Hyde* v. *Skinner*, 2 P. Wms. 196. Thus, a covenant to grant a new lease, "with all covenants, grants, and articles, in this indenture contained," was held to be satisfied by the tender of a new lease, containing all the former covenants, except the covenant for further renewal: *Iggulden* v. *May*, 7 East, 237; 2 Bos. & P. N. R. 449; 9 Ves. 315; see also *Moore* v. *Foley*, 6 Ves. 232; *Dowling* v. *Mill*, 1 Mad. 541; *Brown* v. *Tighe*, 2 Cl. & F. 396.

Whether renewed lease to contain covenant for renewal.

But where the covenant was to grant such further lease as should be desired by the lessee, under the same rents and covenants, it was held, that the lease might contain such a covenant: *Bridges* v. *Hitchcock*, 5 Bro. P. C. 522; see also *Furnival* v. *Crewe*, 3 Atk. 83; *Hare* v. *Burgess*, 4 K. & J. 45.

Where a lease contains a clear covenant for perpetual renewal, the Court will decree specific performance: *Furnival* v. *Crewe*, 3 Atk. 83; and see *Iggulden* v. *May*, 9 Ves. 331; *City of London* v. *Mitford*, 14 Ves. 52; *Redshaw* v. *Bedford Level Gov.* 1 Eden, 128. As to what conduct of the lessee will preclude his right to performance, see *Gourlay* v. *D. of Somerset*, 1 Ves. & B. 68; *Thompson* v. *Guyon*, 5 Sim. 65, and *ante*, p. 113; and as to performance of an agreement to renew an existing lease, Ib.; and *Robertson* v. *St. John*, 2 Bro. C. C. 140. Where an under-lease contained a covenant for renewal at the same rent, as often as the superior landlord should renew to the covenantor, and the covenantor took a new lease at an advanced rent, it was held, that he was bound to execute a new

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under-lease at the old rent: *Evans* v. *Walshe*, 9 Sch. & L. 419.

No obligation arises from practice to renew.

It is a common practice with some corporations to renew their leases without any covenant, and this custom of renewal enhances the value of the lessee's interest; but such a custom, however old, or invariably acted upon, confers no right to a renewal: see *Baynham* v. *Guy's Hospital*, 3 Ves. 298; *Eaton* v. *Lyon*, 3 Ves. 694; *Iggulden* v. *May*, 9 Ves. 331. As to covenants for yearly renewal in leases of copyholds, *vide ante*, p. 87.

A tenant's reasonable expectation of a renewal cannot be regarded in awarding compensation to him for the occupation of the premises, under an Act of Parliament: *R.* v. *Liverpool and Manchester Rail. Co.*, 6 N. & M. 186.

Renewals by trustees, &c.

The chance of renewal, however, is so far considered to have a real existence as property, that the benefit of it belongs in equity to the beneficial owner of the renewable lease, who is entitled to any renewed lease taken by his trustee, guardian, &c.: *Keech* v. *Sandford*, Sel. Ca. Ch. 61; and see the notes on that case in 1 White & Tud. L. C. 46. See also *Fitz-Gibbon* v. *Scanlan*, 1 Dow. 261; *Mill* v. *Mill*, 3 H. L. C. 828; *Cooper* v. *Phibbs*, L. R. 2 H. L. 149; and, similarly, persons having partial interests, as tenants for life, mortgagees, &c., are considered as trustees to the extent of the interest which is in other persons: see *Griffin* v. *Griffin*, 1 Sch. & L. 252; *Bowles* v. *Stewart*, 1 Sch. & L. 209; *Featherstonehaugh* v. *Fenwick*, 17 Ves. 298; *Randall* v. *Russell*, 3 Mer. 190; *Jeddings* v. *Jeddings*, 3 Russ. 241; *Webb* v. *Lugar*, 2 Y. & C. 427. So also, if a partner obtains a renewal of a lease of premises belonging to the partnership in his own name, he will be deemed a trustee for the firm: *Clegg* v. *Edmondson*, 8 De G. M. & G. 787. As to a renewal unduly obtained by a stranger, see *Parker* v. *Brooke*, 9 Ves. 583.

Covenants for renewal should clearly define the terms of renewal.

Another point to be attended to in covenants for renewal, is to define with precision the period and terms for and upon which the renewed lease is to be granted. Disputes may, for instance, arise between

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the lessor and lessee, whether upon the true construction of the covenant to renew in a lease for lives, the lessee is obliged to renew at the dropping of each life, or has the liberty of waiting until the expiration of all the lives. The construction of the covenant in such cases has generally been against the lessee.

Whether lessee, in a lease for lives, bound to renew at the dropping of first life.

Thus, in *Baynham* v. *Guy's Hospital,* 3 Ves. 295, where in a lease for three lives the lessor covenanted, within two years from the death of "the first or any or either of the life or lives," to make a renewed lease, "to commence from the expiration of these presents," provided the fine were tendered within two years after the "decease of any or either of the life or lives," it was held, that the lessee was bound to renew within two years after the decease of the first life. See also *Eaton* v. *Lyon,* 3 Ves. 690.

Effect of non-renewal within the period allowed by the covenant.

Where a lessee neglects to renew within the time prescribed by the covenant, the right of renewal is gone, as well in leases for years as in leases for lives. Thus, where in a lease for sixty-one years, the lessor covenanted with the lessee, within one year after the expiration of twenty years of the said term of sixty years, on the request and at the costs of the lessee, his executors, &c., and at a certain fine, to grant a further lease for twenty years, to commence after the expiration of the term of sixty-one years; and so, in like manner, at the end of every twenty years during the term, to grant another lease of twenty-one years, to commence at the expiration of the lease then last before granted; it was held, that the lessee was bound to apply for the renewal at the expiration of the first twenty-one years, and by default had lost the benefit of the covenant: *Rubery* v. *Jervoise,* 1 T. R. 229. But, where in a similar lease the covenant was that the lessee might renew "at the end and expiration of each and every term of fourteen years," upon giving notice of his intention so to do to the lessor, it was held that the lessee did not lose his right to renewal at the end of the third term of fourteen years, by not having claimed such right at the end of any such prior term: *Bogg* v. *Midland Rail. Co.* L. R. 4 Eq. 310.

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The Court will not generally relieve a lessee from the consequence of his laches, in not applying for a renewal within the prescribed period: *Allen* v. *Hilton*, 1 Fonb. Eq. 432. But cases may exist to call for the extraordinary interference of the Court in granting the relief in question. Thus, it has been laid down by a high authority, that, "if by unavoidable accident, by fraud, by surprise, by ignorance, not wilful, parties have been prevented from executing the covenant literally, a Court of Equity will interfere, and, upon compensation being made, the party having done everything in his power, and being prevented by the means alluded to, will give relief:" *per* Sir *R. P. Arden*, M.R., *Eaton* v. *Lyon*, 3 Ves. 693. See *Bateman* v. *Murray*, cit. 4 Bro. C. C. 417.

No relief in equity.

But the mere fact, that the lessee or his assignee was ignorant of the event of the death of the *cestui que vie* does not excuse his neglect to renew at the proper time: *Harris* v. *Bryant*, 4 Russ. 89. In a twenty-one years' lease of a copyhold (which could by the custom, be leased for twenty-one years only), the lessor covenanted before the end of the term, to renew the lease for twenty-one years, and so on at the end of such term for twenty-one years, and twenty-one years, and fifteen years, making in all ninety-nine years. Lord *Alvanley*, M.R., considered that it was substantially to be regarded as a lease for ninety-nine years: *Rawstorne* v. *Bentley*, 4 Bro. C. C. 415. It is to be observed, that no act was to be done on the part of the lessee; no fine was payable, nor was even a request for renewal required to be made: see *Statham* v. *Liverpool Docks Trustees*, 3 Y. & J. 565; *Hunter* v. *Lord Hopetown*, 13 L. T. N. S. 130.

What conduct on part of lessee disentitles him to renewal.

Breach of condition amounting to a forfeiture, of course, discharges a covenant to renew; and where the covenant was to renew at the end of the term, if it should not be sooner determined by the lessee's acts, or default, and, after the expiration of the term, the lessor commenced an ejectment against the tenant, who had broken conditions during the term, equity refused an injunction, or performance

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of the condition: *Thompson* v. *Guyon*, 5 Sim. 65. So, where a lease contained a covenant to keep the property in repair, and also a covenant for renewal in case the lessee's covenants should have been duly performed, it was held that a want of repair, though not serious, at the time the new lease was applied for, disentitled the lessee from claiming a renewal: *Finch* v. *Underwood*, 2 Ch. D. 310.

Whether right of renewal runs with the lease, or is personal to the lessee.

Another question arising on covenants for renewal, and which requires to be attended to in framing them, is, whether they are to be executed in favour of the person for the time being entitled to the lease, or are personal to the lessee.

The former construction is undoubtedly the more reasonable, and the courts would, it is conceived, require a clear and rather special demonstration of intention to confine it to the lessee. In *Hide* v. *Skinner*, 2 P. Wms. 196, Lord *Macclesfield* held, that a covenant to renew at the request of the lessee extended to his executors, the executors of every person being "implied in himself." See also *Chapman* v. *Dalton*, Plow. 284; *Constable's Case*, cit. Cro. Car. 280.

As to under-leases of renewable leaseholds.

It frequently happens, that persons having renewable leases, who are desirous of selling a portion of the demised property, instead of assigning such portion to a purchaser, grant an under-lease, for a premium, at a nominal rent, leaving in themselves (as in this case) a bare reversion of a few days only, and by this means the right of renewal is preserved; for it is to be observed, that in most cases, the renewal being required to be preceded by a surrender of the existing lease, if the lessee assigned any portion of the property, he would place it out of his power to make such surrender, without the concurrence of the assignee; whereas the granting of an under-lease has not this effect, since the stat. 4 Geo. 2, c. 28, s. 6, makes good the surrender of an original lease, in order to its being renewed, without the junction of the under-lessees; the statute providing that the person taking the renewed lease shall have the same remedies against the under-lessees as if the original lease had been kept on foot; and the

Concurrence of under-lessees not necessary in surrender for the purpose of renewal.

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chief landlords the same remedy by distress against the under-tenants for the rent reserved by the new leases, to the extent of the rent reserved in the surrendered lease, as they had before: see *Doe* d. *Palk* v. *Marchetti*, 1 B. & Ad. 715.

A covenant by a grantee under letters patent, to use his best endeavours to procure a renewal of them, binds him to pay a reasonable fine for the renewal, if necessary; and three years' annual value is a reasonable fine upon a grant for three lives: *Simpson* v. *Clayton*, 6 Scott, 469; *Wilson* v. *Hoare*, 2 Per. & D. 659. See further, as to what is a breach of covenant to renew, or to procure a renewal, *Scudamore* v. *Stratton*, 1 Bos. & P. N. R. 455; *Clarke* v. *Peppin*, 2 Vent. 99; *Maine's Case*, 5 Rep. 20 b; *Ford* v. *Tiley*, 6 B. & C. 325; *Lender* v. *Pryor*, 8 Car. & P. 518.

As to the principle on which the apportionment of the expenses of renewal between tenant for life and remainderman is calculated, see *Reeve* v. *Creswick*, 3 Y. & C. 715. See, as to the rights of tenant for life and remainderman respecting renewable leaseholds, *infra*.

8. Who Bound by, and Who may take Advantage of, Covenants.

Remedies on Covenants.]—At common law the remedies on covenants were confined to the "parties (*h*) and privies (*i*)" to the covenant, and

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When covenantee must be a party.

(*h*) The covenantee must be named as a party to the indenture, although it is not necessary that he should execute it: *Giby* v. *Copley*, 3 Lev. 138; *Storer* v. *Gordon*, 3 Mau. & S. 322; *Berkley* v. *Hardy*, 5 B. & C. 355; *Metcalfe* v. *Rycroft*, 6 Mau. & S. 75. On the other hand, the covenantor need not be a party, but must execute the deed: *Salter* v. *Kidgley*, Carth. 66. But a deed-poll, not being confined to particular parties, may contain a covenant with any person: 2 Roll. Abr. 22, F. pl. 1; *Gardner* v. *Lachlan*, 8 Sim. 123.

Right to sue on covenants at common law.

(*i*) Covenants in law ran with the reversion at common law. Thus, the implied covenant for paying rent contained in the *reddendum*, gave a right of action to the grantee of the reversion previously to the statute: *Harper* v. *Bird*, 7 Jo. 102; 2 Lev.

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did not extend to grantees, and consequently the grantees of reversions could not take advantage of covenants in the leases granted to those under whom they claimed; and this state of the law produced little inconvenience in early times, when the transfer of property was comparatively infrequent; but when the dissolution of the monasteries threw a large proportion of the land of the kingdom into new hands, the necessity of extending the benefit of such covenants to the new owners of the reversion, and giving (as the justice of the case obviously required) a corresponding remedy to the lessees, was strongly felt. This led to the passing of the stat. 32 Hen. 8, c. 34, by which it is enacted, that all grantees of reversions should enjoy like advantages against the lessees, their executors, administrators, and assigns, by entry for non-payment of the rent, or for doing of waste, or other forfeiture; And also should have and enjoy all the same advantage, benefit, and remedies by action only, for not performing of other conditions, covenants, or agreements contained and expressed in the leases, as the lessors themselves might have had; and further (sect. 2), that all lessees of lands or other hereditaments for terms of years, life or lives, their executors, administrators, and assigns, should have like action, advantage, and remedy, against all persons, and bodies politic, their heirs, successors, and assigns, being grantees of the reversion of the lands, &c., so letten, or any parcel thereof, for any condition, covenant, or agreement contained or expressed in the leases, as the lessees might have had against the said lessors and grantors, their heirs and successors.

Stat. 32 Hen. 8, c. 34.

Grantees of reversions to have the benefit of covenants, conditions, &c., in leases.

Lessees' remedy against grantees of reversions.

Though the immediate object of this statute related to the lands of the dissolved monasteries which fell to the crown, its provisions extend to vest in all grantees of reversions the benefit of covenants

Observations upon the statute.

206; *Vyvyan* v. *Arthur*, 2 D. & Ry. 670. And a release by the lessor of all covenants, after having granted away his reversion, was no discharge to the lessee: Ib.; *Middlemore* v. *Gooddale*, Cro. Car. 503. See, however, 2 Wms. Saund. 240 n.

entered into with their grantors, and on the other hand give to the lessees a co-extensive remedy against such grantees.

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The following points have been decided upon the statute:—

1. That it applies only to demises by deed: *Standen* v. *Christmas*, 10 Q. B. 135; *Elliott* v. *Johnson*, L. R. 2 Q. B. 120; *Smith* v. *Edgington*, L. R. 9 C. P. 145. Where the lease is not under seal the lessor retains his right of action against the lessee, notwithstanding an assignment of the reversion: *Bickford* v. *Parson*, 5 C. B. 920.

2. That it extends to copyholds: *Glover* v. *Cope*, 3 Lev. 326; Salk. 185; *Whitton* v. *Peacock*, 3 My. & K. 325; and see *Platt* v. *Plommer*, Cro. Car. 24.

Statute extends to copyholds;

3. That it applies to covenants entered into by and with lessees for life and years, but not to covenants made between grantors and grantees in fee-simple or fee-tail: *Lewes* v. *Ridge*, Cro. Eliz. 863.

—not to covenants in conveyances in fee-simple or fee-tail;

4. That it extends to the assignees of reversionary terms of years, or, in other words, to the grantees of persons who have made under-leases: *Matures* v. *Westwood*, Cro. Eliz. 617; *Mathuris* v. *Westroray*, Moor, 527, pl. 695; *Davy* v. *Matthews*, Cro. Eliz. 650.

—extends to assignees of reversionary terms;

5. That the persons claiming the benefit of the statute need not be grantees of the whole estate in reversion; but an action may be sustained by the grantee of a partial interest only; and, therefore, where the lessor (being tenant in fee) grants the reversion for years, or for life, such grantee may maintain an action against the lessee and his assigns: *Attoe* v. *Hemmings*, 2 Buls. 281; 2 Roll. Rep. 10; *Burton* v. *Barclay*, 5 Moo. & P. 785. But in such cases the damages recovered can only be commensurate with the interest of the plaintiff: *Evelyn* v. *Raddish*, 1 Holt, N. P. C. 543, 545 n.; and the covenantor would be immediately liable to another action by the persons entitled to the ulterior interest: see *Biddlesford* v. *Onslow*, 3 Lev. 209; for the present value of the reversion is diminished by an injury done to the land; and, therefore, such injury may be the subject of an

—grantees of partial interests;

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immediate action: *Jesser* v. *Gifford*, 4 Burr. 2141. See also, on this subject, *Some* v. *Barwish*, Cro. Jac. 231; *Attersol* v. *Stevens*, 1 Taun. 183; *Baxter* v. *Taylor*, 1 N. & M. 13. On the other hand, the grantee of the particular estate is not liable unless he take the whole of that estate; in other words, the privity of estate and contract only subsists between the particular tenant and the immediate reversioner, so that a lessor has no remedy against an under-lessee: *Holford* v. *Hatch*, 1 Doug. 182.

—grantees, &c., of part of the lands demised;

6. That, under this statute, an action is maintainable by or against the assignees of part of the lands demised: *Palmer* v. *Edwards*, 1 Doug. 187; *Congham* v. *King*, Cro. Jac. 329; *Simpson* v. *Clayton*, 6 Scott, 469; and by or against the grantees of part of the lands in reversion: *Twynam* v. *Pickard*, 2 B. & Al. 105.

—remaindermen (leases being made by tenants for life, &c.);

7. That persons entitled in reversion or remainder are grantees within the meaning of the statute: *Isherwood* v. *Oldknow*, 3 Mau. & S. 382; and see *Whitfield* v. *How*, 1 Vent. 238; *Bringloe* v. *Goodson*, 6 Scott, 902.

—not to persons claiming by a paramount title;

But persons claiming by a title paramount the lessor cannot, of course, claim the benefit of covenants entered into with him; and, therefore, a lord who enters upon the lessor for a forfeiture is not an assignee within the meaning of the statute. (Co. Litt. 215 b.). Nor is an assignee of part of the land to which the covenant relates, who came in before the demise: *Targett* v. *Lloyd*, 2 Vent. 277. And the alienee of the reversioner loses his remedy if he extinguish his reversion, by purchasing the next estate in remainder or reversion: Moore, 94. Thus, if a tenant for life lease and convey away his life estate, and the alienee purchase the remainder in fee, his remedy on the covenants is gone. Where the lease is made by a tenant for life under a power, the case is different, for the term so created is prior in order of limitation to the subsequent estates, which are merely modifications of the general reversion expectant upon the term. See *Isherwood* v. *Oldknow*, 3 Mau. & S. 382.

Where a lease was executed by the intended lessee, only, who entered, and the lessor died, having

devised the property; it was held that the devisee could not sue as assignee of the reversion upon the covenants contained in the lease: *Cardwell* v. *Lucas*, 2 M. & W. 111; *Cooch* v. *Goodman*, 2 Q. B. 580.

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8. That covenants contained in a demise which operates by estoppel do not run with the reversion: *Noke* v. *Awden*, Cro. Eliz. 436; *Whitton* v. *Peacock*, 3 My. & K. 325.

—to covenants that run with the land only.

Lastly, that the statute extends to covenants only which immediately affect the nature, value, or mode of occupation of the subject of the demise, or, in other words, which run with the land, and not to personal and collateral covenants. This brings us to the consideration of what are covenants that run with the land—a point of no less importance than difficulty. It should be premised, however, that, in order to fall within the operation of the statute, the covenant must be made with the person having the legal estate; and, therefore, if a *cestui que trust* and his trustee join in a lease, covenants made with the former will not run with the land, or pass to his assignee: *Webb* v. *Russell*, 3 T. R. 393; and see *Stokes* v. *Russell*, 3 T. R. 678; *Russell* v. *Stokes*, 1 H. Bl. 562; *Earl of Portmore* v. *Bunn*, 3 D. & Ry. 145. And in an action by the assignee, the lessee is not estopped from setting up the want of title in the covenantee: Ib.; *Whitton* v. *Peacock*, 2 Scott, 630. So, performance to the assignees in bankruptcy of a *cestui que trust* is no defence to an action by the trustee: *Britten* v. *Perrott*, 2 Cr. & M. 597.

For what breaches action maintainable.

It may also be observed, that the assignee of the reversion can only sue for breaches of covenant occurring after the assignment: *Lewes* v. *Ridge*, Cro. Eliz. 863; *Johnston* v. *St. Peter*, 6 N. & M. 106; 4 A. & E. 520; *Flight* v. *Bentley*, 7 Sim. 151 (*k*); though, if there are continuing breaches, the fact of the covenant having been broken before will not affect his remedy; as where buildings, which were out of repair at the time of the assignment, are suffered to continue in that condition afterwards:

(*k*) Nor can he sue, it seems, for use and occupation previous to the assignment: *Mortimer* v. *Preedy*, 3 M. & W. 602.

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Mascall's Case, Moor, 242. The conversion of a house into a shop is a breach consummated and complete at once, but the using of any part of it for a prohibited purpose is a continuing breach : *Doe* d. *Ambler* v. *Woodbride,* 9 B. & C. 576 ; 4 M. & Ry. 302. A grantee or assignee may bring an action or be sued for a breach made during the continuance of his estate, after he has parted with that estate ; for the statute, it is said, transfers the privity of contract, and the contract remains though the privity of estate is gone : *Midgely* v. *Lovelace,* Carth. 289 ; *Harley* v. *King,* 2 Cr. M. & R. 18.

What covenants run with the land.

What covenants run with the land.]—A covenant is said to run with the land when either the liability to perform it, or the right to take advantage of it passes to the assignee of that land. A covenant is said to run with the reversion when either the liability to perform it, or the right to take advantage of it passes to the assignee of that reversion : see the notes to *Spencer's Case* (reported 5 Rep. 16) in 1 Smith L. C. p. 75. In that case, which is the leading authority upon this subject, several propositions are laid down, according to which it seems there are three species of covenants : *First,* Covenants which run with the land, though the assigns be not named ; and of this kind are covenants "which extend to a thing *in esse,* parcel of the demise," as a covenant to repair the demised premises.

Propositions in *Spencer's Case.*

Secondly. Covenants which will bind assignees if named, but not otherwise ; and to this class belong those which concern a thing to be newly done upon the thing demised, as to build a wall or a messuage, &c.

Thirdly. Covenants which are simply collateral, and which, as they do not concern the subject of demise, will not bind assignees, whether named or not ; as a covenant to build a house on land not parcel of the demise, to pay a sum of money, or the like.

Implied covenants run with land.

All covenants implied by law run with the land : see *Williams* v. *Burrell,* 1 C. B. 402 ; so also the benefit of the covenants implied in a lease or assignment of a lease by deed by virtue of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), sect. 7.

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Express covenants which run with land.

The following express covenants have also been held to run with the land; viz., lessee's covenants to pay rent: *Parker* v. *Webb*, 3 Salk. 5; to pay taxes: *Dean of Windsor's Case*, 5 Rep. 2; to build: *Sampson* v. *Easterby*, 9 B. & C. 505; to repair: *Longlee* v. *Williams*, 2 Lev. 92; *Wakefield* v. *Brown*, 9 Q. B. 209; *Martyn* v. *Clue*, 18 Q. B. 661; as to repair of sea walls, see *Morland* v. *Cook*, L. R. 6 Eq. 212; to deliver up in good repair at the end of the term: *Matures* v. *Westwood*, Cro. Eliz. 599; *Doe* d. *Strode* v. *Seaton*, 9 Cr. M. & R. 730; *Martyn* v. *Clue*, 18 Q. B. 661; to repair and renew fixtures and fixed machinery: *Williams* v. *Earle*, L. R. 3 Q. B. 739; to insure premises within the bills of mortality: *Vernon* v. *Smith*, 5 B. & Al. 1; to cultivate land in a particular manner: *Cookson* v. *Cook*, Cro. Jac. 125; *Walsh* v. *Watson*, Esp. N. P. 295; to carry all corn grown on the demised premises to be ground at the landlord's mill: *Vyvyan* v. *Arthur*, 1 B. & C. 410; to reside on the demised premises: *Tatem* v. *Chaplin*, 2 H. Bl. 133; to leave land as well stocked with game at the end of the term as it was at the commencement thereof: *Hooper* v. *Clark*, L. R. 2 Q. B. 200; to allow to the landlord access to premises excepted from the demise: *Cole's Case*, 1 Salk. 196; not to assign or under-let without licence: *Williams* v. *Earle*, L. R. 3 Q. B. 739; at all events if the assigns are named: see *West* v. *Dobb*, L. R. 4 Q. B. 634; not to carry on a particular trade: *Tatem* v. *Chaplin*, 2 H. Bl. 133; *Mayor of Congleton* v. *Pattison*, 10 East, 130. Also covenants by the lessor to pay ground rent, and repair: *Martyn* v. *Clue*, 18 Q. B. 661; to allow deductions from rent: *Baylye* v. *Offord*, Cro. Car. 137; to supply the demised premises with water: *Jourdain* v. *Wilson*, 4 B. & Al. 266; see *Cooke* v. *Chilcott*, 3 Ch. D. 694; for renewal of lease: *Brooke* v. *Bulkeley*, 2 Ves. sen. 498; *Roe* v. *Hayley*, 12 East, 464; *Bastin* v. *Bidwell*, 18 Ch. D. 238; to endeavour to procure a renewal: *Simpson* v. *Clayton*, 4 Bing. N. C. 758; for production of title deeds: *Barclay* v. *Raine*, 1 S. & S. 449; for quiet enjoyment: *Noke* v. *Awden*, Cro. Eliz. 375; *Campbell* v. *Lewis*, 3 B. & Al. 392; *Williams* v. *Burrell*,

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What covenants do not run with the land.

1 C. B. 402; for further assurance; *Middlemore* v. *Goodhall*, Cro. Car. 503; *King* v. *Jones*, 5 Taun. 518.

But if the covenant only affect the land incidentally and indirectly, it will not run with it, and the assigns will not be bound thereby, though named. Therefore, a covenant by the lessee to pay a sum annually to the churchwardens is merely a collateral covenant: *Mayho* v. *Buckhurst*, Cro. Jac. 438; see *Flight* v. *Glossop*, 2 Scott, 220; *Holcombe* v. *Hewson*, 2 Camp. 391; *Jones* v. *Edney*, 3 Camp. 285.

So, a covenant by a lessee for himself, his executors, administrators, and assigns, not to hire persons to work in the mill who were settled in other parishes, without a parish certificate, was decided not to run with the land: *Mayor of Congleton* v. *Pattison*, 10 East, 136. So also the following lessee's covenants have been held to run with the land; viz., covenants to pay interest on landlord's outlay in improving the premises: *Gorton* v. *Gregory*, 3 B. & S. 90; with a mortgagor (in a lease granted by him and his mortgagee) to pay rent and repair: *Webb* v. *Russell*, 3 T. R. 393; to replace farming stock: *Spencer's Case*, 5 Rep. 16; *S. C.* 1 Smith, L. C. 75; or to replace chattels and utensils not affixed to the land: *Gorton* v. *Gregory*, 3 B. & S. 90; *Williams* v. *Earle*, L. R. 3 Q. B. 739.

A covenant by the lessor not to dispose of the demised premises without first offering them to the lessee, though made with him, his executors, administrators, and assigns, was considered not to run with the demised premises: *Collison* v. *Lettsom*, 6 Taun. 224. And the following other covenants by lessors have been held not to run with the land: to pay for improvements made by the tenant during the term: *Gorton* v. *Gregory*, 3 B. & S. 90; see also *Grey Cuthbertson*, 2 Doug. 351; not to keep a public-house within a specified distance of the demised premises: *Thomas* v. *Hayward*, L. R. 4 Ex. 311; see *Wilson* v. *Hart*, L. R. 1 Ch. A. 463.

The rules applicable to covenants that run with the land apply also to incorporeal hereditaments. Thus, where a lessee of tithes covenanted for himself, his executors, administrators, and assigns, not to let

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any of the farmers occupying the estate out of which the tithes arose have any part of the tithes, without the consent of the lessors, it was held that this covenant was not a mere collateral covenant, but related to the thing demised, and, as such, fell within the rules laid down by Lord *Coke* in *Spencer's Case*, and was binding on the assignee, being named, and there being a privity between the lessor and the assignee: *Bally* v. *Wells*, 3 Wils. 25; see *Earl of Portmore* v. *Bunn*, 3 D. & Ry. 145.

Of course, covenants which result by implication of law, run with the land as well as where they are formally expressed. Thus, in *Vyvyan* v. *Arthur*, 1 B. & C. 410, where A., seised in fee of lands, and also of a certain mill, demised the lands to B., his executors, administrators, and assigns, yielding and paying to the lessor, his heirs, and assigns, certain rents, and doing certain suits and services, and doing suit to the mill by grinding all such corn there as should grow upon the demised premises; it was held that the covenant which resulted by implication from this *reddendum* ran with the land, so long as the lands and mill belonged to the same person: see also *Uxbridge* v. *Staveland*, 1 Ves. sen. 56; *Sampson* v. *Easterby*, 1 Cr. & J. 105; and *Keppell* v. *Bailey*, 2 My. & K. 540.

Effect of assignment of reversion.

Effect of Assignment on Liabilities and Rights of Parties.]—At common law an assignment of the reversion by a lessor gave the assignee a right to the rent reserved by the lease, and to enforce payment of the same by distress, and also to sue for breaches of any covenants implied by law, but not for breaches of covenants expressly made by the lessee with the lessor. But the stat. 32 Hen. 8, c. 34, sect. 1, gave to the assignees of reversions the like remedies for non-payment of rent, doing of waste, or breach of covenants expressed in leases against the lessees and their assigns as the lessors might have had; and by sect. 2 of the same Act the like remedies were given to lessees and their assigns against the reversioner and his assigns as they might have had against the lessors. The effect of this Act was fully considered in

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Spencer's Case, 5 Rep. 16; *S. C.* 1 Smith L. C. 75, in which it was laid down that the Act applied only to covenants relating to the thing demised, *i.e.*, covenants which run with the land. So also to be within the Act the covenant must have been made with the owner of the legal reversion (*l*); and accordingly, where a mortgagor made a lease for a term reciting the mortgage, and the lessee covenanted with the mortgagor (the mortgagee not being a party) to pay a certain yearly sum in part of interest at a specified place, it was held that this was a covenant in gross not running with the land: *Pargeter* v. *Harris*, 7 Q. B. 708. The Act does not apply where the demise is not by deed; and therefore where a lease was not under seal it has been held that it did not empower the assignee of the reversion to sue on the stipulations agreed on between the lessee and the assignor: *Standen* v. *Christmas*, 10 Q. B. 135; *Smith* v. *Edgington*, L. R. 1 C. P. 145. In such a case the original lessor retained his right of action: *Bickford* v. *Parson*, 5 C. B. 920; but after payment and receipt of rent by the assignee of the reversion, a fresh contract of tenancy might be presumed between the lessee and the assignee of the reversion: *Cornish* v. *Stubbs*, L. R. 5 C. P. at p. 339; see also *Elliott* v. *Johnson*, L. R. 2 Q. B. 120.

Assignment does not discharge covenantor.

The statute of 32 Hen. 8, c. 34, in subjecting the grantees of reversions to the covenants entered into by the lessors, in regard to the demised premises, has not exonerated the covenanting parties themselves, and their representatives, from such covenants; for, as the covenantor is bound, in such case, by express contract, and not by privity of estate merely, the obligation, by virtue of the covenant, exists independently of the state of the ownership of the property. The principle of course applies to lessees. Thus, it has long been held, that a lessee, or his representative, is not discharged from the

(*l*) By the operation of the stat. 8 & 9 Vict. c. 106, s. 5, a covenant by a lessee with a mortgagor "and other the person entitled to the reversion" was made to run with the reversion, so as to enable the mortgagee, though not a party, to sue upon it.

covenant for payment of rent, or any other covenant, whether running with the land or not, by an assignment: *Rushden's Case*, Dyer, 4b; *Matures* v. *Westwood*, Cro. Eliz. 617. Nor does the fact of the lessor having recognised the assignee as his tenant, by the acceptance of rent, discharge the lessee: *Barnard* v. *Godscall*, Cro. Jac. 309; *Brett* v. *Cumberland*, Cro. Jac. 521; *Bachelour* v. *Gage*, Cro. Car. 188; *Glover* v. *Cope*, 3 Lev. 326; *Orgill* v. *Kemshead*, 4 Taun. 642.

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On the other hand, an assignee, whose liability to the covenant arises by privity of estate, and is consequential on his ownership merely, ceases to be liable when such ownership ceases; he may, therefore, at any time discharge himself by assigning the land to another person, and it is no objection to the exonerating effect of such an assignment that the assignor gave no notice of it to the lessor, or that the assignee is an indigent person, incapable of performing the covenants: *Pitcher* v. *Toovey*, 1 Show. 340; *Lekeux* v. *Nash*, Stra. 1221; *Taylor* v. *Shum*, 1 Bos. & P. 21; *Paul* v. *Nurse*, 2 M. & Ry. 525; *Beardman* v. *Wilson*, L. R. 4 C. P. 57.

Assignee discharged by assignment.

The Conveyancing and Law of Property Act, 1881 (45 & 46 Vict. c. 41), contains the following provisions with regard to leases which considerably extend the principle of the stat. 32 Hen. 8, c. 34.

Sect. 10.—"(1.) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.

Rent and benefit of lessee's covenants to run with reversion.

"(2.) This section applies only to leases made after the commencement of this Act."

Sect. 11.—"(1.) The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and

Obligation of lessor's

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as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

covenant to run with reversion.

"(2.) This section applies only to leases made after the commencement of this Act."

The first of these sections gives to "the person entitled to the income," whether the legal owner of the reversion or not, the full benefit of the rent and lessee's covenants, &c.; and by sect. 11, all the lessor's covenants in a lease, whether granted by an owner in fee or by virtue of an express or statutory power, and which the lessor has power to enter into as against the remainderman, are rendered binding on the successors in title of the lessor.

The same Act contains the following further provisions with respect to the form and effect of covenants contained in instruments made after the 31st of December, 1881:—

Covenant to bind heirs, &c.

Sect. 58.—"(1.) A covenant relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed.

"(2.) A covenant relating to land not of inheritance, or not devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if executors, administrators, and assigns were expressed.

"(3.) This section applies only to covenants made after the commencement of this Act."

Covenant to extend to heirs, &c.

Sect. 59.—"(1.) A covenant and a contract under seal, and a bond or obligation under seal, though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators and personal estate, of the person making the same, as if heirs were expressed.

"(2.) This section extends to a covenant implied by virtue of this Act.

"(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the terms of the covenant, contract, bond, or obligation, and to the provisions therein contained.

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"(4.) This section applies only to a covenant, contract, bond, or obligation, made or implied after the commencement of this Act."

Sect. 60.—"(1.) A covenant and a contract under seal, and a bond or obligation under seal, made with two or more jointly, to pay money or to make a conveyance, or to do any other act, to them or for their benefit, shall be deemed to include, and shall, by virtue of this Act imply, an obligation to do the act to, or for the benefit of the survivor or survivors of them, and to, or for the benefit of any other person to whom the right to sue on the covenant, contract, bond, or obligation devolves.

Effect of covenant with two or more jointly.

"(2.) This section extends to a covenant implied by virtue of this Act.

"(3.) This section applies only if and so far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the covenant, contract, bond, or obligation, and to the provisions therein contained.

"(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act."

Effect of the above provisions.

The combined effect of sects. 10 and 58 of this Act is to render it unnecessary that covenants should now be made expressly with the heirs, executors, administrators, and assigns of the covenantee (*m*) for the purpose of giving to the reversioner the benefit of the covenants. Nothing, however, in the Act will make a covenant run with the land or reversion which would not otherwise have run with the land or reversion, if "heirs and assigns," or "executors, administrators, and assigns," had been expressly mentioned. So also, by virtue of sect. 59, it is no longer necessary that a covenant should be made expressly by a covenantor for himself and his heirs, executors, or administrators, according to the former practice, so as to bind such successors in title; and by virtue of sect. 11, a covenant by a lessor will,

(*m*) The personal representatives of a covenantee, although not expressly named, might always sue upon a covenant relating to personalty: *Doe* d. *Rogers* v. *Rogers*, 2 N. & M. 550.

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so far as he has power to bind the reversion, have the effect of binding his assigns, though not expressly mentioned. In other cases, however, the Act does not obviate the necessity of expressly mentioning assigns in a covenant, where such mention was necessary to bind them before the commencement of the Act, as, for instance, where the covenant concerns a thing not *in esse* at the time of the demise, but to be made or done afterwards on the demised premises: see *Spencer's Case*, 5 Rep. 16; *S. C.*, 1 Smith L. C. 75 (*n*). The practical result is that a lessee should expressly covenant for himself and his assigns in all cases where the mention of assigns was necessary before the passing of the Act to make the obligation of a covenant run with the land; so also a lessor's covenant should be similarly framed where it is intended that it should bind his assigns in respect of lands not included in the demise, a case which is not covered by the provisions of the Act. The most prudent course seems to be, that in all cases where the obligation of a covenant is intended to run with the land, the covenantor should be made to covenant for himself and his assigns (*o*): see Wolst. Conv. Acts, 113.

Notice of covenants as to user of land.

It is to be observed that it has long been a settled rule of equity that whether or not a covenant is such as to run with the land, an assignee with notice of stipulations affecting the user of land will be bound thereby if it appears that such was the intention of the parties: see *Tulk* v. *Moxhay*, 2 Ph. 774; *Wilson* v. *Hart*, L. R. 1 Ch. A. 463; see also the observations of *Cotton*, L. J., in *Fairclough* v. *Marshall*, in 4 Ex. D. at p. 48; and *London & S. W. Rail. Co.*, 20 Ch. D. 563; *Haywood* v. *Brunswick Building Co.*, 8 Q. B. D. 403.

By the operation of sect. 60, read in connection

(*n*) The efficacy of the mention of assigns in such a case has, however, been doubted: *Minshall* v. *Oakes*, 2 H. & N. 793; see also *Patman* v. *Harland*, 17 Ch. D. 353.

(*o*) In most of the following precedents the successors in title of the parties are expressly imported into leases, and agreements for leases, by means of an interpretation clause, a plan recommended by considerations of obvious convenience.

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with the two preceding sections, the form of covenants with several persons jointly is greatly simplified. Thus the words "A. hereby covenants with B. and C." will bind the heirs of the covenantor, and entitle the covenantees and the survivor of them and his successors in title to sue upon the covenant as fully as if the old form had been used, viz., "A. doth hereby, for himself, his heirs, executors, and administrators, covenant with B. & C., their heirs, executors, administrators, and assigns."

Acts to be done, &c., by parties to covenants.

A further question arises with regard to acts to be done, requests to be made, or consents or notices to be given under the covenant, and the persons by or to whom such acts, requests, consents, or notices are to be done, made, or given. It is conceived that, as a matter of construction, a covenant that "A. will pay to B. a yearly rent, &c., and will, at the request of B. [*or* upon notice by B.], execute and do all such repairs, &c." is to be taken to have the same effect as if the "heirs and assigns" or "the executors, administrators, and assigns" of the parties (as the case might require) had been repeated after the names of the respective parties according to the former practice. This view receives confirmation from the frame of the specimen forms given in the Appendix to the Act; but it must be borne in mind that these forms are in nowise directory, nor is their effect and operation guaranteed except in relation to the provisions of the Act. It will therefore, perhaps, be the safer course in framing covenants, that, except in the operative parts thereof, the representatives and assigns of the parties should be expressly mentioned throughout: see *Roe* v. *Harrison*, 2 T. R. 425; *Paul* v. *Nurse*, 8 B. & C. 489 (*p*).

Effect of bankruptcy of lessee upon his covenants.

Effect of Bankruptcy.]—The effect of bankruptcy upon the obligatory force of the covenants in a lease is important to be considered. Formerly, a bankrupt lessee (for it is in regard to him only that the

(*p*) In leases, &c., framed in accordance with the following precedents, the question above referred to will not arise, all doubt on the subject being removed by an interpretation clause.

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question has generally arisen) was liable to the covenants in the lease after the bankruptcy, and his certificate did not discharge him: *Auriol* v. *Mills*, 4 T. R. 94.

By sect. 54 of the Bankruptcy Act, 1883, the property of a debtor divisible among his creditors vests in the trustee immediately upon the making of the order of adjudication, or on his subsequent appointment as trustee, liable to be divested by disclaimer under sect. 55 of that Act. The bankrupt is thenceforth deprived of all interest in the property, and is liberated from all contracts, liabilities, engagements, and contingencies in respect thereof. See *Ex parte Llynvi Coal and Iron Co.*, *Re Hide*, L. R. 7 Ch. A., at p. 32. So full and complete is the discharge of the liability of the debtor by his adjudication as a bankrupt, that where a bankrupt lessee, after his discharge, purchased the leaseholds from his assignees in bankruptcy, his liability as original lessor did not revive, but he took as any ordinary assignee of a lease: *Doe* v. *Smith*, 5 Taun. 795. The personal liability of a bankrupt lessee having been thus determined, is not affected by the subsequent disclaimer of the lease by his trustee, which determines, "as from the date of the disclaimer, the rights, interests, and liabilities of the bankrupt and his property, in or in respect of the property disclaimed."

If a trustee in bankruptcy does not disclaim, he becomes personally liable for the rent which accrues due after the property becomes vested in him: *Ex parte Dressler*, 9 Ch. D. 252; see *Wilson* v. *Walloin*, 5 Ex. D. 155; and he also becomes liable in respect of the covenants in the lease as from the date of his appointment, but not for breaches committed before his appointment: *Tillerton* v. *Cooper*, 9 Q. B. D. 473. But he may relieve himself of his liability by assigning over the lease: *Fagg* v. *Dobie*, 3 Y. & C. Ex. 96; and that notwithstanding a covenant against assignment without licence of the lessor: *Goring* v. *Warner*, 7 Vin. Abr. 85; *Doe* d. *Goodebeere* v. *Beavan*, 3 Mau. & S. 353; and the fact that he knows the assignee to be a pauper will not

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invalidate the assignment: *Onslow* v. *Currie*, 2 Mad. 330; *Wilkins* v. *Fry*, 1 Mer. 265; *Hopkinson* v. *Lovering*, 11 Q. B. D. 92; the effect of such assignment is entirely to destroy the privity of estate by which alone a trustee in bankruptcy becomes or remains liable to the rent on covenants of a lease: *Paul* v. *Nurse*, 8 B. & C. 489. But the assignment must be absolute and so far in good faith that it shall not be in a collusive arrangement by which the apparent assignee is merely to manage the property, while the apparent assignor remains the real owner and receives the profits: *Philpot* v. *Hoare*, 2 Atk. 219. The trustee may be sued for breaches of covenant committed by him after the property becomes vested in him, and before the privity of estate between him and the lessor is determined by the assignment: *Harley* v. *King*, 2 Cr. M. & R. 18. As to disclaimer of leases by trustees in bankruptcy, see *ante*, tit. DISCLAIMER, Vol. II. p. 841 *et seq.*

As to the Liability of Executors or Administrators of Lessees.]—In regard to the liability of executors and administrators of lessees to the payment of the rent and performance of the covenants entered into by their testator or intestate, much learning is to be found in the early writers. The following positions embody the result of the numerous authorities:—

Positions showing the result of the authorities.

First, that executors or administrators are liable to the payment of the rent out of the general assets, and the performance of the covenants of a lease granted to their testator or intestate: *Agard* v. *King*, Cro. Eliz. 775; *Howse* v. *Webster*, Yelv. 103; *Bachelour* v. *Gage*, Cro. Car. 188; *Simmons* v. *Bolland*, 3 Mer. 547; *Vyvyan* v. *Arthur*, 1 B. & C. 410.

Secondly, that their liability in the representative character is not dependent upon, or at all affected by, the fact of their having entered upon the property or not; for as an executor or administrator cannot "assume the office for part, and refuse for part," his responsibility remains the same, notwithstanding his non-assumption of the possession: *Bolton* v. *Cannon*, 1 Vent. 271; 1 Freem. 336, 393; *S. C.*, sub-nom. *Bolton* v. *Canham*, Pollex. 59; *Howse*

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Liability of executors, &c.

v. *Webster*, Yelv. 103; *Rubery* v. *Stevens*, 1 N. & M. 185; *Nation* v. *Tozer*, 1 Cr. M. & R. 172.

Thirdly, that if an executor or administrator enter upon the lands, he is chargeable in respect of his perception of the profits "as assignee;" *i.e.*, he is personally liable to the lessor for the rent, the surplus only of the profits, after payment of such rent, being assets in his hands: *Ipswich* v. *Martin*, Cro. Jac. 411; *Sackvill* v. *Evans*, 1 Freem. 171; *Bolton* v. *Cannon*, 1 Freem. 393; Pollex. 59; *Helier* v. *Casebert*, 1 Lev. 127, 128; *Billinghurst* v. *Speerman*, 1 Salk. 297; *Tilney* v. *Norris*, 1 Salk. 309; and *vide* 1 Salk. 317. So that "if an executor hath a lease for years of lands of the value of £20 per annum, rendering £10 per annum rent, it is assets in his hands only for £10 over and above the rent:" *Body* v. *Hargraves*, Cro. Eliz. 711; see also *Hargreave's Case*, 5 Rep. 31. See Dyer, 82 b. According to the doctrine of one decision, indeed, the executor is liable, notwithstanding his non-entry in such a case: *Mawle* v. *Cacyffyr*, Cro. Jac. 549. See *Nation* v. *Tozer*, 1 Cr. M. & R. at p. 176. If an executor or administrator enters, his personal liability for the rent in the absence of sufficient assets will be measured by the extent to which he might by reasonable diligence have made a profit out of the premises: *Hopwood* v. *Whaley*, 6 C. B. 744.

Fourthly, but, at all events, even after entry, the executor or administrator may discharge himself *pro tanto* by showing that the land is of less value than the rent: *Billinghurst* v. *Speerman*, 1 Salk. 297; *Jevens* v. *Harridge*, 1 Wms. Saun. 1; *Remnant* v. *Bremridge*, 8 Taun. 191; *Rubery* v. *Stevens*, 1 N. & M. 182.

The general tenor of the authorities suggests the observation that wherever a lease, which is not beneficial, forms part of the estate of a lessee, who has died insolvent, the executor or administrator is at liberty, and, it should seem, ought, to offer to surrender to the lessor, and that he will not, after such offer, be liable in respect of his occupation, if he has derived no advantage from it. The executor or administrator in such a case should, of course, be

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prepared to show, for the satisfaction of creditors and other persons interested, that the retention of the lease so surrendered would have been an incumbrance, and not a benefit to the estate. If there are assets sufficient to pay the rent for some time, but not for the whole of the term, it would seem that the executor or administrator must pay the rent as long as he can, and then waive possession, giving notice to the landlord: Went. Off. Ex. c. 11, p. 244; c. 12, p. 290 (12th ed.); see also Wms. Exors.

Landlord no preferential claim when estate insolvent.

Although an executor or administrator is liable for arrears of rent due from the lessee to the extent of the assets, it must be remembered that rent is a specialty debt within the meaning of the stat. 32 & 33 Vict. c. 46, and that consequently a landlord has no preferential claim for rent in arrear against the estate of a deceased lessee in priority over simple contract creditors: *Shirreff* v. *Hastings,* 6 Ch. D. 610.

Liability for repairs.

An executor or administrator is personally liable upon his occupation, like any other assignee, for breach of covenant to repair: *Tremeere* v. *Morrison,* 1 Bing. N. C. 89; *Butterworth* v. *Simpson,* 1 Cr. M. & R. 835. But it seems that he may, by offering to surrender the term, relieve himself from all future responsibility in respect of the covenants; at least, after the assets are exhausted: see *Reed* v. *Lord Tenterden,* 1 Tyr. 111; *Wilkinson* v. *Cawood,* 3 Anst. 905.

Where an executor or administrator has occupied premises demised to a deceased lessee, it is no defence to an action for non-repair that the premises yield no profit: *Tremeere* v. *Morrison,* 1 Bing. N. C. 89; *Hornidge* v. *Wilson,* 11 A. & E. 645; nor, apparently, that there is a deficiency of assets: *Wollaston* v. *Hakewill,* 3 Man. & Gr. 320; and see *Sleap* v. *Newman,* 12 C. B. N. S. 116.

Insurance.

Where a lessee was bound to insure and the house was burnt down after his death, his executors were held personally liable for not having kept up the insurance: *Fry* v. *Fry,* 27 Beav. 146. As to the liability of executors to contribute to the re-building

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of a party wall, where there were no assets, see *Thacker* v. *Wilson*, 3 A. & E. 142.

An executor or administrator may relieve himself of his liabilities as assignee of a lease by assigning it over to another person, even to a pauper: *Pitcher* v. *Tovey*, 4 Mod. 71; *Wilson* v. *Wigg*, 10 East, 315; *Taylor* v. *Shum*, 1 Bos. & P. 21.

The stat. 22 & 23 Vict. c. 35, contains the following provisions for the protection of executors and administrators of deceased lessees:

Restriction on liability of executor or administrator in respect of rents, covenants, or agreements in leases in certain cases.

Sect. 27. "Where an executor or administrator, liable as such to the rents, covenants or agreements contained in any lease or agreement for a lease, granted or assigned to the testator or intestate, whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease as may have accrued due and been claimed up to the time of the assignment hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed to by the lessee to be laid out on the property demised, or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease, or agreement for a lease, to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be), of the personal estate of the deceased to meet any future liability under the said lease, or agreement for a lease; and the executor or administrator so distributing the residuary estate shall not, after having assigned the lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease; but nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed."

9. Dependent and Independent Covenants. Set off of Payments against the Claim of Rent.

It is to be observed, that mutual covenants cannot be set off against each other, but as a general rule the parties are entitled to avail themselves

independently of the benefit of their respective covenants.

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Thus, it is no answer to an action for the recovery of rent, to show that the lessor has not performed his covenant to repair, by which the defendant has incurred expenses more than equal to the sum demanded: *Leeds* v. *Cheetham*, 1 Sim. 146; *Saunders* v. *Musgrave*, 6 B. & C. 524; nor *vice versâ;* and the principle applies wherever the claim under either covenant is for unliquidated damages: *Howlett* v. *Strickland*, Cowp. 56; *Weigall* v. *Waters*, 6 T. R. 488. It has been laid down that the question whether covenants are dependent or independent must be determined not by the use of any technical words, but by the intention of the parties as indicated by the instrument of demise taken as a whole: *Roberts* v. *Brett*, 11 H. L. C. 337. In many instances, covenants have been held to be independent, where the terms of them might seem to afford ground for inferring that the parties intended the one to be a qualification and condition of the other: as where a person covenants that he will do a certain act, the covenantee performing some other act. So the lessor cannot plead non-payment of the rent in bar to an action on a covenant, that the lessee, paying and performing the rents and covenants, shall quietly enjoy: *Hayes* v. *Bickerstaff*, 1 Freem. 194; *Dawson* v. *Dyer*, 5 B. & Ad. 586. So, where in a lease to A. were excepted the trees, with liberty to the lessor to cut and carry them away, he mending the fences, and filling up the pits; the Court decided that it was a covenant, for which the lessee might bring an action: *Warren* v. *Asters*, T. Jo. 206; see also *Brown* v. *Eyre*, 1 H. Bl. 273.

What words qualify covenants.

Covenant for quiet enjoyment.

But, where the means of enabling the covenantor to perform the covenant are to be provided by the covenantee himself, this will be considered as a qualification of the covenant, and the neglect to perform the act will excuse the non-performance of the covenant.

Covenant conditional where covenantee is to supply the means of performance.

Thus, where the lessee covenanted with a lessor to repair, "he the said lessor, finding, allowing, and assigning timber sufficient for such reparations, during

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the said term, to be cut and carried by the lessee, his executors," &c. To an action on the covenant, the lessee pleaded that the lessor did not allow timber; and this plea was held to be good on demurrer, on the ground that the clause in question was not a covenant to provide timber, but a qualification of the covenant to repair: *Thomas* v. *Cadwallader*, Willes, 496; see also *Porter* v. *Shephard*, 6 T. R. 665. So, when the covenant was that the lessee would not assign without consent, "such consent not being arbitrarily withheld," it was held that an arbitrary refusal entitled the lessee to assign without consent: *Trelsar* v. *Bigge*, L. R. 9 Ex. 151; see *Sear* v. *House Property and Investment Co.*, 16 Ch. D. 238.

Covenant against assignment.

Covenant for renewal.

Where a lease contained a covenant by the lessees to repair, and also a covenant by the lessor that the lessees should at the end of the term have a further lease "upon the lessees paying the rent and performing and observing the covenants," it was held that by reason of the premises being out of repair the lessees were not entitled to performance of the covenant for renewal: *Bastin* v. *Bidwell*, 18 Ch. D. 238.

Rule where the entire consideration for the covenant fails.

Where the whole consideration for which the covenant is entered into fails, the covenantee cannot in general maintain an action on the covenant: *Jones* v. *Barkley*, Dou. 684; *Goodison* v. *Nunn*, 4 T. R. 761; *Glazebrook* v. *Woodrow*, 8 T. R. 366 (*q*).

Upon this principle, too, it is clear, that no action

(*q*) See further, as to whether covenants are independent or conditional, *Pordage* v. *Cole*, 1 Saun. 319; *Northcote* v. *Underhill*, Ld. Ray. 388; Salk. 199: *Clayton* v. *Kynaston*, Ld. Ray. 420; *Campbell* v. *Jones*, 6 T. R. 571; *Porter* v. *Shephard*, 6 T. R. 665; *Duke of St. Albans* v. *Shore*, 1 H. Bl. 270; *Havelock* v. *Geddes*, 10 East, 555; *Gibbon* v. *Mendez*, 1 B. & Al. 17; *Fothergill* v. *Walton*, 8 Taun. 576; *Kingston* v. *Preston*, 2 Doug. 689; *Carpenter* v. *Cresswell*, 1 Moo. & P. 66; *Dallman* v. *King*, 5 Scott, 382; *Mattock* v. *Kinglake*, 2 Per. & D. 343; *Baylis* v. *Legros*, 4 C. B. N. S. 537; *Few* v. *Perkins*, L. R. 2 Ex. 92; *Makin* v. *Watkinson*, L. R. 6 Ex. 25. And see Platt on Covenants. The question depends upon the intention of the parties, to be collected from the whole of the instrument; but this rule, though frequently laid down in reference to particular covenants, &c., is a universal rule of construction, applicable to every instrument, and to all its parts.

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can be maintained on a lessee's covenant to pay, for rent accruing after eviction, whether such eviction have taken place by the act of the lessor, or under a paramount title; the only difference being, that, in the latter case, the rent ceases *pro tanto* only, but, in the former, an eviction from part suspends the rent of the whole. So, it has been determined that eviction is a sufficient bar to an action against the lessee on a covenant to repair: *Andrews* v. *Needham*, Cro. Eliz. 656. And where the demised premises had become dangerous and wholly unfit for occupation for want of repair, and the tenant (who held from year to year, and was under no obligation to repair,) in consequence quitted them without notice; it was held that the landlord was not entitled to recover in an action for use and occupation: *Edwards* v. *Etherington*, 7 D. & Ry. 117. See *Salisbury* v. *Marshall*, 4 Car. & P. 65; *Kirkman* v. *Jervis*, 7 Dow. P. C. 678.

No set-off against rent.

It should be observed too, that though, as before stated, the lessee cannot set off monies paid for repairs, &c., against the landlord's claim for rent, unless authorized so to do; yet, of course, an express provision may be introduced, authorizing such a deduction on that or any other account. *Johnson* v. *Carre*, 1 Lev. 162; *Baylye* v. *Offord*, Cro. Car. 137.

Ground rent paid to a superior landlord, may be pleaded as part payment.

The lessee may also, without an express authority, plead certain payments as payment of the rent, not as a set-off against it; as, for instance, ground-rent paid by him to the superior landlord, on a threat of distress: *Sapsford* v. *Fletcher*, 4 T. R. 511; *Cobb* v. *Carpenter*, 2 Camp. 13, n.; or monies paid to a person having a rent-charge issuing out of the land: *Taylor* v. *Zamira*, 2 Taun. 524. See *Johnson* v. *Jones*, 1 Per. & D. 651, where the same point was decided upon a plea of payment by compulsion to a prior mortgagee. See also *Schlencker* v. *Moxsy*, 3 B. & C. 789; *Doe* v. *Boulter*, 1 N. & P. 651; *Waddilove* v. *Burnett*, 2 Scott, 763; *Brook* v. *Biggs*, 2 Scott, 803. In *Carter* v. *Carter*, 5 Moo. & P. 732, it was held, that though the ground-rent was paid by the tenant, on the mere application of the ground

As to monies paid by tenant to the owner of a rent-charge.

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landlord, without any threat of distraining, and when no rent was due from the tenant to his landlord, the tenant was entitled to consider the sum so paid as part-payment of rent subsequently due. The rule applies to compulsory payments only: where the tenant pays money to avoid a distress, from which he might have defended himself at law, he can neither deduct nor recover it: *Knibbs* v. *Hall*, 1 Esp. 84.

See as to payment by a lodger to the superior landlord of rent due by his immediate tenant, stat. 34 & 35 Vict. c. 79, sect. 3, stated *ante*, p. 181.

Land tax.

So, under the Land Tax Acts, a tenant may tender land tax receipts in or toward payment of the rent: *Andrew* v. *Hancock*, 1 Br. & B. 37; *Spragg* v. *Hammond*, 2 Br. & B. 59. See also stat. 38 Geo. 3, c. 5, *ante*. And where one tenant, who has paid any tax, transfers the occupation to another, handing over to the succeeding tenant the receipt, the latter may, it seems, obtain the allowance: *Clennel* v. *Read*, 2 Marsh. 371. But the land tax, so deducted, must have accrued within the same period as the rent out of which the deduction is proposed to be made; for the lessee cannot set off, against the rent of a given year, the land tax of a former year, which was omitted to be deducted out of the rent of that former year: *Stubbs* v. *Parsons*, 3 B. & Al. 516; *Andrew* v. *Hancock*, 1 Br. & B. 37; *Saunderson* v. *Harrison*, 3 Car. & P. 314.

Deduction must be made out of the rent of the current year.

Property tax.

The liability to pay income tax and property tax (as is the case with most other taxes) rests, in the first instance, with the tenant. But by the stat. 5 & 6 Vict. c. 35, it is provided that occupiers shall be entitled to deduct property tax paid by them "out of the next payment thereafter to be made on account of rent," and all landlords, mediate or immediate, are to allow such deduction under a penalty of £50 for every refusal; see sects. 60, 103; and see *Reg.* v. *Sheil*, 1 F. & F. 204; *Att.-Gen.* v. *Sheil*, 3 H. & N. 834; and by sect. 73 of the same Act it is enacted that—

Contracts.

"No contract, covenant, or agreement between landlord and

tenant, or any other persons, touching the payment of taxes and assessments to be charged on their respective premises, shall be deemed or construed to extend to the duties charged thereon under this Act, nor to be binding contrary to the intent and meaning of this Act; but that all such duties shall be charged upon and paid by the respective occupiers, subject to such deductions and repayments as are by this Act authorized and allowed; and all such deductions and repayments shall be made and allowed accordingly, notwithstanding such contracts, covenants, or agreements."

Covenants, whether Dependent or not.

between landlords and tenants, or other persons not to be binding contrary to the act.

A maximum rent may be reserved subject to reduction according to fluctuations in the rate of property tax or in case of its total repeal: *Colbron* v. *Travers*, 12 C. B. N. S. 181; *Beadel* v. *Pitt*, 13 W. R. 287. An agreement that if the tenant should continue to pay his rent in full without deduction in respect of landlord's property tax paid by him, the landlord would repay all sums which the tenant should pay for the landlord's property tax, has been held not to be invalid as contrary to the provisions of this Act: *Lamb* v. *Brewster*, 4 Q. B. D. 607.

When the deduction is to be made.

The tenant is not entitled to make any deduction until he has himself paid the tax, when the payment will be deemed as *pro tanto* a payment of the rent: *Baker* v. *Davis*, 3 Camp. 474; *Franklin* v. *Carter*, 1 C. B. 750. If he omits to make the deduction when entitled to do so, he may, nevertheless, deduct the tax from subsequent rent during the period through which the same was accruing due: stat. 27 Vict. c. 18, sect. 15. If, however, he allows that period to elapse without making the deduction, he cannot afterwards recover the money as paid for the use of the landlord: see *Cumming* v. *Bedborough*, 15 M. & W. 438.

Tithe rentcharge.

The tithe rentcharge is now by virtue of the stat. 6 & 7 Will. 4, c. 71 (as amended by several subsequent Acts), charged on the land alone, and imposes no personal liability on either the landlord or the tenant: and by sect. 81 of that Act, the tenant paying such rentcharge is to be entitled to deduct the same from the rent payable to the landlord, and to be allowed the same in account with his landlord.

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The rentcharge is recoverable to the extent of two years' arrears by distress upon all lands in the parish occupied by the person in occupation of the land on which the rentcharge in arrear is charged: see sects. 81, 85. And by the stat. 14 & 15 Vict. c. 25, sect. 4, if a tenant on quitting his holding leaves unpaid any tithe rentcharge charged thereon, the landlord or incoming tenant paying such rentcharge and any expenses incident thereto, is entitled to recover the amount so paid from the outgoing tenant or his representatives.

Tenant's remedy for monies which he cannot claim to deduct out of rent.

Where the tenant cannot plead as payment of rent sums paid by him on the landlord's account, his only remedy against the landlord is by an action for the sums so paid; and even this remedy will be barred by a long acquiescence, as by paying rent for a considerable period without claiming any deduction, especially if a claim antecedently made has been abandoned: see *Spragg* v. *Hammond*, 2 Br. & B. 59, and the cases cited in the arguments.

So, on the same principle, where the landlord made a larger deduction of land tax than the tenant was entitled to, having deducted for the improved value, which we have seen the tenant is not entitled to, *vide ante*, p. 189, for seventeen years, it was held that he could not distrain for the amount so improperly allowed as rent unpaid, he having the knowledge, or the means of knowing, the facts under which the deduction was made: *Bramston* v. *Robins*, 12 Moo. 68; see *Waller* v. *Andrews*, 3 M. & W. 312.

Tenant cannot set off ground rent paid by him, which became due before the lessor's title commenced.

The question as to the tenant's right to plead against the rent demanded of him, payment of an arrear of ground rent to the superior landlord accruing antecedently to his landlord's title, was raised in the case of *Cobb* v. *Carpenter*, 2 Camp. 13, n., where it was held, that the tenant, who, just before he quitted, had been distrained upon by the ground-landlord for several years' ground rent, amounting to a much larger sum than was due to the plaintiff (*i.e.*, his landlord), could only set off a part of this sum, proportioned to the period during which the plaintiff had the legal estate. This case, it will be observed,

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does not decide that a lessee cannot, in any case, set off ground rent accruing within a different or longer period than the rent out of which it is claimed to be deducted, but merely, that rent accruing before the landlord's title commenced, cannot be so set off against him.

But where by Act of Parliament a tax was charged upon the tenant with power to deduct the amount out of his rent, the tenant recovered the amount which he had paid to redeem his goods (left on the farm after the expiration of the tenancy) from a distress for the tax, as money paid to the landlord's use. Here, however, the Act gave an ultimate remedy for recovering the sum, by seizing the land itself; so that the tenant might be said, in one sense, to have been immediately liable to pay the tax: *Dawson* v. *Linton*, 5 B. & Al. 521.

CHAPTER V.

PROVISOES OR CONDITIONS OF RE-ENTRY.

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1. CONDITIONS OF RE-ENTRY GENERALLY.

Conditions of Re-entry Generally.

Conditions of re-entry on non-payment of rent and non-performance of covenants.

"Hereinafter," how construed.

How such Conditions are construed.]—A condition providing that the lease shall cease and determine, or giving to the lessor a right of re-entry, on non-payment of the rent, within a certain number of days, or on breach of any of the lessee's covenants, is now inserted in leases as a matter of course. The Courts give a strict construction to such provisions; and therefore, where there was a condition to re-enter on breach of any of the covenants "thereinafter contained," and it appeared that all the covenants on the part of the lessee preceded the clause in question, the Court of King's Bench refused to depart from the literal construction by rejecting or changing that word, though the clause was thereby rendered nugatory: *Doe* d. *Spencer* v. *Godwin*, 4 Mau. & S. 265.

Condition of re-entry for misfeasance is not broken by non-feasance.

So, a clause of re-entry, if the lessee "shall do, or cause to be done, any act, matter, or thing, contrary to and in breach of any of the covenants," does not apply to a breach by non-feasance, as an omission to repair: *Doe* d. *Abdy* v. *Stevens*, 3 B. & Ad. 299. See *Doe* v. *Marchetti*, 1 B. & Ad. 715; and further on the construction of conditions, *Doe* v. *Jepson*, 3 B. & Ad. 402; *Randle* v. *Long*, 6 A. & E. 218.

Indeed, it is a doctrine much insisted on in the early cases, that clauses imposing forfeiture, which is odious in law, are to be strictly construed: see *Moody*

Conditions of Re-entry Generally.

v. *Garnon*, Moor. 848. *Doe* v. *Rees*, 5 Scott, 166; *Northcote* v. *Duke*, 2 Eden, 321; *Doe* v. *Elsam*, Moo. & M. 189, *contra*. But it is not to be understood from this doctrine, that conditions are altogether void, unless expressed in the formal technical terms in which they are usually framed; for in many instances, very informal expressions have been held to amount to a condition, where it could be collected that such was the intention of the parties. Thus, in *Simpson* v. *Titterell*, Cro. Eliz. 242; cit. Moor. 707; 2 Rep. 71; the words "provided always, and it is covenanted and agreed between the said parties," that the lessee shall not assign, &c., following a demise, amounted to a condition. So, in *Whichcot* v. *Fox*, Cro. Jac. 398, a covenant by the lessee not to alien on pain of forfeiture, was held to be a condition. Again, in *Doe* d. *Henniker* v. *Watt*, 8 B. & C. 308; 1 M. & Ry. 694, where, in an instrument not under seal, it was stipulated and conditioned that the lessee should not assign, &c., the words were held to create a condition. And a condition for re-entry on non-performance of "any of the agreements herein contained," applies to the non-payment of rent reserved, although there is no express agreement to pay it: *Doe* v. *Kneller*, 4 Car. & P. 3. See also *Thomas* v. *Ward*, Cro. Eliz. 202; but see *Archdeacon* v. *Jennor*, Cro. Eliz. 604.

What construed to amount to a condition.

But a mere covenant to "give up" the premises on a certain event, without some expressions declaratory of the intention of the parties to reserve to the lessor a right of re-entry on that event, will not be construed as a proviso or condition, so as to enable him to maintain an ejectment, see *Doe* d. *Wilson* v. *Phillips*, 2 Bing. 13.

Agreement to "give up" the premises, how construed.

A right of entry cannot be reserved to a stranger to the estate; and, therefore, where a lease was made by a trustee and several *cestuis que trustent*, and the right of entry upon breach of covenant was limited to the *cestuis que trustent*, it was held that they could not maintain an ejectment, as the power should have been reserved to the person who had the legal estate: *Doe* d. *Barney* v. *Adams*, 2 Cr. & J. 232; *Doe* d. *Barker* v. *Goldsmith*, 2 Cr. & J. 674. By the stat. 32 Hen. 8,

Right of entry cannot be reserved to a stranger.

Conditions of Re-entry Generally.

c. 34, grantees of the reversion upon a lease for life or years by indenture are entitled to the benefit of conditions of re-entry. A right of re-entry is not capable of assignment. The stat. 8 & 9 Vict. c. 106, sect. 6, provides that "a right of re-entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England of any tenure, may be disposed of by deed;" but this enactment has been held not to apply to a right to re-enter for breach of condition of a lease: *Hunt* v. *Bishop*, 8 Ex. 675; *Bennett* v. *Herring*, 3 C. B. N. S. 370.

Form of conditions in leases by tenants in common.

Though, as we have already observed, covenants entered into with tenants in common may be construed as several covenants, though not such in terms, their interest being several, yet it is by no means clear, that the same principle would be applied to conditions, which have always received a stricter construction; and, therefore, it is doubtful whether, under a power of re-entry given to them simply and their heirs, in case of the death of one of the lessors, his heirs could enter upon his share, for, if the condition were joint, the right of entry would survive. The power of re-entry, therefore, should be given them "respectively, and their respective heirs and assigns." In cases where any doubt exists as to the proper terms of limiting the right of entry to the lessors, it may be as well simply to declare, that, in the event prescribed, the lease shall "cease, determine, and be absolutely void." It seems that one of several co-heirs of the lessor cannot alone maintain ejectment upon a condition of re-entry: *Doe* d. *Rutzen* v. *Lewis*, 5 A. & E. 277. A lessee cannot avail himself of his own act to vacate the lease, on the principle, that a man shall not be permitted to take advantage of his own wrong: *Rede* v. *Farr*, 6 Mau. & S. 121. See also *Doe* d. *Bryon* v. *Bancks*, 4 B. & Al. 401; *Hanson* v. *Norcliffe*, Hob. 331; *Davis* v. *Bryant*, 6 B. & C. 656; *Dakin* v. *Cope*, 2 Russ. 170; *Doe* d. *Nash* v. *Birch*, 1 M. & W. 406; *Doe* v. *Rees*, 6 Scott, 161.

Whether leases declared to be void are

Waiver of Forfeiture.]—A proviso that, on non-payment of rent or breach of any of the covenants,

Conditions of Re-entry Generally.

confirmed by acceptance of rent.

the term should cease and be void, and it should be lawful for the lessor to re-enter, was construed to make the lease voidable only, the two members of the sentence being read as if transposed; and Lord *Tenterden* expressed an opinion, that even if the lease had been simply declared to be void, he should still have thought that the receipt of rent by the landlord would be an admission that the lease was subsisting at the time when that rent became due, and that he could not afterwards insist upon a forfeiture previously committed:* *Arnsby* v. *Woodward*, 6 B. & C. 523. See also *Doe* v. *Pritchard*, 2 N. & M. 489; *Dakin* v. *Cope*, 2 Russ. 170; *Roberts* v. *Davey*, 4 B. & Ad. 664. Although the acceptance of rent is a waiver of a right of re-entry for an antecedent breach of covenant, it has no effect upon posterior acts, see *ante*, p. 212. If, therefore, the breach be occasioned by an act which is not complete at the time of such acceptance, but is going on continuously, *de die in diem*, (as that of ceasing to work a coal mine: *Dolby* v. *Iles*, 4 Jur. 432; *Doe* v. *Bancks*, 4 B. & Al. 401; using a house for a prohibited purpose: *Doe* v. *Woodbridge*, 4 M. & Ry. 303; omitting to insure under a covenant for insuring and keeping insured against fire: *Doe* d. *Flower* v. *Peck*, 1 B. & Ad. 428; *Doe* d. *Muston* v. *Gladwin*, 6 Q. B. 953; omitting to repair: *Doe* d. *Hemmings* v. *Durnford*, 2 Cr. & J. 667; *Doe* d. *Baker* v. *Jones*, 5 Ex. 498; *Toleman* v. *Portbury*, L. R. 7 Q. B. 344); the acceptance of rent does not preclude the lessor from availing himself of the forfeiture incurred by the continuance of the breach. It remains to be noticed, that it is not essential to constitute waiver, that the rent should have been received from the person properly entitled as lessee. Acceptance from a person who had taken possession without authority or title will suffice: *Doe* v. *Pritchard*, 2 N. & M. 489.

See further as to waiver of forfeiture by acceptance of rent: *Doe* d. *Gatehouse* v. *Rees*, 4 Bing. N. C. 384; *Price* v. *Worwood*, 4 H. & N. 512; *Walrond* v. *Hawkins*, 10 C. P. 342; *Lawrie* v. *Lees*, 14 Ch. D. 249. Forfeiture may also be waived by an absolute unqualified demand by a person duly authorized, of

Conditions of Re-entry Generally.

rent accrued due subsequently to the forfeiture: *per Parke*, B., in *Doe* d. *Nash* v. *Birch*, 1 M. & W. at p. 408; see also *Green's Case*, Cro. Eliz. 3; *Ward* v. *Day*, 5 B. & S. 359 (*a*). So also by distraining or bringing an action for subsequent rent with notice of the breach of covenant: *Doe* d. *Morecraft* v. *Meux*, 4 B. & C. 606; *Dendy* v. *Nicholl*, 4 C. B. N. S. 376; *Walrond* v. *Hawkins*, L. R. 10 C. P. 342; *Evans* v. *Davis*, 10 Ch. D. 747. But notice to repair in pursuance of a general covenant to repair is not a waiver of the forfeiture incurred by breach of such covenant: *Few* v. *Perkins*, L. R. 2 Ex. 92.

On the other hand if the lessor unequivocally shows his election to treat the lease as determined by the breach of covenant, as by bringing an action of ejectment, he will not be held to have waived the forfeiture by subsequent acceptance of the rent or by distraining or bringing an action to enforce payment: *Grimwood* v. *Moss*, L. R. 7 C. P. 360; *Toleman* v. *Portbury*, L. R. 7 Q. B. 344. But a lessor having thus signified his election cannot sue in respect of rent accrued due on breach of covenant committed after bringing the ejectment: *Jones* v. *Carter*, 15 M. & W. 718.

Rule as to leases for lives.

As to leases for lives, the rule has always been, that a proviso declaring that, on a given event, the estate shall cease and be void, conferred a right of entry only: *Browning* v. *Beston*, Plow. 135. Where entry is necessary on the part of the subject, office must be found in the case of the king: *Finch* v. *Riseley*, Pop. 53.

Avoidance of lease does not destroy the remedy on the covenants.

An entry, under a proviso that, on breach of covenants, "it should be lawful for the lessor to re-enter and hold the premises, as if the indenture had never been made," was held to be no answer to an action of covenant for rent due previously to the entry, the clause being read "as if the indenture had never been made," only from the time of such re-entry: *Hartshorne* v. *Watson*, 5 Scott, 508.

(*a*) An unqualified demand of rent accrued due subsequent to notice to quit is not, however, waiver of such notice: *Blyth* v. *Dennett*, 13 C. B. 178.

2. Relief from Forfeiture.

Relief from Forfeiture.

Forfeiture under conditions for non-payment of rent, relieved against.

Conditions for re-entry on the non-payment of rent are regarded in equity in the character of penalties only, and as a means of enforcing the payment of the rent; and as the injury arising from the breach of such conditions admits of compensation, the Courts of Equity were from very early times in the habit of relieving lessees who had incurred a forfeiture in this manner, on payment or tender of the amount of rent due: *Wadman* v. *Calcraft*, 10 Ves. 67; *Davis* v. *Best*, 12 Ves. 475; *Hill* v. *Barclay*, 16 Ves. 405; 18 Ves. 58; *Lovat* v. *Lord Ranelagh*, 3 Ves. & B. 24.

Extent of relief in equity as to other covenants.

The equitable relief has sometimes been stated as extending to all covenants, the nature of which admits of compensation. In *Sanders* v. *Pope*, 12 Ves. 282, (see also *Webber* v. *Smith*, 2 Vern. 103), Lord *Erskine* relieved against a forfeiture incurred by a lessee in not expending a certain sum in repairs within a given period; but the Court of Exchequer, in *Bracebridge* v. *Buckley*, 2 Pri. 200, refused relief upon a similar covenant.

Cases in which equity will not interfere.

It was also repeatedly determined, that equity would not, as a general rule, interfere where the forfeiture arose from any default of the lessee other than non-payment of money, as in the instance of rent. Relief has accordingly been refused where the forfeiture arose from non-performance of a general covenant to repair: *Hill* v. *Barclay*, 18 Ves. 56; see also *Davis* v. *West*, 12 Ves. 475; and *Nokes* v. *Gibbon*, 3 Drew. 681; a covenant not to assign without licence: see *Hafer* v. *Mocatto*, 9 Mod. 112; *Lovat* v. *Lord Ranelagh*, 3 Ves. & B. 31; but see *Northcote* v. *Duke*, 2 Eden, 319; to cultivate the lands in a particular manner: *Lovat* v. *Lord Ranelagh*, 3 Ves. & B. 31; see also *Davis* v. *West*, 12 Ves. 476; to keep the premises insured: *Reynolds* v. *Pitt*, 2 Pri. 212, n.; *Rolfe* v. *Harris*, 2 Pri. 206; *White* v. *Warner*, 2 Mer. 459: a covenant not to make a way through the premises demised: *Descarlett* v. *Dennett*, 9 Mod. 22; and lastly, not to exercise any, or any particular trade therein: *Macher* v. *Foundling Hospital*, 1 Ves. & B. 188.

Relief from Forfeiture.

Accident and surprise.

An exception to this rule was, however, recognised in cases of accident or surprise: see the remarks of *Stuart*, V.-C., in *Bamford* v. *Cressy*, 3 Giff. 673. Thus, relief has been granted where the tenant had proceeded to execute repairs pursuant to notice, but had been delayed by bad weather: *Bargent* v. *Thompson*, 4 Giff. 473; and where, after notice to repair had been given, negotiations took place for sale of the lessee's interest to the lessor: *Hughes* v. *Metropolitan Rail. Co.*, 2 App. Cas. 439. In one case Lord *Eldon*, C., granted relief from forfeiture for breach of a covenant to repair in the case of a committee of a lunatic, on the ground that otherwise hardship would ensue to the lunatic's estate: *Ex parte Vaughan*, 1 T. & R. 434.

Relief in respect of covenant to insure.

By the stat. 22 & 23 Vict. c. 35, sects. 4—9, courts of equity were empowered to grant relief under certain circumstances against forfeiture for breach of covenant to insure against fire; this enactment is now repealed by virtue of sect. 14, sub-sect. (7), of the Conveyancing and Law of Property Act, 1881, *infra*. This power was extended to the Courts of Common Law by sect. 2 of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), also similarly repealed.

Stay of proceedings in ejectment on forfeiture for non-payment of rent.

In case of forfeiture for non-payment of rent, proceedings in ejectment may be stayed at any time before trial upon a summary application to the Court or to a judge or master, on payment of all arrears of rent and costs: 15 & 16 Vict. c. 76, sect. 212; see also sect. 1 of the Common Law Procedure Act, 1854 (23 & 24 Vict. c. 126). These enactments are not affected by the Conveyancing and Law of Property Act, 1881: see sect. 14, subsect. (8) of that Act, stated *infra*. The relief from forfeiture for non-payment of rent extends to underlessees: *Doe* v. *Byron*, 1 C. B. 623.

Conveyancing, &c., Act, 1881, sect. 14.

The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), contains the following provisions as to re-entry and forfeiture with respect to leases:—

Restrictions on and relief against for-

Sect. 14.—"(1.) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or

Relief from Forfeiture.

condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

feiture of leases.

"(2.) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit.

"(3.) For the purposes of this section a lease includes an original or derivative underlease, also a grant at a fee farm rent, or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators, and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the heirs, executors, administrators, and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns.

"(4.) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.

"(5.) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

"(6.) This section does not extend—

"(i.) To a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest; or

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"(ii.) In case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or the workings thereof.

"(7.) The enactments described in Part I. of the Second Schedule to this Act are hereby repealed (*b*).

"(8.) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

"(9.) This section applies to leases made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary."

In order to obtain relief under this section, the tenant must proceed before the landlord has re-entered: *Quilter* v. *Mapleson*, 9 Q. B. D., at p. 675.

In the case of the *North London Land Co.* v. *Jaques*, 32 W. R. 283, relief was granted under this section against forfeiture by reason of failure to complete a house by a certain time, upon an undertaking to pay rent in arrear, and to complete the house pursuant to the covenant by a time named in the order; see also *Bond* v. *Frere*, W. N. 1884, p. 47.

The landlord's notice under sub-sect. 1 of this section must expressly require the tenant to remedy the breach of covenant complained of: *North London Land Co.* v. *Jaques*, 32 W. R. 283.

Re-entry for non-payment of rent.

Formerly no ejectment could be maintained under a proviso for re-entry unless the rent was demanded on the day on which it became due with certain prescribed formalities: *Duppa* v. *Mayo*, 1 Wms. Saund. 287; see also *Phillips* v. *Bridge*, L. R. 9 C. P., at p. 49. In order to obviate the inconvenience arising from this rule, it is not unusual to insert in the proviso an express stipulation dispensing with the necessity for a formal demand of

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Repeals.

(*b*) The repealed enactments are as follows:—

22 & 23 Vict. c. 35, in part.	An Act to Further Amend the Law of Property and to Relieve Trustees.	In part; namely, sections four to nine.
23 & 24 Vict. c. 126, in part.	The Common Law Procedure Act, 1860.	In part; namely, section two.

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the rent, and by the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76, which virtually re-enacts the provisions of the stat. 4 Geo. 2, c. 28) it is enacted as follows :—

Proceedings in ejectment by landlord for non-payment of rent.

Sect. 210 (*c*). "In all cases between landlord and tenant, as often as it shall happen that one half year's rent shall be in arrear, and the landlord or lessor, to whom the same is due, hath right by law to re-enter for the non-payment thereof, such landlord shall and may, without any formal demand or re-entry, serve a writ in ejectment for the recovery of the demised premises; or in case the same cannot be legally served, or no tenant be in actual possession of the premises, then such landlord or lessor may affix a copy thereof upon the door of any demised messuage, or, in case such action in ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments comprised in such writ in ejectment, and such affixing shall be deemed legal service thereof; which service or affixing such writ in ejectment shall stand in the place and stead of a demand and re-entry; and in case of judgment against the defendant for non-appearance, if it shall be made to appear to the Court where the said action is depending, by affidavit, or be proved upon the trial in case the defendant appears, that half a year's rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that the lessor had power to re-enter, then and in every such case the lessor shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded, and a re-entry made; and in case the lessee or his assignee, or other person claiming or deriving under the said lease, shall permit and suffer judgment to be had and recovered on such trial in ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without proceeding for relief in equity within six months after such execution executed, then and in such case the said lessee, his assignee, and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all relief or remedy in law or equity, other than by bringing error for reversal of such judgment, in case the same shall be erroneous; and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease; 15 & 16 Vict. c. 76, sect. 210.

(*c*) This section is excepted from the general repeal of the Act by the Statute Law Revision Act, 1883 (46 & 47 Vict. c. 49), as are also the following sections, 211—220, relating to ejectments by landlords against tenants.

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and if on such ejectment a verdict shall pass for the defendant, or the claimant shall be nonsuited therein, then and in every such case such defendant shall have and recover his costs; provided that nothing herein contained shall extend to bar the right of any mortgagee of such lease, or any part thereof, who shall not be in possession, so as such mortgagee shall and do, within six months after such judgment obtained and execution executed pay all rent in arrear and costs and damages sustained by such lessor or person entitled to the remainder or reversion as aforesaid, and perform all the covenants and agreements which, on the part and behalf of the first lessee, are and ought to be performed."

Re-entry under statute.

The Act does not apply when there is a sufficient distress: *Doe* v. *Wandlass*, 7 T. R. 117; *Doe* v. *Shawcross*, 5 D. & Ry. 711. By sufficient distress is meant sufficient to cover all arrears due: *Cross* v. *Jordan*, 8 Ex. 149. The demised premises must be strictly searched, to ascertain that there is not sufficient distress: see *Rees* v. *King*, 2 Br. & B. 514; *Doe* v. *Fuchau*, 15 East, 286; *Doe* v. *Franks*, 2 Car. & K. 678; *Price* v. *Worwood*, 4 H. & N. 512; *Wheeler* v. *Stevenson*, 6 H. & N. 155. Proof that there was no distress is unnecessary, when the landlord was prevented from entering by the tenant's locking the doors: *Doe* v. *Dyson*, Moo. & M. 77: see *Doe* d. *Bracebridge* v. *Roe*, 7 Scott, 689.

Unripe growing crops may constitute a sufficient distress: *Ex parte Arnison*, L. R. 3 Ex. 56.

Necessity of words dispensing with a demand of payment at common law.

In conditions for re-entry on non-payment of rent after demand, it is proper to provide that the demand may be made at any time after the day of payment appointed by the condition, because, except in cases which fall under the enactment above stated (which only applies where a half year's rent is due, and there is no sufficient distress), the lessor is not entitled to enter under a condition for re-entry on non-payment of rent, without a formal demand, which must be made with great precision. But it is clear that the parties may, by agreement, dispense altogether with the necessity for such a demand of payment: *Dormer's Case*, 5 Rep. 40; *Goodright* d. *Hare* v. *Cator*, Doug. 477. And the words "although no formal or legal demand shall be made for payment" of the rent (which are frequently inserted

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in leases), have been held to render it unnecessary to make any demand whatever, previously to bringing an ejectment: *Doe* d. *Harris* v. *Masters*, 2 B. & C. 490; 4 D. & Ry. 44.

Tender of rent.

When the rent is not paid on the day it becomes due, tender to the lessor, at any time and place before the day allowed by the condition, will be sufficient: *Cropp* v. *Hambleton*, Cro. Eliz. 48.

Requisites of a formal demand for rent.

Unless the instrument of demise expressly dispenses with the necessity of a formal demand of the rent, or unless the case falls within sect. 210 of the Common Law Procedure Act, 1852 (stated *supra*), the landlord, in order to entitle himself to maintain an ejectment, must make a formal demand in strict accordance with the requirements of the common law: Co. Lit. 201 b; 1 Wms. Saund. 287 n.: see *Molineux* v. *Molineux*, Cro. Jac. 144; *Doe* d. *Forster* v. *Wandlass*, 7 T. R. 117. These requirements may be briefly stated as follows: see Woodf. L. & T. 297:—

1. The demand must be made by the landlord or his duly authorised agent: *Roe* d. *West* v. *Davis*, 7 East, 363.

2. It must be made on the very last day specified in the condition, exclusive of the day on which the rent became due: *Doe* d. *Dixon* v. *Roe*, 7 C. B. 134; see *Phillips* v. *Bridge*, L. R. 9 C. P. 48.

3. It must be made at any convenient time before the sun-setting of the last day of payment: Co. Lit. 202.

4. It must be made either upon the land or at the place appointed by the parties if the instrument of demise appoints such place: Co. Lit. 202: see *Borrough's Case*, 4 Rep. 73; *Buskin* v. *Edmunds*, Cro. Eliz. 415.

5. The demand must be of the precise sum due: *Fabian* v. *Winston*, Cro. Eliz. 209. If rent be payable quarterly, and the rent due for one quarter falls in arrear without being demanded, such arrears must not be included in a subsequent demand of the rent for the succeeding quarter: *Scot* v. *Scot*, Cro. Eliz. 73; *Tomkins* v. *Pincent*, 7 Mod. 97.

See further, as to the conditions requisite to a formal demand: *Maund's Case*, 7 Rep. 28; *Cluns' Case*, 10 Rep. 129; *Duppa* v. *Mayo*, 1 Wms. Saund.

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287; *Sapsford* v. *Fletcher*, 4 T. R. 511; *Doe* d. *Wheeldon* v. *Paul*, 3 C. & P. 613.

Words "lawfully demanded," how construed.

Inasmuch as when the proviso for re-entry requires simply that the rent should be "lawfully demanded," the demand must be according to the strictness of the common law; such words should not be introduced without qualification. The expression, however, does not exclude the operation of the statute; and, therefore, if a half-year's rent is due, and there is no sufficient distress, the lessor may enter notwithstanding these words, assuming, of course, that the case does not fall within the terms of the proviso: *Doe* d. *Scholefield* v. *Alexander*, 2 Mau. & S. 525; *Doe* d. *Earl of Shrewsbury* v. *Wilson*, 5 B. & Al. 384. The express reservation of a right of re-entry in case of non-payment after a certain number of days, qualifies the lessor's right of entry under the general clause in regard to the payment of rent: see *Smith* v. *Earl of Jersey*, 3 Bli. 464, 478.

Remedy under stat. 11 Geo. 2, to recover the vacant possession.

Entry to recover vacant possession.]—Where the premises are deserted, and there is no sufficient distress, the stat. 11 Geo. 2, c. 19, provides a remedy, enacting:—

Sect. 16. "That if any tenant holding at a rack-rent, or where the rent reserved shall be full three-fourths of the yearly value, who shall be in arrear for one year's rent, shall desert the demised premises, and leave the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent, it shall be lawful for two or more justices of the peace of the county, riding, division, or place (having no interest in the demised premises), at the request of the lessor or landlord, or his, her, or their bailiff or receiver, to go upon and view the same, and to affix, or cause to be affixed, on the most notorious part of the premises, notice in writing, what day (at the distance of fourteen days at least) they will return to take a second view thereof; and if upon such second view the tenant, or some person upon his or her behalf, shall not appear and pay the rent in arrear, or there shall not be sufficient distress upon the premises, then the said justices may put the landlord or landlords, lessor or lessors, into the possession of the said demised premises; and the lease thereof to such tenants, as to any demise therein contained only, shall from thenceforward become void."

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Sect. 17 declares that such proceedings of the justices shall be examinable in a summary way by the next justice or justices of assize of the counties in which such lands or premises lie; and if they lie in London or Middlesex, by the Courts of Queen's Bench or Common Pleas [and if in the counties palatine of Chester, Lancaster, or Durham, then before the judges thereof; and if in Wales (*d*), then before the Courts of Grand Sessions respectively]; who are empowered to order restitution to be made to such tenant, together with his or her expenses and costs, to be paid by the lessor or landlord, if they shall see cause for the same; and in case they shall affirm the act of the said justices to award costs not exceeding £5 for the frivolous appeal: see as to proceedings under this Act, *Ashcroft* v. *Bourne*, 3 B. & Ad. 684; *Boston* v. *Carew*, 5 D. & Ry. 558; *Doe* d. *Bracebridge* v. *Roe*, 7 Scott, 689.

Extended by stat. 57 Geo. 3, c. 52.

By stat. 57 Geo. 3, c. 52, the provisions of this statute are extended to tenants who shall be in arrear one half-year's rent, and who shall hold under any demise or agreement, whether written or verbal, and although no right of re-entry be given in case of non-payment of rent.

It was held, where a tenant ceased to reside on the premises for several months, and left them without any property to satisfy the year's rent, that landlord might properly proceed under the stat. 11 Geo. 2, c. 19, s. 16, to recover the premises, although he knew where the tenant then was, and although the justices found a servant upon the premises when they first went to view them; the Court considering that this person was placed there to maintain a colourable possession: *Ex parte Pilton*, 1 B. & Al. 369.

Deserted premises within metropolitan police district.

As to the recovery of possession of deserted premises situate within the metropolitan police

(*d*) The jurisdiction of the Courts of Great Sessions is abolished by the 11 Geo. 4 & 1 Will. 4, c. 70; and that of the judges of the Palatine Courts over matters of this nature by the Judicature Act, 1873.

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district by means of a warrant issued by a police magistrate: see stats. 3 & 4 Vict. c. 84, sect. 13, and 11 & 12 Vict. c. 43, sect. 34. By sect. 33 of the last-mentioned Act a stipendiary magistrate in any city, town, liberty, borough, or place (other than the city of London and the metropolitan police district) may exercise in like manner as two or more justices the powers conferred by the stat. 11 Geo. 2, c. 19, *supra*.

3. Apportionment of Conditions.

Apportionment of conditions on severance, &c.

As regards leases made after the 31st of December, 1881, the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), enacts as follows:

Sect. 12. (1.) Notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition, contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.

(2.) This section applies only to leases made after the commencement of this Act.

Effect of this provision.

This section supplements the provisions of sects. 10 and 11 of the Act (*ante*, p. 233), and provides for the apportionment of conditions both where the reversion is severed and where there is an avoidance or cesser in any manner of the term as to part of the land. The apportioned conditions will then, by virtue of the two preceding sections, run with the reversion. Lord St. Leonards' Act (22 & 23 Vict. c. 35), sect. 3, provided only for the apportionment of conditions of re-entry when the reversion was severed and the rent was legally apportioned.

CHAPTER VI.

AS TO INDORSEMENTS ON LEASES.

Indorsements on Leases.

WHERE it is intended to change or add to the provisions of a lease already prepared, this alteration is usually affected by way of indorsement, and the memorandum so indorsed, if made previously to the execution of the lease (*a*), is, in point of construction and effect, considered as part of the instrument.

Provisions in leases may be be varied by indorsement.

Thus, in *Goodright* d. *Nicholls* v. *Mark*, 4 Mau. & S. 30, where lands were demised for twenty-one years, determinable by the lessees at the end of seven or fourteen years, on giving twelve months' notice, a memorandum was indorsed before its execution, by which it was agreed that the lessor should have the same option of determining the lease as the lessees upon a like notice, and it was not attempted to be denied that this clause formed an integral part of the lease. See also *Griffin* v. *Stanhope*, Cro. Jac. 456.

Caution suggested in framing indorsements.

Indorsements, however, for varying the provisions of a lease or other instrument, as originally prepared, should always be framed with great care, and with a due regard to the whole contents of the instrument; for a memorandum of this nature being generally the offspring of some sudden and unpremeditated arrangement between the parties, when the deed is ready for execution, often raises questions in regard to the effect of engrafting this new article upon the provisions of the lease. Thus, in *Flint* v. *Brandon*, 1 Bos. & P. N. R. 73, where there was a covenant in a lease that the lessee should not dig gravel out of any part of the demised premises, without the consent of the lessor, or paying £10 per

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Presumption as to time when an indorsement is made.

(*a*) An indorsement on a deed, or any alteration therein is, in the absence of proof to the contrary, presumed to have been made at the execution of the deed, and accordingly to form part of the instrument: *Brewster* v. *Kidgell*, Carth. 438; *Flint* v. *Brandon*, 1 Bos. & P. N. R. 73; *Doe* d. *Tatum* v. *Catamore*, 16 Q. B. 745.

Indorsements on Leases.

load, except what should be dug out of two acres, part of the demised premises, and part of a garden late in the occupation of A.; and by indorsement made before the execution of the lease, it was agreed that it should be lawful for the lessor to let any part of the premises for the purpose of making bricks or tiles, he paying the lessee £3 for every acre he should so let; and further, that it should be lawful for the lessee to break up and dig for gravel in any part of the demised premises, he covenanting to pay the lessor £20 for every acre he should so dig, at or before the expiration of the time, and to make good the same; the question was, whether the lessee was entitled to dig in the two acres of garden ground without making them good; and it was held that he was not, for the memorandum was in general terms, and extended to every part of the land demised.

Indorsement executed after signing, but before delivery.

It has been held to be no objection to treating an indorsement as part of a deed, that it was executed after the deed was signed, but before it was sealed and delivered; Lord *Ellenborough* observing, "that this was sufficient, since the whole was one transaction done at the same time": *Lyburn* v. *Warrington*, 1 Stark. 162; see *Jones* v. *Jones*, 1 Cr. & M. 721, where an alteration was made in a deed after the conveying party had executed, and before execution and assent by any other party; and the grantor re-executed immediately after the alteration; and it was held that the deed did not require re-stamping. See also *Knight* v. *Crockford*, 1 Esp. 189; *Doe* d. *Waters* v. *Houghton*, 1 M. & Ry. 208; *Hall* v. *Chandless*, 12 Moo. 316; *Reed* v. *Deere*, 7 B. & C. 261; *ante*, tit. ATTESTATION, Vol. II. p. 252.

Indorsement made subsequently to execution, treated as a separate instrument.

But a memorandum indorsed upon a lease or other instrument *subsequently* to its execution, though it professes to refer to the intention of the parties at the time, is to all intents, a new instrument, and must be executed and stamped accordingly: *Goodright* d. *Nicholls* v. *Mark*, 4 Mau. & S. 30; *Dowling* v. *Mill*, 1 Mod. 541.

Receipts.

As to indorsements of receipts for fines, &c., see *ante*, p. 128.

CHAPTER VII.

TENANCIES FROM YEAR TO YEAR.

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1. TENANCIES FROM YEAR TO YEAR: HOW CREATED.

Tenancies from Year to Year, how Created.

General letting.

A GENERAL letting at an annual rent, without any limitation as to time, creates, in construction of law, a tenancy from year to year (*a*), which is the most ordinary species of letting in modern times, having, in a great measure, superseded tenancies at will, which formerly were held to arise under circumstances of this

(*a*) The payment of rent is *primâ facie* evidence of a yearly tenancy, which may be rebutted by circumstances: see *Doe* v. *Dodd*, 2 N. & M. 838; *Phillips* v. *Moseley*, 1 Car. & P. 262; *Doe* v. *Francis*, 2 M. & Rob. 57; *Doe* d. *Lord* v. *Crago*, 6 C. B. 90; *Woodbridge Union* v. *Colneis*, 13 Q. B. 269; *Marquis of Camden* v. *Batterbury*, 7 C. B. N. S. 864; see also *Crouch* v. *Tregonning*, L. R. 7 Ex. 88; *Adams* v. *Hagger*, 4 Q. B. D. 480. A tenancy by permission, rent free, can never become a yearly tenancy, without some agreement for that purpose: *Doe* d. *Jones* v. *Jones*, 10 B. & C. 718; see *Revett* v. *Brown*, 2 Moo. & P. 12. The common case of a purchaser entering before the conveyance is a familiar example: see *Doe* d. *Newby* v. *Jackson*, 1 B. & C. 448; *Roe* d. *Blair* v. *Street*, 4 N. & M. 42. An agreement that the purchaser should pay and allow to the "vendor at the rate of £100 per annum, from the time of taking possession, until the completion of the purchase," was held to be an agreement for rent: *Saunders* v. *Musgrave*, 9 D. & Ry. 529; but where the agreement was to be completed at the end of three months, and the purchaser to be let into immediate possession, paying interest at the rate of £5 per cent. on the purchase-money in the meantime, the court held, that no more than a tenancy at will existed: *Doe* d. *Tombes* v. *Chamberlayne*, 5 M. & W. 14. Where the tenancy is incident to some office (as that of a schoolmaster), the right to put an end to it may be regulated by the right to put an end to the appointment: *Wilkinson* v. *Malin*, 2 Cr. & J. 636.

Tenancies from Year to Year, how Created.

nature: *Agard* v. *King*, Cro. Eliz. 775. And it is immaterial whether the rent be reserved half-yearly or quarterly: see *Richardson* v. *Langridge*, 4 Taun. 128. A mere demand of rent is not sufficient to convert a tenancy at sufferance, on which no rent is reserved, into a yearly tenancy: *Doe* d. *Rogers* v. *Pullen*, 3 Scott, 271. But a demand of rent acquiesced in by the occupier, may be sufficient, without actual payment: *Cox* v. *Bent*, 9 Moo. & P. 281. When the lease is for purposes of husbandry, and the crop requires two or three years to come to perfection, it seems a longer tenancy might be presumed: *Roe* d. *Bree* v. *Lees*, 2 W. Bl. 1171.

Void parol demise.

So, where a person is let into possession under a parol demise, which is void on account of its being for a longer period than is allowed by the Statute of Frauds, *i.e.*, for more than three years, he is tenant from year to year: *Doe* d. *Rigge* v. *Bell*, 5 T. R. 471; *Clayton* v. *Blakey*, 8 T. R. 3. So, agreements in writing for terms longer than three years, which not being under seal were void as leases under the stat. 8 & 9 Vict. c. 106, have been held after payment of rent to constitute good tenancies from year to year on the terms of the agreement so far as applicable to such tenancies: *Lee* v. *Smith*, 9 Ex. 662; see also *Bond* v. *Rosling*, 1 B. & S. 371, and *Tidey* v. *Mollett*, 16 C. B. N. S. 268, where such instruments were held good as agreements. What was the nature of the tenancy before any payment of rent had been made, seems to have been a debateable point: see *Doe* d. *Hollingsworth* v. *Stennett*, 2 Esp. 717. But in a recent case it has been decided that since the Judicature Acts the rule no longer holds that a person holding under an executory agreement for a lease is only made tenant from year to year at law by the payment of rent, but that he is to be treated in every Court as holding on the terms of the agreement: *Walsh* v. *Lonsdale*, 21 Ch. D. 9; see *ante*, p. 99. In *Doe* v. *Bell*, 5 T. R. 471, when the tenant entered at Lady-day, under a parol lease for seven years, the tenant to enter at Lady-day and quit at Candlemas, a notice to quit at Lady-day was held to be

bad. Where, under a similar agreement, the tenant continued to occupy until the end of the term contracted for, it was held that the landlord might then bring ejectment without having given the tenant notice to quit: *Doe* d. *Tilt* v. *Stratton*, 1 Moo. & P. 183. The same point was determined as to an agreement to repair in *Richardson* v. *Gifford*, 3 N. & M. 325; and see *Beale* v. *Sanders*, 5 Scott, 58. It may be here observed that, although no action can be maintained for breach of an executory parol agreement for a lease for less than three years (*Inman* v. *Stamp*, 1 Stark. 12; *Edge* v. *Strafford*, 1 Cr. & J. 391), yet, after the lessee has taken possession under such an agreement, he holds subject to the special conditions of the agreement: *Lord Bolton* v. *Tomlin*, 1 N. & P. 247; *Martin* v. *Smith*, L. R. 9 Ex. 50.

Tenancies from Year to Year, how Created.

Parol demise for less than three years.

The presumption that a tenancy from year to year is created by payment and acceptance of rent is the same in the case of a corporation as in the case of an individual: *Doe* d. *Pennington* v. *Taniere*, 12 Q. B. 998. And where a person enters, occupies, and pays rent for corporate property under a demise for a term of years made on behalf of the corporation, but not sealed with their common seal, he becomes tenant from year to year on such terms of the demise as are applicable to a yearly tenancy: *Eccl. Commrs.* v. *Merral*, L. R. 4 Ex. 162; see also *Wood* v. *Tate*, 2 Bos. & P. 247. The terms of the agreement will be enforced both against and in favour of a corporation: *Marshall* v. *Corporation of Queensborough*, 1 S. & S. 520; *Stevens' Hospital* v. *Dyas*, 15 Ir. Ch. R. 405.

Parol promise to grant a lease.

Where a mortgaged term became forfeited, and it was agreed that a new lease should be granted to the mortgagee, and that he should under-let to the mortgagor, and the lease was accordingly made to the mortgagee, who let the mortgagor into possession, and said, "Go on as before; pay me the money as fast as you can; and, when you have paid it, you shall have your underlease;" and no rent was ever paid, though demanded, it was held, that, even if the agreement were for a lease on the terms of that which had expired, it was conditional on the pay-

Tenancies from Year to Year, how Created.

ment of the money, and therefore did not amount to a present demise: *Doe* d. *Rogers* v. *Pullen,* 3 Scott, 271; see *Doe* d. *Bingham* v. *Cartwright,* 3 B. & Al. 326.

Void lease, in intended execution of a power.

Upon a similar principle, where a tenant for life, with a power of leasing, makes a lease which is void against the remainderman for non-compliance with the requisitions of the power, the acceptance of rent by the remainderman which, it is well known, does not operate to confirm the lease, creates a tenancy from year to year: *Doe* d. *Martin* v. *Watts,* 7 T. R. 83; *Denn* d. *Brune* v. *Rawlins,* 10 East, 261; *Doe* d. *Tucker* v. *Morse,* 1 B. & Ad. 365; see *Hutton* v. *Warren,* 1 M. & W. 466, where a tenant of a parson having paid rent to his successor, was considered to hold under the terms of the former lease.

And if the reversioner or remainderman accept the rent as due on the days of payment at which it was reserved by the lease, this will be conclusive evidence of the holding being from the same period of the year as under the lease, and not from the death of the tenant for life: *Roe* d. *Jordan* v. *Ward,* 1 H. Bl. 97.

Where lessee holds over, and lessor accepts rent.

Where a lessee for a definite term holds over after the expiration of his lease, and the lessor accepts rent from him, though the payment of rent were for a single quarter only, he becomes tenant from year to year, and cannot quit or be ejected without notice: *Bishop* v. *Howard,* 2 B. & C. 100; 3 D. & Ry. 293; see also *James* v. *Dean,* 11 Ves. 395; *Simpkin* v. *Ashurst,* 1 Cr. M. & R. 261; *Torriano* v. *Young,* 6 Car. & P. 8; but see *Freeman* v. *Jury,* 1 Moo. & M. 19; *Pierse* v. *Sharr,* 2 M. & Ry. 418. And the terms of the new holding will be considered to be the same as those of the expired lease: *Doe* d. *Spicer* v. *Lea,* 11 East, 312; even though there be a variation in some particulars, as by an advance of rent: *Digby* v. *Atkinson,* 4 Camp. 275. But holding over, and paying double rent, under the stat. 11 Geo. 2, c. 19, s. 18 (*infra,* p. 305), does not create any tenancy: *Booth* v. *Macfarlane,* 1 B. & Ad. 904. A tenant for a term, holding over without paying rent, is only liable in use and occupation for the time

during which he holds over; but a tenant from year to year holding over, is liable for a whole year, before payment of rent: *Ibbs* v. *Richardson*, 1 Per. & D. 618.

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So, in *Mann* v. *Lovejoy*, 1 Ry. & M. 355, a distress on the goods of a tenant, who was let into possession under an agreement for a lease, and who had paid rent, was sustained: see *Doe* d. *Westmoreland* v. *Smith*, 1 M. & Ry. 137; *Hamerton* v. *Stead*, 5 D. & Ry. 206. And it is to be observed, that although the agreement for a lease does not specify the rent to be paid, yet, if a rent be paid during the holding under it, this creates a tenancy from year to year, and entitles the landlord to distrain for arrears of rent at the rate previously paid: *Knight* v. *Bennett*, 11 Moo. 222. The assent of both parties to an account for rent is equivalent to payment: *Cox* v. *Bent*, 2 Moo. & P. 281.

But a tenant who enters under an agreement for a lease, is not for all purposes considered as a tenant from year to year; for it has been held that, at the expiration of the term contracted for, he may be ejected without a notice to quit, being, in this respect, regarded as standing in the same situation as if the lease had been granted: *Doe* d. *Tilt* v. *Stratton*, 1 Moo. & P. 183. Until a yearly tenancy has been created by payment of rent, the tenant in possession may be ejected at any time on mere demand of possession: *Hegan* v. *Johnson*, 2 Taun. 148; see *Lapierre* v. *M'Intosh*, 1 Per. & D. 629.

Where a tenant comes in, in the place of one who is leaving, it seems he will be considered as his successor in the tenancy before he has paid rent: *Doe* d. *Morris* v. *Williams*, 9 D. & Ry. 30; see *Bruce* v. *Ruler*, 2 M. & Ry. 3; *Woodcock* v. *North*, 1 M. & Sc. 317.

Tenancies a will may be created by express contract.

A tenancy at will may, however, be created by express contract: and this construction was given to a tenancy which was to endure for so long time as the parties respectively pleased, there being no reservation of an annual rent from which to infer an annual letting: *Richardson* v. *Langridge*, 4 Taun. 128. And such a tenancy may be created notwith-

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standing the reservation of an annual rent, if such be the expressed desire of the parties: *Doe* d. *Bastow* v. *Cox*, 11 Q. B. 122; *Doe* d. *Dixie* v. *Davies*, 7 Ex. 89.

Tenants at will cannot be ejected without demand of possession.

A tenant at will, it should be observed, though not entitled to a prospective notice to quit, as in the case of a tenant from year to year, cannot be ejected by legal process without a previous demand of possession; for, the possession being originally lawful, the owner is not at liberty to treat the tenant as a trespasser without such a demand. And therefore it has been repeatedly determined that, where a person is let into possession under a contract for a purchase (a step which a well-advised vendor seldom consents to), the owner cannot evict him without a previous demand of possession: *Right* d. *Lewis* v. *Beard*, 13 East, 210; *Doe* d. *Newby* v. *Jackson*, 2 D. & Ry. 414; *Ball* v. *Cullimore*, 2 Cr. M. & R. 120; *Saunders* v. *Musgrave*, 9 D. & Ry. 529. As to the right to maintain an action for the use and occupation in such a case, see *Kirtland* v. *Pounsett*, 2 Taun. 145. It is not easy to say what act is sufficient to determine the will; a mere entry by the landlord in the absence of the tenant, and not communicated to him, does not seem to be sufficient: *Lapierre* v. *M'Intosh*, 1 Per. & D. 629. Where B. held at the will of A., and C. held at the will of B., a demand of possession upon the premises made by A. from C.'s wife was held sufficient: *Roe* d. *Blair* v. *Street*, 4 N. & M. 42. The death of either party is a determination of the will: *Doe* d. *Burgess* v. *Thompson*, 1 N. & P. 215.

Possession under circumstances held not to create a tenancy.

In regard to tenancies from year to year, it is further to be observed that, in order to constitute such a tenancy, an actual or implied letting is necessary; and, therefore, where a person obtained possession of a house which was empty, without the privity of the landlord, intending to take a lease of it from him, and some negotiation afterwards took place between them upon the subject, but they disagreed about the valuation of the fixtures; Lord *Ellenborough* held, that the relation of landlord and tenant never subsisted; if it was a tenancy of

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any sort, it was a tenancy at sufferance, and no notice to quit was necessary: *Doe* d. *Knight* v. *Quigley*, 2 Camp. 504.

So, if a tenant, whose lease is expired, be permitted to continue in possession, pending a treaty for a renewal, he does not thereby become a yearly tenant, unless rent has been received, but so strictly at will that he may be turned out of possession without notice: *Doe* d. *Hollingsworth* v. *Stennett*, 2 Esp. 717, though as tenant at will he is entitled, we have seen, to a demand of possession.

Presumption of tenancy from year to year, less favoured in regard to lodgings.

Where the letting is of apartments only, the presumption is less favourable to a tenancy from year to year, than in the other cases, such a transaction being contrary to the usual mode of letting lodgings. Thus, in *Wilson* v. *Abbott*, 3 B. & C. 88, it appeared that A., at Michaelmas, 1822, let apartments in his dwelling-house to B. at a rent payable half-yearly; B. took possession, and at Lady-day, 1823, paid a half-year's rent. On the 23rd of June, 1823, B. left the apartments without giving any notice to quit, and tendered to the landlord one quarter's rent to the then Midsummer, which he refused to accept; and when Michaelmas came, demanded a half-year's rent, which B. paid. At Lady-day, 1824, A. demanded another half-year's rent, which B. refused to pay; upon which an action for use and occupation was brought. It was held that there was no ground for inferring a contract for a tenancy continuing from year to year, and consequently that the action was not maintainable.

Tenancy from year to year, when for two years certain.

Agreements intended to create yearly tenancies, determinable by notice at the end of the first year, have often been so expressed as to create certain interests for two or more years. It would seem to have been held in the early cases, that a lease from year to year as long as the parties please, is but a lease for one year: see *Legg* v. *Hackett*, or *Strudwick*, 2 Salk. 414, pl. 6; Gwill. Bac. Ab. *Lease*. Where, however, the agreement was for a tenancy "not for one year only, but from year to year," it was held to amount to a lease for two years certain: *Denn* d. *Jacklin* v. *Cartwright*, 4 East, 31; and where a de-

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mise was "for one year from the date hereof, and so on from year to year, until the tenancy hereby created shall be determined as hereinafter mentioned" (namely, by three months' notice), it was held that the tenancy could not be determined by notice before the end of the second year: *Doe* d. *Chadborn* v. *Green*, 1 Per. & D. 454.

In *Thompson* v. *Maberley*, 2 Camp. 573, the agreement was "for twelve months certain, and six months' notice to quit afterwards," and a notice to quit at the end of the first year was held good, as the statement of one period as certain excluded the construction of a longer certain period being intended: see *Doe* v. *Donovan*, 1 Taunt. 555; *Kemp* v. *Derrett*, 3 Camp. 510.

An agreement that "A. and B. should become tenants of certain premises, at £375 a quarter, the tenancy to commence on the 14th June, they paying a quarter's rent on that day; and that they should give security to pay one quarter's rent in advance as long as they should continue tenants," was held to create only a quarterly tenancy: *Wilkinson* v. *Hall*, 4 Scott, 301.

2. Tenancies from Year to Year, how Determined; and as to Notices to Quit.

Notice to quit, when necessary.

Where lands are demised for a definite term, no notice to quit at the end of the term is necessary, but the relation of landlord and tenant ceases between the parties at that period, and the tenant continuing in possession might thenceforth be treated as a trespasser. A tenancy from year to year, however, is a continuing interest until determined on one side or other by notice; except in the case of a tenancy from year to year, arising out of a void demise by parol, or by writing not under seal, for a longer term, *ante*, p. 124; and this necessity of notice, which applies as well to the first as to every succeeding year of the tenancy, forms one of the principal characteristics of this species of interest, and generally raises the question in regard to its creation. The death of a tenant from year to year,

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it is clear, has no effect upon the tenancy, which vests in his personal representatives: *Doe* d. *Shore* v. *Porter*, 3 T. R. 13; and see *Agard* v. *King*, Cro. Eliz. 775; *Rees* d. *Mears* v. *Perrot*, 4 Car. & P. 230; *Buckworth* v. *Simpson*, 1 Cr., M. & R. 834; in which respect it differs from a tenancy at will, which is determined by the death of either party: see *James* v. *Dean*, 11 Ves. 391; and it may be observed, that the interest which devolves upon executors or administrators under a tenancy from year to year, and, apparently, even the benefit they derive from succeeding to the lands without a title, as where the tenancy is at will or by sufferance, is a trust for the persons beneficially entitled: see *James* v. *Dean*, 11 Ves. 392; *Randall* v. *Russell*, 3 Mer. 190.

Tenancy from year to year not affected by death, &c.

A tenancy from year to year is, of course, equally unaffected by the death of the lessor, unless, indeed, his interest in the lands determined on that event (*b*), in which case the tenancy is necessarily at an end. And, upon this principle, it was held that where the incumbent of a living let the glebe lands to a tenant from year to year, his successor might eject the tenant without any previous notice to quit: *Doe* d. *Kerby* v. *Carter*, 1 Ry. & M. 237. But where the succeeding incumbent permitted the tenants of the glebe lands to continue in possession for eight months after the death of his predecessor, he was considered to have assented to the continuance of the tenancy on the same terms as before, and it was held that he could not eject the tenants without notice: *Doe* d. *Cates* v. *Somerville*, 6 B. & C. 129.

Persons claiming under the lessor or lessee, by grant or assignment (whether by way of mortgage or otherwise), are of course bound to give, and entitled to receive, the same notice as the lessor or lessee himself: *Birch* v. *Wright*, 1 T. R. 378; see *Doe* v. *Hilder*, 2 B. & Al. 782. As to leases by mortgagees, *ante*, p. 84, and *infra*, tit. MORTGAGEES.

Tenant disclaiming the tenancy may

A tenant, who has done any act renouncing the tenancy, may be evicted as a trespasser without any

(*b*) As to the powers of leasing given to limited owners by statutory enactment, see *ante*, p. 24.

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be evicted without notice.

previous notice (*c*). But where there are conflicting claims by persons who profess to derive their title from the original lessor, as between an heir-at-law and devisee, a refusal by the tenant to pay the rent to one claimant, where it was accompanied by an expression of willingness to pay the rent to the person entitled to receive it, was held to be no disavowal of the title of his landlord, so as to deprive the tenant of his right to a regular notice: *Doe* d. *Williams* v. *Pasquali*, Peake, 259. See *Doe* d. *Clun* v. *Clarke*, P. Ad. Ca. 230.

Interpleader in case of adverse claims.

A tenant, who is threatened with proceedings to compel payment of rent, by several adverse claimants, may protect himself by interpleader, provided it involve no denial of his landlord's title: *Clarke* v. *Byne*, 13 Ves. 383; but he must be careful not to collude with either claimant. These proceedings, however, are not of very frequent occurrence; because, as the costs of the tenant come out of the fund, it is obviously the interest of the contending parties that some amicable arrangement should be made, under which the tenant may safely pay his rent, for the benefit of the claimant to whom it may eventually be decided to belong.

Notices to quit.

Notice to quit.]—In regard to the question, what is a sufficient notice to determine a tenancy from year to year, the following points have been determined:—

What is a sufficient notice to determine a tenancy from year to year.

That it must generally be a half year's notice (*d*), and must expire at the period of the year at which the tenancy commenced: *Gulliver* d. *Tasker* v. *Burr*, 1 Bli. 596; *Roe* d. *Jordan* v. *Ward*, 1 H. Bl. 197; *Right* d. *Flower* v. *Darby*, 1 T. R. 159; *Leighton* v. *Theed*, 1 Ld. Ray. 707; *Doe* v. *Spence*, 6 East, 121. And it is immaterial whether the letting was from

(*c*) As to what acts amount to such a renunciation of title: see *Doe* d. *Calvert* v. *Frowd*, 1 Moo. & P. 480; *Doe* v. *Grubb*, 5 M. & Ry. 666; *Cornish* v. *Search*, 1 M. & Ry. 703; *Doe* v. *Pitman*, 2 Nev. & M. 672; *Doe* v. *Litherland*, 6 Nev. & M. 313; *Doe* v. *Flynn*, 1 Cr. M. & R. 137; *Doe* v. *Wells*, 2 Per. & D. 296; *Doe* v. *Cooper*, 8 Scott, 36; *Doe* d. *Bennett* v. *Long*, 9 C. & P. 773; *Jones* v. *Mills*, 10 C. B. N. S. 788; *Vivian* v. *Moat*, 16 Ch. D. 730.

(*d*) In cases where the Agricultural Holdings Act, 1883, applies, a year's notice to quit is now necessary, see *infra*, p. 286.

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one of the general quarter-days, or from any other day; and, therefore, where a tenant entered on the 29th day of October, under an agreement that he should "always be subject to quit at three months' notice," (and which was held to create a quarterly tenancy), Lord *Ellenborough* held, that the quarterly notice should expire on the 29th of January, the 29th of April, the 29th of July, or the 29th of October: for that, in the absence of evidence to the contrary, it must be presumed that he held from the time when he entered as tenant: *Kemp* v. *Derrett*, 3 Camp. 509. Though the tenancy in this case was a quarterly tenancy, it is obvious that the same principle applies to a tenancy from year to year.

What the expiration of the tenancy, where tenant enters in the middle of a quarter.

But where the tenant entered in the middle of a quarter, upon an agreement "to pay rent quarterly, and for the half-quarter," it was held that the tenancy commenced from the quarter-day preceding the entry: *Doe* d. *Hadmore* v. *Selwyn*, Adam, Eject. 129.

Notice must be from quarter-day to quarter-day.

The general rule, however, seems to be, that if a tenant enters in the middle of a quarter, and pays rent for the fractional period of the current quarter, from the end of which quarter he pays half-yearly, (which is a very frequent arrangement), his tenancy commences from the regular quarter-day to which he paid up: and in order to dissolve the tenancy, the half-year's notice to quit must expire at that period: *Doe* d. *Holcomb* v. *Johnson*, 6 Esp. 10. *Savage* v. *Stapleton*, 3 Car. & P. 275. See *Doe* d. *Bedford* v. *Kendrick*, Ad. Eject. 129; *Powis* v. *Smith*, 1 D. & Ry. 420; *John* v. *Jenkins*, 1 Cr. & M. 227, as to the effect of an agreement for a different rent, &c. in the middle of a quarter.

The half-yearly notice to determine a tenancy which commenced at any general quarter-day should be from the last preceding quarter-day but one; and it is no objection to such notice that the interval between these days consists of less than a moiety of three hundred and sixty-five days, or than six calendar months. Thus, a notice given at Michaelmas-day, to quit at the following Lady-day, is sufficient, though it include a hundred and seventy-seven days only, which is less than half the year. *Doe* d. *Harrop* v.

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Green, 4 Esp. 199; *Doe* d. *Durrand* v. *Doe*, 6 Bing. 574. And by parity of reasoning, a previous notice of six calendar months, or of the number of days included in half the year, will not be sufficient, if it do not extend from quarter-day to quarter-day: *Morgan* v. *Davies*, 3 C. P. D. 260. But the Courts, it seems, will construe a notice to quit at the expiration of "six calendar months," as a half-yearly notice; and, therefore, such a notice given from Lady-day has been held to be a good notice to quit at Michaelmas; and Lord *Ellenborough* observed, that if the word "calendar" had been omitted, it would have been equally good: *Howard* v. *Hemsley*, 6 Esp. 53.

A popular notion prevails, that a notice to quit must be served before twelve o'clock at noon, on the quarter-day, but this is not correct; for the law does not in general recognise fractions of a day, and a service at any time before midnight, when the day expires (or at all events before sunset), would be good.

Reservation of rent quarterly does not vary the rule.

The fact of the rent being reserved quarterly is no dispensation with a half-year's notice: *Shirley* v. *Newman*, 1 Esp. 766; and see *Brown* v. *Burtenshaw*, 7 D. & Ry. 603.

Rule may be varied by custom.

But a custom may be shown in favour of a longer or shorter notice: *Roe* d. *Brown* v. *Wilkinson*, Harg. Co. Lit. 270. b., n.; *Roe* d. *Henderson* v. *Charnock*, Peake, 4; *Tyley* v. *Seed*, Skinn. 649; and see 3 Burr. 1609; as well where the letting is under a written agreement, (the agreement, of course, being silent on the subject): *Brown* v. *Burtenshaw*, 7 D. & Ry. 603, as where it is not reduced to writing.

Custom of London.

By the custom of London, it seems, a half-year's notice is requisite of messuages of above 40*s.* rent, and a quarter's notice where the rent is under that sum: *Tyler* v. *Seed*, Skinn. 649.

Parol evidence.

It has been held, that, in the case of a parol demise, with a stipulation that the rent shall take place from the following Lady-day, evidence is admissible that, by the custom of the country, *old* Lady-day must have been intended: *Doe* d. *Hale* v. *Benson*, 4 B. & Al. 588. But *contra*, it seems, where the lease is by deed: *Doe* d. *Spicer* v. *Lea*, 11 East, 312. See

Smith v. *Walton*, 1 M. & Sc. 380; *Denn* v. *Hopkinson*, 3 D. & Ry. 507; *Carlby* v. *Martinez*, 11 A. & E. 720.

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An express stipulation varying the length of the notice to be given does not interfere with the rule regulating the period of its expiration; and, therefore, if parties agree that the tenancy shall be determinable at a quarter's notice, such notice must, in the absence of agreement or custom to the contrary, (see 7 D. & Ry. 611), expire at that period of the year at which the tenancy commenced: *Doe* d. *Pitcher* v. *Donovan*, 1 Taun. 555; 2 Camp. 78. See *Kemp* v. *Derrett*, 3 Camp. 510.

Notice must expire at the end of the year, notwithstanding variation as to length.

Where the original lessee holds over after the determination of the lease, the implied tenancy created by payment and acceptance of rent, will be deemed to have commenced from the date which corresponds to his entry under the lease, and not from the determination of the lease: *Roe* d. *Jordan* v. *Ward*, 1 H. Bl. 98; *Doe* d. *Collins* v. *Waller*, 7 T. R. 478; *Doe* d. *Robinson* v. *Dobell*, 1 Q. B. 806; *Humphreys* v. *Franks*, 18 C. B. 323; *Kelby* v. *Patterson*, L. R. 9 C. P. 681. So in *Berey* v. *Lindley*, 3 M. & Gr. 498, the defendant entered at Michaelmas, 1823, under an agreement for a lease for a term of five years and a half which would end at Lady-day, 1829; the defendant having held over the term, and paid rent, it was held that the resulting tenancy from year to year was in correspondence with the commencement of the original tenancy and therefore from Michaelmas. But where a lease is assigned, and the assignee holds over, the tenancy from year to year will be deemed to commence from the determination of the lease; so where a sub-lessee by assignment held over after the expiration of a lease for fourteen years and a half from the 25th of December, 1831, it was held that a notice to quit at Midsummer was good: *Doe* d. *Buddle* v. *Lewis*, 11 Q. B. 402. See also the observations on this case of Lord *Coleridge*, C. J., in *Kelby* v. *Patterson*, L. R. 9 C. P., at p. 687.

Where tenancy is created by holding over.

It not unfrequently happens, that a tenant enters upon the several parts of the demised premises at different times of the year, and hence arises the

Question where tenant enters upon

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question, which is to be considered as the period of entry, for the purpose of regulating the commencement and determination of the tenancy.

different parts at different times.

In the case of farms, where the tenant (as is often the case), enters upon the arable land before the quarter-day, for the purpose of sowing and preparing it, the tenancy generally commences and the rent begins to run from the next quarter-day: *Doe* d. *Dagget* v. *Snowdon*, 2 Bli. 1224; *Doe* d. *Strickland* v. *Spence*, 6 East, 120.

Relative value must often be resorted to, for the purpose of determining which is the principal, and which the auxiliary subject of demise, and the conclusion is, in all cases, matter for the consideration of a jury: *Doe* d. *Heaper* v. *Howard*, 11 East, 488; see *Doe* d. *Bradford* v. *Watkins*, 7 East, 551; *Doe* d. *Mayor of Richmond* v. *Morphett*, 7 Q. B. 577.

As to lettings by the month, &c.

Where houses or lodgings are let from month to month, or week to week, a month's or week's notice is required to determine the letting: *Doe* d. *Parry* v. *Hazell*, 1 Esp. 94, unless a longer or shorter notice be stipulated for: *Doe* d. *Peacock* v. *Raffan*, 6 Esp. 4; and by the same rule which governs tenancies from year to year, the notice, in such cases, whatever be its duration, must expire at the end of the month, &c. See *Kemp* v. *Derrett*, 3 Camp. 509. Thus, if the letting is from month to month, determinable at a week's notice, the notice must expire at the end of the month.

No local description necessary.

No local description is necessary in a notice; it is sufficient that the premises be referred to as those which the tenant holds of the landlord: *Doe* d. *Matthewson* v. *Wrightman*, 4 Esp. 5. And even if the notice purport to describe the premises, an error in some of the particulars will not vitiate the notice, provided a doubt is not thereby raised as to the identity: *Doe* d. *Cox* v. ———, 4 Esp. 185.

Notice need not enumerate all the subjects of demise.

Nor need all the several subjects of demise (where more than one) be specifically referred to. Thus, a notice to quit a messuage, "farm, lands, and premises, with the appurtenances," has been held to include tithes: *Doe* d. *Morgan* v. *Church*, 3 Camp. 71. And in a case where the notice contained a

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detailed description which did not include the principal part of the farm, yet the notice was held to be sufficient. "It meant," Lord *Ellenborough* said, "the Town Barton *cum sociis;* especially with reference to the lease, which only gave him power to determine the tenancy as to the whole of what was let altogether:" *Doe* d. *Rodd* v. *Archer*, 14 East, 245.

Palpable mistake immaterial.

A mistake, evidently arising from a mere slip of the pen will not vitiate a notice; and, therefore, where a notice was given to a tenant at Michaelmas, 1795, to quit at Lady-day, "which will be in the year 1795," it was decided to be a good notice to quit at Lady-day, 1796, the words "will be" shewing that 1795 could not be meant: *Doe* d. *Duke of Bedford* v. *Knightley*, 7 T. R. 63. And, where persons who were entitled to the reversion as devisees in trust, and who were also appointed executors, inaccurately gave the notice in the character of executors, the error was held to be immaterial: *Right* d. *Fisher* v. *Cuthell*, 5 Esp. 149. See *Doe* d. *Brooks* v. *Fairclough*, 6 Mau. & S. 40; *Doe* v. *Culliford*, 4 D. & Ry. 249; *Doe* d. *Williams* v. *Smith*, 5 A. & E. 350.

Notice may be signed by one joint tenant on behalf of the whole.

Where several persons are interested in the reversion, as joint-tenants (whether in the character of trustees or otherwise), the notice to quit need not be signed by all; if given by one of them only, on behalf of the others, it is sufficient: *Doe* d. *Aslin* v. *Summerset*, 1 B. & Ad. 135, overruling Lord *Ellenborough's dictum* in *Doe* d. *Fisher* v. *Cuthell*, 5 East, 496. See also *Goodtitle* d. *King* v. *Woodward*, 3 B. & Al. 689; *Doe* d. *Elliot* v. *Hulme*, 2 M. & Ry. 433.

Contra as to notice to determine lease, which is required to be under the hand of the lessor.

But a notice for determining a lease which is required to be under the hand of the lessor, must, it seems, be signed by all the persons who are jointly interested in the reversion as executors or otherwise; and the subsequent adoption of the notice by the party who did not sign, evidenced by his joining in the ejectment, will not cure the defect, as the tenant is entitled to a notice on which he can depend as binding all the parties interested at the time: *Doe*

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v. *Cuthell*, 5 East, 496; but see Cole Eject. 43. Where the notice is given by an agent, he must have authority so to do at the time; the subsequent recognition of the agent's authority is not sufficient to validate the notice: *Doe* d. *Mann* v. *Walters*, 10 B. & C. 626; *Doe* d. *Rhodes* v. *Robinson*, 4 Scott, 396. But the authority need not appear on the face of the notice: *Jones* v. *Phipps*, L. R. 3 Q. B. 567.

Notice from receiver empowered *to let*, good.

It seems that an authority to let includes an authority to determine tenancies; and, therefore, a notice given by a receiver appointed by the Court, with power to let estates to a tenant of such estates, has been held to be good: *Doe* d. *Marsack* v. *Read*, 12 East, 57. And a person authorized to let would probably be considered as competent to receive notices from the tenants. In *Shirley* v. *Newman*, 2 Esp. 266, it was assumed that a notice *to* the person who received the rents of the estate was sufficient. See, however, *Pearse* v. *Boulter*, 2 F. & F. 133. A notice *by* such a receiver would not be sufficient: *Doe* d. *Mann* v. *Walters*, 10 B. & C. 626; *Doe* d. *Rhodes* v. *Robinson*, 4 Scott, 396.

Notice after death of tenant.

When a notice was served on the widow of the deceased tenant who was in possession, it was held that the landlord need not prove in ejectment that she was the executrix or administratrix of the deceased: *Rees* v. *Perrot*, 4 Car. & P. 230.

Notice in writing not necessary.

Though it is usual (and, on account of the facility of proof, in general advisable) to give notices, which are intended to determine tenancies from year to year in writing, yet a verbal notice is clearly sufficient for the purpose: *Timmins* v. *Rowlinson*, 3 Burr. 1603; *Doe* d. *Lord Macartney* v. *Crick*, 5 Esp. 196; *Roe* d. *Rochester* v. *Pierce*, 2 Camp. 96.

Personal service not necessary.

It is not necessary that the notice be personally served on the tenant, provided a fair presumption can be raised of its having reached his hands; and delivery to a servant at the tenant's house will raise this presumption: *Jones* d. *Griffiths* v. *Marsh*, 4 T. R. 464; *Tanham* v. *Nicholson*, L. R. 5 H. L. 561; see *Liddy* v. *Kennedy*, L. R. 5 H. L. 134. The fact of the servant being dead before the trial, and therefore incapable of being called, does

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not invalidate the notice: *Doe* d. *Neville* v. *Dunbar*, 1 M. & Mal. 10. Service on the tenant's wife is sufficient: *Doe* d. *Blair* v. *Street*, 2 A. & E. 329; so also service on the tenant's solicitor, or agent: *Doe* d. *Prior* v. *Ongley*, 10 C. B. 25; or the notice may be put under the door of the tenant's house, or sent to him through the post: *Alford* v. *Vickery*, Car. & M. 280; *Papillon* v. *Brunton*, 5 H. & N. 518. But delivery of notice to quit on the premises will not be sufficient, if neither the tenant nor any assignee of his is in occupation, unless the instrument of demise provides for this contingency: see *Hogg* v. *Brooks*, 15 Q. B. D. 256.

Joint lessees.

Where there are several persons interested jointly as lessees or tenants, it seems that a notice to one is sufficient: *Doe* d. *Bradford* v. *Watkins*, 7 East, 553; *Doe* d. *Lord Macartney* v. *Crick*, 5 Esp. 197.

Notice to quit at the end of the current year, good.

It is not necessary that the notice should be to quit on a specific day; it may refer to one of two alternative days: *Doe* d. *Matthewson* v. *Wrightman*, 3 Esp. 6; or may be in general terms, to quit at the expiration of the current year of the tenancy: *Doe* d. *Baker* v. *Wombwell*, 2 Camp. 559. Thus, a notice to quit "at the expiration of the current year of the tenancy, which shall expire next after the end of one half-year from the date hereof," has been held to be a good notice: *Doe* d. *Phillips* v. *Butler*, 2 Esp. 589; *Doe* d. *Campbell* v. *Scott*, 4 Moo. & P. 20. So, where land and houses were held by the same tenant, the respective tenancies of which commenced at different times, a general notice to quit both at such time or times as the holding thereof, or of the several parts thereof, should expire after, &c., was held good: *Doe* d. *Williams* v. *Smith*, 5 A. & E. 350; see *Doe* v. *Spence*, 6 East, 120; *Doe* d. *Campbell* v. *Scott*, 4 M. & Ry. 20. See a form of such a notice, *infra*, tit. Notices. A notice given under such circumstances, therefore, should be expressed in terms corresponding to those which have thus been adjudged to be sufficient; but the advantage which a more definite notice has over such a general one, is, that if there is any doubt of the landlord being able to prove when the tenancy commenced,

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Effect of acquiescence in notice.

he may, under a notice to quit at a specified time, avail himself of the tenant's assent or non-objection to the notice, as raising the presumption of that being the period at which the tenancy commenced; for it seems to be clear, that if the tenant does not, at the time of the delivery of the notice, object to the time stated, it is *primâ facie* evidence of that being the right period of determining the tenancy; and the production of receipts shewing the payment of rent as due at that period of the year, would, in that case, be sufficient evidence of the fact on an ejectment: *Doe* d. *Clarges* v. *Foster*, 13 East, 405; *Doe* v. *Wombwell*, 2 Camp. 559; *Doe* d. *Leicester* v. *Biggs*, 2 Taun. 109. But, in order to raise this presumption, an acquiescence in the notice must be proved. See *Doe* d. *Ash* v. *Calvert*, 3 Camp. 387. If it should appear from the examination of the witness serving the notice that the tenant did not look at it, so as to know its contents, the presumption of acquiescence would be rebutted: see *Doe* d. *Clarges* v. *Foster*, 13 East, 407.

What amounts to an acquiescence.

But, it seems, that where a tenant keeps the notice, whether served personally or left at his house, it is in general an acquiescence in the sufficiency of it: see *Shirley* v. *Newman*, 2 Esp. 267. *A fortiori*, if he use expressions upon receiving the notice admitting its sufficiency. So, where a notice was served on a tenant who made no objection to the notice, but said he should go out as soon as he could suit himself with another house, it was held that the tenant had admitted the tenancy to have been determined by the notice: *Doe* d. *Baker* v. *Wombwell*, 2 Camp. 559.

Tenant bound by his own statement respecting the commencement of the tenancy.

Where a tenant, upon being applied to on behalf of the lessor to know when his holding commenced, stated a particular period, and the notice was given accordingly, he was held to be precluded from impeaching the notice by shewing the tenancy to have commenced at any other period. And it is immaterial whether the inaccuracy of the information proceeded from mistake or design: *Doe* d. *Eyre* v. *Lambly*, 2 Esp. 635. Where, however, the tenant

gave a notice to quit at Midsummer, which was accepted by the landlord, and afterwards the tenant discovering that his tenancy expired at Christmas, gave a new notice accordingly, it was held that the landlord could not maintain ejectment on the first notice, which was bad as such, and could not operate as a surrender, being to take effect *in futuro*: *Doe* d. *Murrell* v. *Milward*, 3 M. & W. 328. So a parol notice to quit on the right day, but given within the half year, was held to be inoperative, though accepted by the landlord: *Johnstone* v. *Huddlestone*, 4 B. & C. 922.

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The notice, when personally served on the tenant, need not be directed to him: *Doe* d. *Matthewson* v. *Wrightman*, 4 Esp. 5; and, if directed, an inaccuracy in the Christian name is not material if he accept the notice: *Roe* v. *Spiller*, 6 Esp. 70.

Need not be directed to tenant.

Error in Christian name.

Notice to quit by a tenant must be given to the *immediate* landlord of whom the tenant holds, or if he be dead, or have assigned his reversion, then to the person for the time being legally entitled to the immediate reversion: *Woods* v. *Hyde*, 10 W. R. 339; or to his duly authorized agent: *Doe* d. *Prior* v. *Ongley*, 10 C. B. 25; *Papillon* v. *Brunton*, 5 H. & N. 518. See *ante*, p. 282.

Notice to quit by tenant.

If the lessor, or his agent duly authorized, accept rent for a period subsequent to the period mentioned in his notice to quit, that is, *primâ facie*, a waiver of the notice: *Doe* d. *Ash* v. *Calvert*, 2 Camp. 387; but the lessor's banker is not an agent for this purpose without special authority. See *Goodright* v. *Cordwent*, 6 T. R. 220; *Zouch* v. *Willingale*, 1 H. Bl. 311; *Doe* v. *Batten*, Cowp. 243; *Whiteacre* v. *Symonds*, 10 East, 13.

Waiver of notice to determine tenancy.

On the other hand, if the tenant has given notice to quit, and hold over for a few days merely, he will not necessarily be held to have waived the notice, although it is to be inferred, *primâ facie*, that he holds over as tenant and not as trespasser: *Jones* v. *Shears*, 6 Nev. & M. 428; see *Knight* v. *Bennett*, 11 Moo. 227; *Beavan* v. *Delahay*, 1 H. Bl. 5.

As to waiver of a notice by giving a second notice, see *Doe* d. *Williams* v. *Humphrey*, 2 East, 237; *Doe*

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d. *Brierly* v. *Palmer*, 16 East, 53; *Doe* v. *Steel*, 3 Camp. 117; *Messenger* v. *Armstrong*, 1 T. R. 53; *Doe* d. *Scott* v. *Miller*, 2 Car. & P. 348.

Agricultural Holdings Act, 1875.

With regard to agricultural and pastoral holdings of two acres and upwards, the Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92), sect. 51 provided that in cases to which the Act applied, where a half year's notice expiring with a year of tenancy was by law necessary for determining a tenancy from year to year, a year's notice so expiring should be necessary. That Act (which is now repealed), was, however, permissive, and did not prevent landlords and tenants from entering into such contracts as they might think fit; and its operation might be entirely or partially excluded by agreement in writing between the parties: see sects. 54 and 55 of that Act.

Agricultural Holdings Act, 1883, sect. 33.

The Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), sect. 33, in effect provides that in all cases to which the Act applies (*e*), a year's notice to quit shall be necessary, unless the parties agree by writing under their hands that the section shall not apply. This section is as follows:

Time of notice to quit.

"Where a half-year's notice, expiring with a year of tenancy is by law necessary and sufficient for determination of a tenancy from year to year, in the case of any such tenancy under a contract of tenancy made either before or after the commencement of this Act, a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same, unless the landlord and tenant of the holding, by writing under their hands, agree that this section shall not apply, in which case a half-year's notice shall continue to be sufficient; but nothing in this section shall extend to a case where the tenant is adjudged bankrupt, or has filed a petition for a composition or arrangement with his creditors."

Where it is desired that a tenancy from year to year of an agricultural or pastoral holding, or of a market garden, shall be determinable, as heretofore, by a half year's notice to quit, care must be taken to

(*e*) This Act applies to holdings wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as market gardens, without any limitation as to the size of the holding: see sect. 54 of the Act.

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have an agreement in writing excluding the application of this section, signed by both the landlord and the tenant. In *Wilkinson* v. *Calvert*, 3 C. P. D. 360, it was held that under the similar provision of the Act of 1875 an agreement in writing made before the commencement of that Act to accept *six months'* notice would exclude the operation of the Act, inasmuch as a six months' notice is not in law identical with a half year's notice: see also *Morgan* v. *Davies*, 3 C. P. D. 260; and this rule has been held to extend to the present enactment in the recent case of *Barlow* v. *Teal*, W. N. 1885, p. 114. Where, however, it is intended that the provisions of the Act as to notice to quit shall not apply, it will be advisable to insert in the agreement for the tenancy an express declaration to that effect. It should be observed that the section now under consideration applies only to tenancies from year to year, to determine which a half year's notice has hitherto been necessary and sufficient, and not to quarterly, monthly, or weekly tenancies; nor do any of the provisions in the Act apply "to any holding let to the tenant during his continuance in any office, appointment, or employment, held under the landlord:" see sect. 55.

The last part of sect. 33 is intended to meet the case of a disclaimer of a tenancy by a trustee in bankruptcy or under a statutory composition or scheme of arrangement, as to which see *ante*, tit. DISCLAIMER, Vol. II. p. 841, *et seq.*

Formerly, a notice to quit a part of a holding was bad: but by sect. 52 of the Agricultural Holdings Act, 1875, it was provided that such a notice should be valid when the landlord desired to resume possession of part of a holding for the purpose of improvements specified in the section. And the Act of 1883 substantially re-enacts this provision in sect. 41, which is as follows:—

Resumption of possession for cottages, &c.

"Where on a tenancy from year to year a notice to quit is given by the landlord with a view to the use of land for any of the following purposes:—

"The erection of farm labourers' cottages or other houses, with or without gardens;

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"The providing of gardens for existing farm labourers' cottages or other houses;

"The allotment for labourers of land for gardens or other purposes;

"The planting of trees;

"The opening or working of any coal, ironstone, limestone, or other mineral, or of a stone quarry, clay, sand, or gravel pit, or the construction of any works or buildings to be used in connection therewith;

"The obtaining of brick earth, gravel, or sand;

"The making of a watercourse or reservoir;

"The making of any road, railway, tramroad, siding, canal, or basin, or any wharf, pier, or other work connected therewith;

and the notice to quit so states, then it shall, by virtue of this Act, be no objection to the notice that it relates to part only of the holding.

"In every such case the provisions of this Act respecting compensation shall apply as on determination of a tenancy in respect of an entire holding.

"The tenant shall also be entitled to a proportionate reduction of rent in respect of the land comprised in the notice to quit, and in respect of any depreciation of the value to him of the residue of the holding, caused by the withdrawal of that land from the holding or by the use to be made thereof, and the amount of that reduction shall be ascertained by agreement or settled by a reference under this Act, as in case of compensation (but without appeal).

"The tenant shall further be entitled, at any time within twenty-eight days after service of the notice to quit, to serve on the landlord a notice in writing to the effect that he (the tenant) accepts the same as a notice to quit the entire holding, to take effect at the expiration of the then current year of tenancy; and the notice to quit shall have effect accordingly."

The notice to quit must be a given notice pursuant to sect. 33 of the Act (*ante*, p. 286) unless otherwise agreed between the parties, and must state one or more of the purposes named in the section for which the landlord intends to use the land.

The purposes named in this section are identical with those in the Act of 1875, with the addition of "railway" before "tramroad." No limit is imposed as to the quantity of land to be included in the notice.

CHAPTER VIII.

SURRENDERS.

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Definition of a surrender.

SURRENDER is a yielding up of an estate for life or years to him who hath the immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement: Co. Litt. 337 b; see *Burton* v. *Barclay*, 5 Moo. & P. 785; *Thorn* v. *Woolcombe*, 3 B. & Ad. 586.

Surrenders are of two kinds, namely, (1) surrenders by express terms, and (2) surrenders by operation of law.

Surrender must be of the whole estate.

Surrenders by Express Terms.]—The surrender must be of the whole estate; and, therefore, if a tenant for life make a lease to him in reversion or remainder, for the term of the life of the latter, this shall not enure as a surrender, because it does not comprise the whole estate: Shep. Touchst. 308. So, if a tenant for life grant the lands to the reversioner or remainderman for 100 years, if the grantor shall so long live, the grant operates as a lease, and not as a surrender: see *Garraway's case*, cit. Hard. 417. And this may sometimes be a convenient mode of limitation, where the tenant for life sells his estate to the person entitled in reversion or remainder, and it is wished not to merge the estate for life, and yet to vest, so far as may be, the legal as well as equitable title in the purchaser. The freehold, subject to the determinable term, remains in the vendor, who declares that he holds it in trust for the purchaser, or it is conveyed to another person in trust for him.

Word "surrender" not essential to the instrument.

The words "surrender" and "yield up," though the most proper words of conveyance, are not essential to the operation of a surrender; any language which denotes the intention of the parties,

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is sufficient: see *Sleigh* v. *Bateman*, Cro. Eliz. 487; 2 Roll. Abr. 497, (H), pl. 1.

So, where a lessee agreed that the lessor should have the house on the terms mentioned in the lease, it was held that this amounted to a surrender: *Smith* v. *Mapleback*, 1 T. R. 441. See *Parmenter* v. *Webber*, 2 Moo. 658; *Burton* v. *Barclay*, 5 Moo. & P. 785; *Farmer* v. *Rogers*, 2 Wils. 26.

Surrender may be made upon condition.

A surrender, like any other conveyance, may be made upon condition, so that if the condition be broken, the instrument fails of effect, and the estate remains in the surrenderor: 4 Bac. Abr. 214; see *Lloyd* v. *Langford*, 2 Mod. 176; *Coupland* v. *Maynard*, 12 East, 134; *Doe* d. *Gray* v. *Stanion*, 1 M. & W. 695.

Assent of surrenderee, whether requisite to the operation of the instrument.

It would seem that a surrender has not any operation as such before the assent of the surrenderee: *Thompson* v. *Leach*, 2 Vent. 108; 3 Lev. 284; *Coles* v. *Evanson*, 19 C. B., N. S. 382.

Analogy between surrender and merger.

In order to ascertain whether the estate to be conveyed will pass by surrender, recourse must be had to the law of merger, which indeed has been not unaptly denominated a surrender in law; for it may be laid down as a general rule, that wherever the estate of the surrenderee, devolving by any means to the surrenderor, would, under the doctrine of merger, extinguish or absorb the estate of the latter, the conveyance will operate as a surrender, otherwise not. Thus, where an estate stood limited to A. for life, with remainder to B. for life, with remainder to C. in fee, and A. surrendered to C., it was held that the deed could not operate as a surrender, by reason of the mesne estate of B.: *Doe* v. *Pickard*, 1 Wms. Saund. 236. One instance, indeed, may be adduced in which surrender has a more extensive effect than merger. Thus, if A., tenant for life, with remainder to B. and C. as joint-tenants in fee, surrenders to B. alone, this will enure to both joint-tenants: Shep. Touchst. 308 (*a*); Co. Litt. 192 a.; whereas,

(*a*) But see Shep. Touchst. 303, where the same author has, with singular inconsistency, treated it as essential to a surrender, that the surrenderee "be solely seised of the estate in remainder or

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if A. were tenant *pur autre vie*, with reversion or remainder in fee to B. and C., and the estate for life of A. were to devolve by descent to B. (as it might do if it were a descendible freehold), merger would be produced *quoad* the share of B., *i.e.*, one moiety only, and B. would be tenant for life of the other moiety.

As to a surrender to one joint tenant enuring to the benefit of all.

But although a joint-tenant in reversion or remainder, being seised *per mie* and *per tout*, has a capacity in point of estate to receive a surrender on behalf of himself and his co-tenants, yet it does not follow that every conveyance to one such joint-tenant will enure to the use of all. Thus, if a tenant for life grants his estate for life to one of several joint-tenants in remainder or reversion, this will operate as a surrender only to the extent of the share of that one, and he will hold the other share or shares for the life of the grantor: see Shep. Touchst. 84. In both these cases, the intention is the governing principle of construction. If it be the clear intention that the estate shall be extinguished, or, in other words, that the deed shall operate as a surrender, it is necessary, in order to effectuate such intention, that it should enure to the use of all the joint-tenants; and this, therefore, is adjudged to be its effect: but unless such an intention be manifest, it will operate for the benefit of the grantee, and of him only.

A practical hint suggested by the analogy which has been noticed to exist between the law of merger and the law governing surrenders is, that where it is doubtful whether the estate of the proposed surrenderor would merge in the estate of the proposed surrenderee, the deed should be so framed as to pass the estate, whether it take effect as a surrender or not. The case of several terms of years, the one being a remainder to the other, will occur to the learned reader as being in the predicament in question.

As to the surrender of

As an *interesse termini* cannot merge, so it is clear it cannot be the subject of an express surrender:

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reversion, and not in joint tenancy:" and this is often cited without remark.

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an *interesse termini.*

Doe d. *Rawlings* v. *Walker,* 5 B. & C. 111; see *Edwards* v. *Wickwar,* L. R. 1 Eq. 403.

But an *interesse termini,* may be extinguish by the virtual or implied surrender which is produced by the acceptance of a new lease. Thus, if a lease be granted to commence at Michaelmas next, if such lessee before Michaelmas take a new lease for years, either to begin presently or at Michaelmas, this is a surrender in law of the first lease presently, since such lessee having contracted for a new interest inconsistent with the first, his acceptance of such new interest waives and dissolves the first. 4 Bac. Abr. 216. See Shep. Touchst. 302. An *interesse termini* created by parol may be determined by parol: *Petre* v. *Kendal,* 6 B. & C. 703.

Lessee for years may take surrender from a prior lessee for years.

It is settled that a term of years will merge in a reversion for years, and therefore that a lessee for years may take a surrender from a lessee claiming under a prior lease: *Hughes* v. *Rowbotham,* Cro. Eliz. 302; *Stephens* v. *Bridges,* 6 Mad. 66. As the value of the estate which the immediate reversioner has in the reversion, is immaterial, it seems to follow that a tenant at will, or a judgment creditor in possession, may take a surrender of a prior term of years.

As to the powers of tenants for life to accept surrenders of settled lands, see Settled Land Act, 1882 (45 & 46 Vict. c. 38), sect. 13; set out *ante,* p. 36.

Statute of Frauds. Surrender must be by writing.

Before the Statute of Frauds, 29 Car. 2, c. 3, surrenders might have been made without writing; but that statute, sect. 3, enacted,

"That no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest (*b*), of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be surrendered, unless it be by deed, or notice in writing signed by the party so surrendering the same, or his agent thereunto lawfully authorised by writing, or by act and operation of law."

This has been held to extend to tenancies from

(*b*) A lease of a copyhold estate granted by licence of the lord, is a common law estate, and, therefore, seems not to be within the above exception. As to such leases *vide ante,* p. 85.

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year to year: *Mollett* v. *Brayne*, 2 Camp. 103; *Doe* v. *Westlake*, 5 Taun. 519; *Thomson* v. *Wilson*, 2 Star. 379; *Johnstone* v. *Hudleston*, 7 D. & Ry. 411.

Surrender of term exceeding three years must be by deed.

And now by the stat. 8 & 9 Vict. c. 106, sect. 3, a surrender in writing, made after the 1st of October, 1845, of an interest in any tenements or hereditaments, not being a copyhold or customary interest, and not being an interest which might by law have been created without writing, is void at law unless made by deed. The effect of the combined operation of these two statutes is, that every surrender by express terms must be in writing and that every surrender of a lease for a term exceeding three years computed from its commencement must be by deed.

Cannot take effect *in futuro*.

It seems that a surrender even of an estate for years cannot be made to take effect *in futuro*, because the surrender must be accepted by the reversioner, and it cannot be said who will be the reversioner at a future day: *Weddal* v. *Capes*, 1 M. & W. 50; *Doe* v. *Millward*, 3 M. & W. 328, overruling *Aldenborough* v. *Peaple*, 6 Car. & P. 212. See *Parson's Case*, Dyer, 374 b. In *Williams* v. *Sawyer*, 6 Moo. 226, an agreement to deliver up the principal part of a farm to the landlord who was to purchase the stock, and the tenant to hold over part of the house without paying rent, and deliver that up on a subsequent day, was held to require a stamp as a surrender. *Per Cur.*—"It is quite clear that a party may surrender his interest of one part of lands immediately and the other part on a subsequent day. An absolute surrender and an agreement to surrender must bear the same construction." The surrender was of course good as to lands which the lessee was not to retain: see 4 Bac. Abr. 217.

Cancellation of lease no surrender.

Surrenders by Operation of Law.]—It is clear, that the cancellation of a lease does not operate as a surrender of it: *Roe* d. *Earl of Berkeley* v. *Archbishop of York*, 6 East, 86; although done with the assent of both parties: *Doe* d. *Courtail* v. *Thomas*, 9 B. & C. 286; *Watley* v. *Gregory*, 2 Y. & J. 536. Nor, standing alone, is it any evidence of a surrender: see *Walker* v. *Richardson*, 2 M. & W. 882;

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Bolton v. *Carlisle*, 2 H. Bl. 263. So where a lease had the names of the parties torn off, it was held that there was neither a surrender by operation of law, nor any sufficient evidence of a surrender by express terms: *Doe* d. *Courtail* v. *Thomas*, 9 B. & C. 288.

Acceptance of new lease.

The acceptance of a new lease which is inconsistent with the former, whatever be its duration, and though the old lease be by deed and the new lease by parol, is a surrender by operation of law, "because the lessee has, by acceptance thereof affirmed the lessor to have ability to make the new lease, which he had not if the first lease shall stand:" *Ive's Case*, 5 Rep. 11 b; see *Gybson* v. *Searle*, Cro. Jac. 84, 176; *Whitley* v. *Gough*, Dyer. 140 b; *Thomson* v. *Trafford*, Pop. 8; *Magennis* v. *Maccullogh*, Gib. Eq. R. 236; *Furnival* v. *Grove*, 8 C. B., N. S. 496.

Thus, it is clear that if a lessee for thirty years takes a new lease for three years, this is a surrender and determination of the old term of thirty years, because thereby the lessee admits the lessor's power to make such lease, which, if the first should stand in the way, would be void: Perkins, s. 617; see *Hughes* v. *Robotham*, Cro. Eliz. 302. The inconsistency of the new with the old lease is the ground of the surrender; and to this test every case must be brought, in order to ascertain whether a surrender is produced. The acceptance of any interest or right in or incident to the land, if inconsistent with the lease (and inconsistent of course it must be if the former lease comprise such interest or right), will produce an implied surrender: 2 Roll. Abr. 496 (F).

Acceptance of a void lease, whether an implied surrender.

And even where the new lease was void for a defective execution, being a lease for life to begin on a future day, yet it was held to be a surrender of a prior lease for life, "because the lessee admitted that the lessor had power to make the new lease for life, which he could not have unless the former was surrendered:" *Mellow* v. *May*, Moore, 636, pl. 876; see also 4 Bac. Abr. 214. But, in the case of *Watt* v. *Maidwell*, Hutton, 104, it was held, that no im-

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plied surrender took place where the second lease was void for want of the lessor's power to make it, he having in the interval between the two leases demised the lands to a third person, so that the effect of the first lease being surrendered would have been to let in the lease of such third person. So, in the case of *Lloyd* v. *Gregory*, W. Jo. 405, Cro. Car. 501, it was held, that an infant's surrender by the acceptance of a new lease was void, where the new lease, being granted without any increase of the term or decrease of the rent, and therefore not apparently for the advantage of the infant, was void also. So, it has been repeatedly decided that the acceptance of a lease granted under a power, but which was void for non-compliance with the terms of such power was no surrender of a valid subsisting lease; for, it is said that "if a surrender is intended for a particular purpose, and that purpose, the only motive for it, fails, the surrender ought to fail:" *Davison* d. *Bromley* v. *Stanley*, 4 Burr. 2210: see also *Zouch* v. *Parsons*, 3 Burr. 1807; *Wilson* v. *Sewell*, 4 Burr. 1980; *Roe* d. *Berkeley* v. *York*, 6 East, 86. And this seems to be the sensible rule on the subject. It is probable that the doctrine of the case of *Mellow* v. *May* will not be carried beyond the peculiar circumstances of that case. In *Roe* v. *York* a distinction was taken between leases void and voidable. In *Hamerton* v. *Stead*, 3 B. & C. 478, a mere agreement by a lessee for a new lease to himself and another jointly, which did not amount to a demise, but upon which both entered and occupied the premises jointly, was held to amount to a surrender: see *Doe* v. *Benjamin*, 1 Per. & D. 440; *John* v. *Jenkins*, 1 Cr. & M. 227; *Doe* d. *Rochester* v. *Bridges*, 1 B. & Ad. 847.

Effect of the acceptance of a new lease from a conditional grantee of the reversion.

But if a lessee accepts a new lease from the owner for the time being of the reversion, whose estate is conditional, and subsequently fails, so that the new lease, which was derived out of it, fails also, the first lease is not revived: *Brewster* v. *Parrot*, Cro. Eliz. 264.

Where new lease com-

Where the new lease comprises part only of the lands demised by the old one, the surrender will be

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prised part only.

confined to that part: *Fish and Campion*, 2 Roll. Abr. 498, (M). And though a contract for years cannot not be so divided or severed, as to be avoided for part of the years, and to subsist for the residue, either by act of the party or act in law, yet the land itself may be divided or severed, and he may surrender one or two acres, either expressly or by act in law, and still the lease for the residue stand good and untouched; because here the contract for the residue remains entire, whereas, in the other case, the contract for the whole would be divided, which the law will not allow: 4 Bac. Abr. 217; see *Williams* v. *Sawyer*, 6 Moo. 226; *Reeve* v. *Bird*, 1 C. M., & R. 31; *Holme* v. *Brunskill*, 3 Q. B. D. 495.

Construction making new lease consist with old.

And the inconsistency, which is the ground of the implied surrender in these cases, will, if possible, be avoided altogether, such a construction being given to the new lease as will make it consist with the old. Thus, if a lessee accepts a rent out of land, without any time of its commencement being stated, this shall not be a surrender; for it does not appear but that it is intended to issue out of the reversion after the expiration of the lease: *Sible and Serle's case*, 2 Roll. Abr. 496, pl. 15. See also *Gybson* v. *Searle*, Cro. Jac. 176; Cro. Car. 197; and other cases cit. 4 Bac. Abr. 217; Com. Dig. *Surrender*, I, 1.

Surrender immediate, though new lease is to commence *in futuro*.

But if the new lease is to commence at any future specified time during the continuance of the first, it will be an implied surrender of the latter, and that immediately, for the surrender is not suspended until the time of the commencement of the new lease, but takes place *instanter*, as it arises from inconsistency of contract, and is not referable to the law of merger. See *Ives' case*, 5 Rep. 11 b; *Ives* v. *Sims*, Cro. Eliz. 521; *Hutchins* v. *Martin*, Id. 605; *Maton* v. *Hutchins*, 2 Roll. Abr. 496, (F), pl. 12; Perk. 118, n. by Greening.

This implied surrender is founded on the inconsistency of the dealings between the parties, with the supposition that the tenant was intended to retain his old estate, and always supposes a surrender of that estate prior to the granting of the

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new estate, and not a merger of it in the new estate. Hence, a lessee for life, contracting with the reversioner for an immediate lease for years, is held to have surrendered his life estate. Vin. Ab. *Surrender*, (F), pl. 38.

What constitutes a surrender by operation of law has been a frequent subject of litigation, in regard as well to tenancies from year to year, as to demises for terms of years.

What constitutes a surrender by operation of law if a yearly tenancy.

It is clear, that a mere parol licence to quit, given by the landlord, and a quitting by the tenant accordingly, is not a determination of a tenancy from year to year, and the landlord may maintain an action for use and occupation, for rent accruing subsequently to the tenant's dereliction of the premises; *Mollett* v. *Brayne*, 2 Camp. 103; *Thompson* v. *Wilson*, 2 Stark. 379. See also *Johnstone* v. *Hudleston*, 4 B. & C. 922; *Doe* d. *Read* v. *Ridout*, 5 Taun. 519; *Brown* v. *Burtinshaw*, 7 D. & Ry. 603. The above cases decide that the tenancy cannot be determined otherwise than by a proper notice to quit, or a surrender in writing. But a parol agreement, that, in consideration of the tenant's giving up possession, he shall be discharged from any further rent, if there be delivery and acceptance of possession accordingly, though not a surrender, is a good defence to an action for subsequent rent: *Gore* v. *Wright*, 3 N. & P. 243; *Whitehead* v. *Clifford*, 5 Taun. 518. See also *Grimman* v. *Legge*, 2 M. & Ry. 428.

Parol licence to quit does not determine tenancy.

The right to sue for rent may be discharged by parol.

If the landlord accept another person as tenant in the room of the quitting tenant, it seems that the tenancy is determined by operation of law, and the tenant is discharged: *Thomas* v. *Cooke*, 2 B. & Al. 119; see also *Stone* v. *Whiting*, 2 Stark. 235; *Rex* v. *Banbury*, 3 N. & M. 291. The new tenant must be admitted with the assent of the legal owner of the reversion; the assent of his vendee in possession, without a conveyance, is not sufficient: *Matthews* v. *Sewell*, 2 Moo. 262. The new tenant must actually take possession; at least if there is no written evidence of his tenancy: *Taylor* v. *Chapman*, Peak. Ad. Ca. 19: see *Buttemere* v. *Hayes*, 5 M.

Substitution of another tenant dissolves a tenancy.

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& W. 456; but it is not necessary that he should pay rent: *Doe* d. *Morris* v. *Williams*, 6 B. & C. 41. Where it appeared to be the custom to send in old leases to the lessor's office before a renewal was made, which old leases were cancelled by A.'s officer, and a lease to B., the term of which was unexpired, was produced from A.'s custody with the seals torn off, it was held to be evidence from which the jury might (in an action by A. against B.) presume B.'s assent to a subsequent lease by A. to C.; and that, on that presumption, B.'s term must be considered as surrendered: *Walker* v. *Richardson*, 2 M. & W. 882. *Wootley* v. *Gregory*, 2 Y. & J. 536, in which a contrary decision was made upon very similar circumstances, was not cited in *Walker* v. *Richardson*. A re-letting by auction after a void parol notice to quit, at which the lessee attended and bid, but under which the new lessee did not take possession, was held not to amount to a surrender: *Doe* d. *Huddlestone* v. *Johnstone*, M'Clel. & Y. 141; see *Reeve* v. *Bird*, 1 C. M. & R. 31; *Weddal* v. *Capes*, 1 M. & W. 50. In *Bees* v. *Williams*, 2 Cr. M. & R. 581, where two tenants of different lessors agreed to exchange their closes and tenancies, and took possession accordingly, and afterwards communicated their arrangement to the agent of both lessors, who expressed his concurrence; it was held that this was evidence for the jury of a surrender by each tenant of his former lease; see also *Lyon* v. *Read*, 13 M. & W. 285. When partners take a lease, and the original partners retire, and others are successively admitted, the landlord does not, by giving receipts for the rent to the new firm alone, or by promising to grant a lease to them, lose his remedy against the original lessees: *Graham* v. *Wichelo*, 1 Cr. & M. 100.

Exchange of tenancies.

Lessees—partners, change of firm.

What acts of the landlord discharge a tenant.

It may not be amiss to observe, in this place, that if a tenant quit apartments without giving notice, the landlord may recover the rent, though he has put a bill up at the window for the purpose of letting the apartments: *Redpath* v. *Roberts*, 3 Esp. 225; see *Oascler* v. *Henderson*, 2 Q. B. D. 575; or lighted and used fires in the rooms: *Griffith* v. *Hodges*, 1 Car. & P. 419; *Harding* v. *Crethorn*, 1 Esp. 57. But if the

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landlord lets them to another tenant, he has rescinded the contract, and cannot recover rent for any subsequent portion of the period included in the original tenancy, during which they remained unoccupied and unproductive: *Walls* v. *Atcheson*, 11 Moo. 379; *Hall* v. *Burgess*, 5 B. & C. 332.

Where a person is let into possession under an agreement that he is to stand in the place of the former tenant, it is not competent to him, in an action by the landlord for use and occupation, to allege the existence of the former tenancy: *Phipps* v. *Sculthorpe*, 1 B. & Al. 51; see *Doe* d. *Batten* v. *Murless*, 6 Moo. & Sc. 110. Where the tenant imposes an insolvent substitute upon his landlord, he will still be liable for use and occupation: *Bruce* v. *Ruler*, 2 M. & Ry. 3.

Effect of surrender of lease upon underleases.

Formerly if a lessee who had granted an underlease surrendered his lease or did any other act by which his reversionary interest became merged in the ultimate reversion, the consequence was that all his remedies as lessor against the under-lessee, which were incident to such reversion, were destroyed, and he could neither distrain for the rent reserved by the underlease, nor bring an action on any of the covenants: Co. Litt. 238 b; *Webb* v. *Russell*, 3 T. R. 393; *Thre'r* v. *Barton*, Moore, 94.

But by the stat. 4 Geo. 2, c. 28, sect. 6, it is enacted:

"That in case any lease shall be duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord or landlords, the same new lease shall, without a surrender of all or any the underleases, be as good and valid to all intents and purposes as if all the underleases derived thereout had been likewise surrendered at or before the taking of such new lease; and all and every person and persons in whom any estate for life or lives, or for years, shall from time to time be vested by virtue of such new lease, and his, her, and their executors and administrators, shall be entitled to the rents, covenants, and duties, and have like remedy for recovery thereof, and the under-lessees shall hold and enjoy the messuages, lands, and tenements in the respective underleases comprised, as if the original leases out of which the respective underleases are derived, had been still kept on foot and continued, and the chief landlord or landlords shall have and be entitled to such and the same remedy

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by distress or entry in and upon the messuages, lands, tenements, and hereditaments comprised in any such underlease for the rents and duties reserved by such new lease, so far as the same exceed not the rents and duties reserved in the lease out of which such underlease was derived, as they would have had in case such former lease had been still continued, or as they would have had in case the respective underleases had been renewed under such new principal lease, any law, custom, or usage to the contrary hereof notwithstanding."

The effect of this provision is to enable a lessee to surrender his lease for the purpose of a renewal without a surrender of any subleases made by him and to retain notwithstanding such surrender of his own lease all his remedies against the sub-lessees for enforcing payment of rent and performance and observance of the covenants and provisions of the sub-leases as if the original lease were still subsisting. And the superior landlord also retains by virtue of this section all his remedies with respect to the rents and covenants, &c., reserved and contained by the new lease so far as not in excess of those reserved and contained in the original lease. And now by the stat. 8 & 9 Vict. c. 106, sect. 9, on the surrender of a reversion expectant on a lease the estate which confers as against the tenant the next vested right to the tenements is to be deemed the reversion for the purpose of preserving the incidents to and obligations in the reversion. The section referred to enacts as follows:

"When the reversion expectant on a lease made either before or after the passing of this Act, of any tenements or hereditaments of any tenure shall, after the said first day of October, 1845, be surrendered or merge, the estate which shall for the time being confer as against the tenant under the same lease, the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to and obligations on the same reversion as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease."

Rights of third parties.

A surrender will not be allowed to prejudice the rights of third parties: see Co. Litt. 338 b.; *Mellor* v. *Watkins*, L. R. 9 Q. B. 400; *Saint* v. *Pilley*, L. R. 10 Ex. 137.

CHAPTER IX.

DETERMINATION OF LEASE BY NOTICE.

Determination of Lease by Notice.

Payment of rent, &c., necessary to enable lessee to determine lease by notice.

WHERE a lessee is authorized to determine the lease by notice at a period earlier than the expiration of the term, on payment of the rent and performance of the covenants, compliance with these terms has been held to be a condition precedent to the power of determining the lease. Thus, where in a lease for seven years, containing the usual covenants on the part of the lessee, to pay the rent, keep the premises in repair, &c., there was a proviso that if the lessee, his executors, &c., should be minded, at the end of the first three or five years of the term, to quit the premises, and should give six months' previous notice, then, and in such case, and from and after the expiration of the said three or five years, and payment of all rents and duties on the tenant's part to be paid, and performance of the covenants contained on the part of the lessee, until the expiration of the said three or five years, the indenture should cease and be utterly void; it was held, that the payment of rent and performance of the other covenants was a condition precedent to the lessee's determination of the term, at the end of the first three years: *Porter* v. *Shephard*, 6 T. R. 665.

Construction where lease is to be for several alternative periods.

Where a lease is granted, or agreed to be granted, for several alternative periods, as for seven, fourteen, *or* twenty-one years, (an ambiguity which sometimes occurs in informally prepared agreements), it will be construed, as against the lessor, as a lease, or agreement to grant a lease, for the longest of the periods specified, determinable at the option of the lessee only, in conformity to the rule that grants are to be taken most strongly against the grantor: *Dann* v. *Spurrier*, 3 Bos. & P. N. R. 399; *Doe* d. *Webb* v. *Dixon*, 9 East, 15; see also *Price* v. *Dyer*, 17 Ves. 356.

Lease not determinable as to part only.

It has also been held, that the provisoes for determining leases by notice do not authorize the determination of the lease as to part only, though it

Determination of Lease by Notice.

contain several demises of distinct parts: *Roe* d. *Rodd* v. *Archer*, 14 East, 245; and therefore, where it is intended that the lease shall be determinable as to part only, or shall be determinable as to the several parts at different periods, a special clause to this effect should be introduced; and unless distinct rents are reserved of such parts *ab initio*, a distinct reservation should be made in respect of each part on such event.

Where in a lease a power was given to either party, his executors, and administrators, at the end of the first seven or fourteen years, on giving twelve months' notice to the other, his heirs, executors, or administrators, it was held, that this power, as to the lessor, was annexed to the reversion, and might be exercised by his devisee, as the person for the time being entitled to such reversion: *Roe* d. *Bamford* v. *Hayley*, 12 East, 464. See *Simpson* v. *Clayton*, 6 Scott, 469. Where there are several persons jointly interested in the reversion, a notice of determining the lease, signed by one, will be sufficient to determine the tenancy as to all: *Doe* d. *Aslin* v. *Summersett*, 1 B. & Ad. 135. So also a notice, signed by a person authorised by one of several joint-tenants: *Doe* d. *Kindersley* v. *Hughes*, 7 M. & W. 139; see *Alford* v. *Vickery*, Car. & M. 210; *Doe* d. *Bailey* v. *Foster*, 3 C. B. 215.

As to notice by joint tenants.

Requisites of notice.

The notice must be explicit: *Muskett* v. *Hill*, 7 Scott, 855; *Doe* v. *Jackson*, Dougl. 175; but a distinct notice to quit will not be vitiated by an additional clause, offering the tenant to remain on at an increased rent: *Ahearn* v. *Bellman*, 4 Ex. D. 201. And although the power need not be referred to (see *Giddews* v. *Dodd*, 3 Drew. 485), its terms must be strictly adhered to. Thus, if the power be to determine the lease by notice in writing, a parol notice will not be valid: *Legg* v. *Benion*, Willes, 43. So the notice must be to determine the lease at the very date specified in the power or proviso, and not at any other time: *Cadby* v. *Martinez*, 11 A. & E. 720; *Sheep* v. *Milligan*, 22 Beav. 612.

See as to determination of tenancies from year to year by notice to quit, *ante*, p. 276 *et seq.*

CHAPTER X.

RIGHTS OF THE PARTIES ON THE EXPIRATION OF THE TENANCY.

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1. LANDLORD'S REMEDY TO RECOVER POSSESSION.

Landlord's Remedy to Recover Possession.

Right of entry.

AT the expiration of the tenancy the landlord or his agent may make a peaceable (*a*) entry upon the premises, after which the tenant and all persons coming in under him (whether before or after the entry) will be trespassers: see *Taylor* v. *Cole*, 3 T. R. 292, and the notes on that case in 1 Smith L. C. 150 *et seq.* For this purpose, it is unnecessary formally to state the object of the entry; it is sufficient that it be referable to no other object: *Taunton* v. *Costar*, 7 T. R. 431; *Butcher* v. *Butcher*, 7 B. & C. 397; *Hay* v. *Moorhouse*, 8 Scott, 156.

(*a*) Where a tenant holds over, a landlord breaking in forcibly so as to endanger the public peace, will be liable to be indicted under the stat. 5 Rich. 2, st. 2, c. 8: see 1 Hawk. P. C. c. 64. In *Newton* v. *Harland*, 1 Bos. & P. N. R. 474, it was held by *Tindal*, C.J., and *Bosanquet* and *Erskine*, JJ. (*diss. Coltman*, J.), that he would be liable also to an action. But this decision, though not actually overruled, has on several occasions been questioned, and it may be now regarded as settled that a landlord may break into the house to obtain possession, using no unnecessary violence, without incurring the risk of an action for the forcible entry: *Davison* v. *Wilson*, 11 Q. B. 890; *Davis* v. *Burrell*, 10 C. B. 825; *Harvey* v. *Bridges*, 14 M. & W. 437; *Beddall* v. *Maitland*, 17 Ch. D. 174; *Edwick* v. *Hawke*, 18 Ch. D. 199; see also Smith, L. & T. 383; Woodf. L. & T. 713.

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Where a plaintiff who had recovered judgment in ejectment took possession after the lapse of more than a year from the date of the writ of possession without a *scire facias*, he was directed by the Court to restore the land: *Doe* d. *Stevens* v. *Lord*, 2 N. & P. 604.

If the tenant leave the premises locked up, the landlord may force an entry at the expiration of the notice, whether given by the landlord or by the tenant: *Turner* v. *Meymott*, 7 Moo. 574; *Hillary* v. *Gay*, 6 Car. & P. 284; *Doe* d. *Lewis* v. *Cawdor*, 1 C. M. & R. 398. See *Wildbore* v. *Rainsforth*, 2 M. & Ry. 185; *Burling* v. *Reade*, 11 Q. B. 904.

Tenant holding over after notice from landlord, liable to double value.

By stat. 4 Geo. 2, c. 28, s. 1, tenants for life, lives, or years (which has been held not to extend to a weekly tenant, *Lloyd* v. *Rosbee*, 2 Camp. 453; see Co. Litt. 54 b.), holding over after the determination of their terms, and "demand made, and notice in writing by his or their landlords or lessors, or the person or persons to whom the remainder or reversion shall belong, his or their agents lawfully authorized," shall pay to the persons so kept out of possession, their executors, &c., double the value, to be recovered in any of his Majesty's Courts of Record, by action of debt, whereunto the defendant shall be obliged to give special bail.

The statute has been held not to extend to a *bonâ fide* holding over under a treaty, which afterwards went off, for a further term (*Anon.* cit. 5 Rep. 215); nor, where the lessee held over, under a further lease, granted by the preceding tenant for life, in alleged execution of a power, but which turned out to be invalid for want of compliance with the terms of it: *Wright* v. *Smith*, 5 Esp. 20; see *Swinfen* v. *Baker*, 6 H. & N. 846.

Notice in writing necessary.

In order to entitle the landlord to double value under this statute, notice in writing is necessary, even in cases where the tenancy, being for a period certain, would determine without notice. It may be given either before or after the expiration of the tenancy, provided, in the latter case, the lessor have done no act to create a new tenancy; but where a notice, subsequent to the determination of

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the term, is given in the middle of a quarter, he cannot recover single rent for the fractional period which has elapsed of the quarter: *Cobb* v. *Stokes*, 8 East, 358. No demand distinct from the notice is requisite, the notice itself being a sufficient demand: *Wilkinson* v. *Colley*, 5 Burr. 2694; *Poole* v. *Warren*, 3 N. & P. 693.

The acceptance of single rent after the expiration of the notice amounts, of course, to a waiver of it: *Doe* d. *Cherry* v. *Batten*, Cowp. 243; *Ryal* v. *Rich*, 10 East, 48.

The remedy of tenants in common for double value under this act is several: *Wilkinson* v. *Hall*, 1 Scott, 675; *Cutting* v. *Derby*, 2 W. Bl. 1076.

Tenant holding over after giving notice to quit, liable to double rent.

So, by stat. 11 Geo. 2, c. 19, s. 18, any tenant giving notice to quit, and not delivering up the possession accordingly (*b*), shall thenceforward pay to the landlord or lessor "double the rent or sum which he, she, or they would otherwise have paid," to be recovered in the same manner as the single rent.

Parol notice sufficient.

This statute has been held to extend to a parol demise, and parol notice: *Timmins* v. *Rawlinson*, Burr. 1603; but the notice must be effectual: *Johnstone* v. *Hudleston*, 4 B. & C. 922, and the terms of it absolute and unequivocal. And therefore, where a tenant from year to year gave his landlord notice to quit as soon as he could find another situation, and he did afterwards get another situation, the notice was held to be too vague to bring the case within the statute: *Farrance* v. *Elkington*, 2 Camp. 591. A weekly tenant has been held not to be within the act: *Sullivan* v. *Bishop*, 2 Car. & P. 359.

Distinction where the notice is from the landlord, and where from the tenant.

It is to be observed with regard to these two statutes that the former (*i.e.*, where the notice proceeds from the landlord) requires the notice to be in

(*b*) As to the recovery of possession of parish property, see stat. 59 Geo. 3, c. 12, sect. 24; and see *Doe* d. *Higgs* v. *Cockell*, 6 N. & M. 179; *Reg.* v. *Justices of Middlesex*, 4 Jur. 123. And as to recovery of possession of buildings, &c., held under charities, see stat. 23 & 24 Vict. c. 136, sect. 13.

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writing, and gives double the value, to be recovered by action, while the latter (*i.e.*, where the tenant gives the notice) entitles the landlord to double rent, recoverable by the landlord's ordinary remedies. The first seems to regard the occupier as a trespasser, the other as a tenant; and, therefore, Lord *Ellenborough* in *Soulsby* v. *Neving*, 9 East, 310, doubted whether a landlord could recover double rent (though he clearly may double value, *Cobb* v. *Stokes*, 8 East, 362) after bringing an ejectment, as that proceeding treats the defendant as a trespasser.

When the tenant holds over for a year and pays double rent, under the stat. 11 Geo. 2, c. 19, he may quit without giving any fresh notice, and will not be liable for any rent beyond his possession: *Booth* v. *Macfarlane*, 1 B. & Ad. 904.

Stat. 1 & 2 Vict. c. 74.

A further remedy has been given by the stat. 1 & 2 Vict. c. 74, where the term does not exceed seven years, and the rent is not above twenty pounds a year. This Act enacts as follows:—

When tenant or occupier of premises where there is no rent, or where the rent does not exceed 20*l.* a year, refuses to give possession, the landlord may give him notice of his intention to proceed to recover possession under the authority of the Act.

Sect. 1. "When and so soon as the term or interest of the tenant of any house, land, or other corporeal hereditaments held by him at will, or for any term not exceeding seven years, either without being liable to the payment of any rent or at a rent not exceeding the rate of twenty pounds a year, and upon which no fine shall have been reserved or made payable, shall have ended or been duly determined by a legal notice to quit or otherwise, and such tenant, or (if such tenant do not actually occupy the premises, or only occupy a part thereof,) any person by whom the same or any part thereof shall be then actually occupied, shall neglect or refuse to quit and deliver up possession of the premises, or of such part thereof respectively, it shall be lawful for the landlord of the said premises, or his agent, to cause the person so neglecting or refusing to quit and deliver up possession to be served (in the manner hereinafter mentioned) with a written notice, in the form set forth in the schedule to this act (*c*), signed

(*c*) The following is the form given in the Schedule (Form, No. 1):—

Notice of Owner's intention to apply to Justices to recover Possession.

"I [owner or agent to ———, the owner, *as the case may be*] do hereby give you notice, that unless peaceable possession of the tenement [*shortly describing it*] situate ———, which was held of

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by the landlord or his agent, of his intention to proceed to recover possession under the authority and according to the mode prescribed in this Act; and if the tenant or occupier shall not thereupon appear at the time and place appointed, and show to the satisfaction of the justices hereinafter mentioned reasonable cause why possession should not be given under the provisions of this Act, and shall still neglect or refuse to deliver up possession of the premises, or of such part thereof of which he is then in possession, to the said landlord or his agent, it shall be lawful for such landlord or agent to give to such justices proof of the holding, and of the end or other determination of the tenancy, with the time or manner thereof, and where the title of the landlord has accrued since the letting of the premises, the right by which he claims the possession, and, upon proof of service of the notice, and of the neglect or refusal of the tenant or occupier, as the case may be, it shall be lawful for the justices acting for the district, division or place within which the said premises or any part thereof shall be situate, in petty sessions assembled, or any two of them, to issue a warrant under their hands and seals to the constables and peace-officers of the district, division, or place within which the premises or any part thereof shall be situate, commanding them, within a period to be therein named, not less than twenty-one nor more than thirty clear days from the date of such warrant, to enter (by force if needful) into the premises, and give possession of the same to such landlord or agent: Provided always, that entry upon any such warrant shall not be made on a Sunday, Good Friday, or Christmas-day,

If tenant does not appear, or fails to show cause why he does not give possession, the justices may issue their warrant directing the constables to give the landlord possession.

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me *or* of the said ———, [*as the case may be*] under a tenancy from year to year, *or*, [*as the case may be*], which expired [*or* was determined], by notice to quit from the said ———, *or otherwise*, [*as the case may be*] on the ——— day of ———, and which tenement is now held over and detained from the said ———, be given to ——— [the owner *or* agent] on or before the expiration of seven clear days from the service of this notice, I, ———, shall, on ——— next, the ——— day of ———, at ——— of the clock of the same day, apply to Her Majesty's Justices of the Peace acting for the district of ——— [*being the district, division, or place in which the said tenement, or any part thereof, is situate*] in Petty Sessions assembled, to issue their warrant directing the constables of the said district to enter and take possession of the said tenement, and to eject any person therefrom.

Dated this ——— (Signed)

To Mr. ——— [Owner *or* Ageut.]"

Form No. 2 is the complaint before two justices.

Form No. 3 is the form of the warrant to peace-officers to take and give possession, by force if necessary.

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or at any time except between the hours of nine in the morning and four in the afternoon: Provided also that nothing herein contained shall be deemed to protect any person on whose application and to whom any such warrant shall be granted from any action which may be brought against him by any such tenant or occupier, for or in respect of such entry and taking possession, where such person had not at the time of granting the same lawful right to the possession of the same premises: Provided also, that nothing herein contained shall affect any rights to which any person may be entitled as outgoing tenant by the custom of the country or otherwise."

The manner in which such summons shall be served.

Sect. 2. "That such notice of application intended to be made under this Act may be served either personally or by leaving the same with some person being in and apparently residing at the place of abode of the person so holding over as aforesaid, and that the person serving the same shall read over the same to the person served, or with whom the same shall be left as aforesaid, and explain the purport and intent thereof: Provided that if the person so holding over cannot be found, and the place of abode of such person shall either not be known or admission thereto cannot be obtained for serving of such summons, the posting up of the said summons on some conspicuous part of the premises so held over shall be deemed to be good service upon such person."

How execution of warrants of possession may be stayed.

Sect. 3 provides that when the person obtaining the warrant had not at the time lawful right to the possession, the obtaining it shall be deemed a trespass by him against the tenant or occupier, although no entry shall be made; and that in case such tenant or occupier will enter into a bond with two sureties to sue the person to whom such warrant was granted, and to pay all the costs, in case a verdict shall pass for the defendant, or the plaintiff shall not prosecute his action or become nonsuit therein, execution of the warrant shall be delayed until judgment. Sect. 4 contains provisions as to the making of the bond and for putting the same in suit. Sect. 5 protects the justices and officers from liability on the ground of defect of title in the party obtaining the warrant. Sect. 7 contains the interpretation of the words "premises," "person," "landlord" and "agent." And by Sect. 8, "The Act is not to extend to Scotland or Ireland."

Protection of justices, constables, &c.

Interpretation clause.

Tenant's Right to Fixtures.

2. Tenant's Right to Fixtures.

When question as to fixtures arises.

The question what are fixtures, or, in other words, what things are, as between the parties, irremovably annexed to the freehold, principally arises between three classes of persons.

1st. The real and personal representatives of the last owner.

2nd. The personal representatives of the tenant for life, and the reversioner or remainderman (*d*).

3rdly. (Which is the point most relevant to the present discussion), between the landlord and tenant.

General rule.

The general rule is, that what a lessee has annexed to the inheritance he cannot remove; and the act of removal is waste: *Cooke* v. *Humphrey*, Moo. 177; *Lord Darcy* v. *Askwith*, Hob. 234: but the rule has been much relaxed, in later times, in favour of the tenant.

The exceptions to the rule above stated will be here considered under three heads, namely:—1. Fixtures erected for ornament or convenience. 2. Fixtures for purposes of trade. 3. Fixtures for agricultural purposes.

1. *Fixtures for Ornament or Convenience.*]—Articles affixed to the premises for ornament, or for the convenience of the tenant, have long been held to be removeable by him at the expiration of the term. Thus, "he has been allowed to carry away matters of ornament, as ornamental marble chimney pieces, pier-glasses, hangings, wainscots fixed only by screws, and the like": per Lord *Ellenborough*, 3 East, 53; and see *Beck* v. *Rebow*, 1 P. Wms. 94; *Ex parte Quincy*, 1 Atk. 477; *Lawton* v. *Lawton*, 4 Atk. 133; *Lawton* v. *Salmon*, 1 H. Bl. 260 n.; *Leach* v. *Thomas* 7 Car. & P. 327.

Similarly, the following articles of domestic use and ornament have been held to be removable: beds fastened by nails to walls or ceilings: *Ex parte Quincey*, 1 Atk. 477; bells (apparently): see *Lyde*

(*d*) The law respecting the two first divisions of the subject, will be found in the excellent treatise on fixtures by Messrs. Amos and Ferard: see also *Minshall* v. *Lloyd*, 2 M. & W. 457.

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v. *Russell*, 1 B. & Ad. 394; bookcases standing on brackets, and screwed to walls: *Birch* v. *Dawson*, 2 A. & E. 37; cornices: *Avery* v. *Cheslyn*, 3 A. & E. 75; cupboards standing on the ground and secured by holdfasts: *R.* v. *St. Dunstan*, 4 B. & C. 686; furnaces and coppers: *Squier* v. *Mayer*, 2 Freem. 249; grates, ranges, and stoves fixed to brickwork: *Lee* v. *Risdon*, 7 Taun. 191; *R.* v. *St. Dunstan*, 4 B. & C. 686; iron backs to chimneys: *Harvey* v. *Harvey*, 2 Str. 1141; iron ovens: *Wynne* v. *Ingleby*, 5 B. & Al. 625; mills for grinding coffee or malt: *R.* v. *Londonthorpe*, 6 T. R. 379; pumps: *Grymes* v. *Boweren*, 6 Bing. 437; slabs of marble, &c.: *Allen* v. *Allen*, Mose. 112; water tubs and wash tubs fixed to walls or floors; and window blinds, locks, and bolts: *Colegrave* v. *Dios Santos*, 2 B. & C. 686; also carpets, curtains, pictures, furniture, and other articles of an ornamental nature which are slightly attached to the walls or floors, and removable without material injury to the freehold: see *Hellawell* v. *Eastwood*, 6 Ex. 313; *Bishop* v. *Elliott*, 11 Ex. 113.

Conservatory.

But in *Buckland* v. *Butterfield* (2 Br. & B. 54), it was held, that a tenant from year to year could not remove a conservatory and pinery, which had been erected by him. The conservatory had a foundation of brickwork, on which was bedded a sill; the framework was placed on the sill; it was attached to the dwelling-house by cantilivers, which were let into the wall, and fastened thereto with wedges; over the conservatory was a balcony with iron rails, resting on those cantilivers, and which had a communication with the drawing room on the first floor through a folding door; the conservatory was heated by a flue communicating with the chimney of the dining room. The pinery had been erected in the garden on a brick wall four feet high. The Court held that it was "clear on the one hand that many things of an ornamental nature may be in a degree affixed, and yet during the term may be removed; and, on the other hand, equally clear that there may be that sort of fixing and annexation, which, though the thing annexed may have been merely for ornament, will yet make the removal of

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it waste; that every case of this sort must depend upon its peculiar circumstances; and that no case had extended the privilege so far as to include the case under consideration."

Whether the article in question is removable without material injury to the freehold, is matter for the jury; and the amount of damage actually done in the removal is a good test: *Avery* v. *Cheslyn*, 3 A. & E. 75; see also *Lane* v. *Dixon*, 3 C. B. 776; *Wood* v. *Hewett*, 8 Q. B. 913.

Rules as to fixtures relaxed in favour of trade.

2. *Trade Fixtures.*]—An exception to the general rule exists in regard to buildings, utensils, &c., erected for the purposes of trade, which have long been held to be removable. Thus, at very early period, it was held that vats, furnaces, &c., used by brewers, dyers, soap-boilers, and such persons, though fixed in the ground or buildings, might be removed by the lessee during the term: Year-Book, 20 Hen. 7, 13 a & b; *Poole's Case*, 1 Salk. 368; and see *Cleves* v. *Mawe*, 3 East, at p. 52.

So, a fire-engine to work a colliery, erected by a tenant for life, has been held to belong to his personal representatives: *Lawton* v. *Lawton*, 3 Atk. 13; *Lord Dudley* v. *Lord Ward*, Amb. 113; *Avery* v. *Cheslyn*, 3 A. & E. 75; and would, therefore, *à fortiori*, be removable by a lessee, who is in general regarded with more indulgence than any other claimant. *Lawton* v. *Salmon*, 1 H. Bl. 260, n. So, a varnish house used by the lessee in his trade, which had a brick foundation let into the ground, with a chimney belonging to it, has been held to be removable: the wooden superstructure (the removal of which was the subject of dispute) had been brought by the lessee from another place: *Penton* v. *Robart*, 2 East, 88. See *Minshall* v. *Lloyd*, 2 M. & W. 450; *Duck* v. *Braddyl*, M'Clel. 217 a; and *infra*, tit. Mortgages. Engines, erections, &c., that are partly substitutions for, as well as additions to, the machinery and erections demised, cannot be removed by the tenant: *Sunderland* v. *Newton*, 3 Sim. 450. The general rule as to erections for the purposes of trade, is excluded by a general covenant to yield up in repair all erections and buildings

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erected and built during the term: *Naylor* v. *Collinge*, 1 Taun. 19. So new mill-stones, which were removable by custom, were held to be within a covenant to leave all fixtures, fastenings, and improvements: *Martyr* v. *Bradley*, 2 Moo. & Sc. 25. These decisions suggest the necessity of framing covenants in leases for manufacturing purposes with particular care and explicitness.

Salt-pans in salt works.

In *Lawton* v. *Salmon*, 1 H. Bl. 259, n., Lord *Mansfield* held, that iron salt-pans, fixed with mortar to a brick floor, which had been brought in pieces, and might be removed in pieces without injury to the buildings, might be removed by the lessee of a salt spring during the term. But this decision has been held not to apply when there is an express covenant by the lessee to leave the *works* in good repair and condition at the end of the term: *Earl of Mansfield* v. *Blackburn*, 6 Bing. N. C. 426.

Effect of local custom or usage of trade.

The right as to trade fixtures given to a tenant by the general law of the land may be extended by local usage or custom of the particular trade: *Davis* v. *Jones*, 2 B. & Al. 145; *Trappes* v. *Harter*, 3 Tyr. 603; *Wansbrough* v. *Maton*, 4 A. & E. 884.

In *Penton* v. *Robart*, 2 East, 88, Lord *Kenyon* expressed his opinion that a nurseryman might remove green-houses, conservatories, &c., erected by him for the purposes of his trade: see 2 East, at p. 90; a comparison of his Lordship's remarks with the case of *Buckland* v. *Butterfield*, 2 Br. & B. 54, *ante*, p. 310, well illustrates the greater indulgence shown in the case of buildings and fixtures erected for purposes of trade than in the case of those erected for purposes of convenience or ornament. A market-gardener may now remove fixtures under sect. 34 of the Agricultural Holdings Act, 1883 upon giving the landlord a month's notice of his intention so to do, but in such case the landlord may, by counter-notice to the tenant, elect to purchase the fixtures at their value to an incoming tenant.

It has been held that a reversionary interest in trade fixtures will pass by a parol agreement: *Petrie* v. *Dawson*, 2 Car. & K. 138.

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3. *Fixtures for Agricultural Purposes.*]—The exception in favour of trade has been held not to apply to buildings and fixtures erected for agricultural purposes. This doctrine was much discussed in the case of *Elwes* v. *Mawe*, 3 East, 39, where the lessee of a farm had, at his own expense, erected a beast-house, carpenter's shop, fuel-house, pump-house, and fold-yard, the buildings being composed of bricks and mortar and tiled, and the foundation about a foot and a half deep in the ground. The carpenter's shop was closed in; the other buildings were open to the front and supported by brick pillars. The fold-yard wall was of bricks and mortar, and its foundation was in the ground. The lessee, before the expiration of his lease, pulled down the erections, dug up the foundation, and carried away the materials, leaving the premises in the same state as when he entered; the lessor brought an action on the case in the nature of waste, and obtained a verdict, with damages, subject to the opinion of the court, who, after much argument, held the action to be maintainable, the buildings in question not being for the purposes of trade. Lord *Ellenborough's* judgment in this case contains an able and elaborate examination of the leading authorities upon the subject.

Trees in a nursery ground.

It may be observed, in farther illustration of the distinction between trade and agriculture, that though it is clear that a person in the business of a gardener or a nurseryman may remove trees planted in the course of his trade, yet a farmer seems to have no right to remove young apple-trees which he has planted in a nursery for the purpose of supplying the orchards: *Wyndham* v. *Way*, 4 Taun. 316; see *Wetherell* v. *Howells*, 1 Camp. 227; *Ex parte Lloyd*, 1 Mont. & A. 507. A tenant cannot remove a box border which he has planted: *Empson* v. *Soden*, 4 B. & Ad. 655.

Barns and sheds.

Barns and sheds erected by the tenant of a farm, are, as usually built, clearly not removable at common law; but in a case where a lessee had erected a barn upon pattens and blocks of timber

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lying upon but not fixed in the ground, they were held to be removable: *Culling* v. *Tufnal*, Bull. N. P. 34; see also *Naylor* v. *Collinge*, 1 Taun. 19; *Wiltshire* v. *Cottrell*, 1 E. & B. 674. A wooden structure, as a mill or a barn, placed upon a brick or stone foundation, on which it rests, and to which it adheres by its own weight, but not in any manner attached or fastened thereto, is removable by a tenant: *King* v. *Inhabitants of Otley*, 2 B. & Ad. 161; *Wansbrough* v. *Maton*, 4 A. & E. 884. Erections of brick are generally considered to be attached to the freehold if they are built upon the ground, although they have no foundation let into it: *Leach* v. *Thomas*, 7 Car. & P. 328. Lord *Kenyon*, indeed, on one occasion, held that a tenant was entitled to remove Dutch barns, though fixed in the ground: *Dean* v. *Allaley*, 3 Esp. 11; but his lordship seems not to have distinguished between buildings for the purposes of trade, and for the purposes of agriculture; a distinction which, we have seen, has been since established by the case of *Elwes* v. *Mawe*. In an early case, cit. 3 Atk. 13, 16, *Comyn*, C. B. at Nisi Prius, held that a cyder-mill was not parcel of the inheritance as between the executor and the heir; and Lord *Ellenborough* seems to have approved of this decision, considering it "as a mixed case between enjoying the profits of land and carrying on a species of trade," and as properly an accessory to the trade of making cyder: see *Elwes* v. *Mawe*, 3 East, 54. The decision has, however, since been disapproved of in the House of Lords, and must be regarded as of doubtful authority: see *Fisher* v. *Dixon*, 12 Cl. & F. 312.

Cyder mill.

Lime-kilns.

The same kind of observation would apply to lime-kilns. In a case where the question as to a lime-kiln arose, it was not decided, the case being determined on another point: *Thresher* v. *East London Waterworks Co.*, 2 B. & C. 608.

Stat. 14 & 15 Vict. c. 25.

The statute 14 & 15 Vict. c. 25, intituled "An Act to improve the law of landlord and tenant in relation to emblements, to growing crops seized in execution, and to agricultural tenants' fixtures," after reciting in the preamble that it is expedient to

amend the law relating to agricultural fixtures, enacts as follows :—

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Tenant may remove buildings and fixtures erected by him on farms, unless landlord elect to take to them.

Sect. 3. "If any tenant of a farm or lands shall, after the passing of this Act, with the consent in writing of the landlord for the time being, at his own cost and expense, erect any farm building, either detached or otherwise, or put any other building, engine, or machinery, either for agricultural purposes or for the purposes of trade and agriculture (which shall not have been erected or put up in pursuance of some obligation in that behalf,) then all such buildings, engines, and machinery shall be the property of the tenant, and shall be removable by him, notwithstanding the same may consist of separate buildings, or that the same or any part thereof may be built in or permanently fixed to the soil, so as the tenant making any such removal do not in anywise injure the land or buildings belonging to the landlord, or otherwise do put the same in like plight and condition, or as good plight and condition, as the same were in before the erection of anything so removed : Provided nevertheless, that no tenant shall, under the provision last aforesaid, be entitled to remove any such matter or thing as aforesaid without first giving to the landlord or his agent one month's previous notice in writing of his intention so to do ; and thereupon it shall be lawful for the landlord, or his agent on his authority, to elect to purchase the matters and things so proposed to be removed, or any of them, and the right to remove the same shall thereby cease, and the same shall belong to the landlord ; and the value thereof shall be ascertained and determined by two referees, one to be chosen by each party, or by an umpire to be named by such referees, and shall be paid or allowed in account by the landlord who shall have so elected to purchase the same."

Agricultural Holdings Act, 1883.

The Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), sect. 34, in effect, provides that where a tenant affixes to his farm any engine, machinery, fencing, or other fixture, or erects any building for which he is not under the Act, or otherwise, entitled to compensation (the fixture or building not being affixed or erected in pursuance of some obligation, or instead of some fixture or building belonging to the landlord), the tenant may remove the fixture or building before or within a reasonable time after the end of the tenancy. But he must, before doing so, have paid all his rent and performed all his obligations to the landlord, and he

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must not damage any other building or other part of the farm by the removal, or if he does must make such damage good. He must also give the landlord a month's notice of his intention to remove the fixture, and the landlord is to have the option of purchasing the fixture from the tenant at its fair value to an incoming tenant, upon giving to the tenant a notice of such option.

Removable fixtures must be removed during the term:

When the Removal must be made.]—It should be observed, that fixtures which the tenant has the power of removing, must generally be removed during the term: *Fitzherbert* v. *Shaw*, 1 H. Bl. 258; and see *Poole's case*, 1 Salk. 368; *Ex parte Quincy*, 1 Atk. 477; *Lee* v. *Risdon*, 7 Taun. 191; *Colegrave* v. *Dios Santos*, 1 B. & C. 79; *Lyde* v. *Russell*, 1 B. & Ad. 394; and the rule applies whether the term determines by effluxion of time, or by re-entry on forfeiture; *Pugh* v. *Arton*, L. R. 8 Eq. 626. In *Penton* v. *Robart* (2 East, 88), it was held that a lessee who held over after his term, and was treated by the lessor as a trespasser, was at liberty to remove fixtures. This may seem to be at variance with the general position before cited, which has often been judicially laid down on the subject; but probably the learned judges who so stated it, had not the case of a tenant holding over after the expiration of his tenancy in their contemplation, and that they used the word "term" in the sense of occupation generally. "The tenant," said Lord *Kenyon*, "was still in possession of the premises at the time when the things were taken away, and therefore there is no pretence to say that he had abandoned his right to them." It is on the ground of abandonment that the general rule to which the exception in question was made, is founded. See *Poole's case*, 1 Salk. 368; and *Mackintosh* v. *Trotter*, 3 M. & W. 184; *Weeton* v. *Woodcock*, 7 M. & W. 14; *Roffey* v. *Henderson*, 17 Q. B. 574. It seems that the tenant's continuance in possession must be made under a right still to consider himself as tenant, in order to entitle him to remove fixtures after the expiration of the term: see *Heap* v. *Barton*, 12 C. B. 274. Where the landlord has re-entered and put a new tenant in

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possession, the old tenant cannot enter to remove fixtures after the expiration of the term: *Leader* v. *Homewood*, 5 C. B. N. S. 272. The Agricultural Holdings Act, 1883, provides, that fixtures removable by the tenant under that Act shall be removed before or within a reasonable time after the end of the tenancy: see *supra*, p. 315.

—where tenant commences a new tenancy;

In *Penton* v. *Robart* (2 East, 88), the lessee had been treated by the landlord as a trespasser, but if he had, by payment of rent, or by accepting a lease, &c., continued in possession under a new tenancy, without doing any act to make the fixtures his own, it seems he could not have severed them during the new tenancy, for at its commencement they were fixed to the freehold and demised with it by the landlord. See *Fitzherbert* v. *Shaw* (1 H. Bl. 258), where the circumstances seem to have come within this principle, although it was not distinctly laid down by the Court. This is a very important point, and should be borne in mind whenever a new contract of tenancy is entered into, either by a formal lease or agreement, or by payment of rent.

—but rule does not extend to chattels which are not fixtures.

But the rule requiring that the removal should take place during the term or possession, only applies to such things as are parcel of the inheritance; and, therefore, where certain jibs were erected by the lessee of a warehouse, which were not fixed in the ground, but were placed in caps or steps of timber, and might be removed without injuring either the caps or the buildings, and were usually valued between outgoing and incoming tenants; it was held that these were personal chattels only, for which trover might be maintained after the lessee had quitted the possession: *Davis* v. *Jones*, 2 B. & Al. 165; see *Anthony* v. *Barry*, 6 Moo. & Sc. 300; *Minshall* v. *Lloyd*, 5 M. & W. 459; *Sheen* v. *Rickie*, 5 M. & W. 175.

In *Lyde* v. *Russell* (1 B. & Ad. 394), a tenant brought trover for some bells put up by him, and which, after he quitted, the landlord had taken down, refusing to deliver them up unless the plaintiff would pay him a sum claimed for rent; it was held, that the tenant, not having removed the bells

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during the term, could not maintain the action, and that the offer to deliver them up on payment of the money was no recognition of any such right.

Inasmuch as a surrender is not allowed to operate to the injury of third parties (see *ante*, p. 300), a person who has purchased the fixtures from the tenant during the continuance of the term is entitled to enter after a surrender by the tenant and remove them: *London and Westminster Loan, &c. Discount Co.* v. *Drake*, 6 C. B. N. S. 798; *Saint* v. *Pilley*, L. R., 10 Ex. 137; but he must enter within a reasonable time after the determination of the tenancy, or the fixtures will pass to the landlord: *Moss* v. *James*, 38 L. T. N. S. 595.

Where a trustee in bankruptcy desires to disclaim a lease, the Court, on giving leave to disclaim, may make such order as to fixtures, tenant's improvements, &c., as may appear just: see stat. 46 & 47 Vict. c. 52, s. 5, *ante*, tit. DISCLAIMER, Vol. II. p. 841. And it has been decided that where a trustee disclaims a lease, the landlord must either take over the fixtures at a valuation, or allow the trustee a reasonable time in which to secure and remove them: *Re Mosen*, 13 Q. B. D. 738; see *Ex parte Gould*, 13 Q. B. D. 454.

Action of trover for fixtures.

A tenant has sufficient interest during the term to enable him to maintain trover against a third party for fixtures wrongfully removed: *Boydell* v. *M'Michael*, 1 Cr. M. & R. 177; *Hitchman* v. *Walton*, 4 M. & W. 416. But they must be actually severed before trover can be maintained for them, and therefore, where an action was brought by a lessee to recover from his assignees under a *fiat* of bankruptcy which he alleged to be void, the value of fixtures and furniture sold by them, it was held that, as the fixtures had not been removed, the plaintiff could not recover their value: *Mackintosh* v. *Trotter*, 3 M. & W. 184. The rule laid down by the Court in that case (and see *Davis* v. *Jones*, 2 B. & Al. 167), that fixtures are not recoverable in trover by the tenant, must be qualified in the manner stated above. In *Boydell* v. *M'Michael*, fixtures belonging to the tenant and removed by the assignees of the

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tenant's mortgagee as being in his reputed ownership, were recovered by the tenant in trover. In *Hitchman* v. *Walton*, the mortgagee of the tenant recovered the value of landlord's fixtures against the tenant's assignees in bankruptcy. See *Higgon* v. *Mortimer*, 6 Car. & P. 616; *Longstaffe* v. *Meagoe*, 2 A. & E. 167; *Sheen* v. *Rickie*, 5 M. & W. 175.

Agreements respecting Fixtures, &c.]—Except in cases which fall within sect. 34 of the Agricultural Holdings Act, 1883, as to which, see *ante*, p. 315, the ordinary rules of law respecting fixtures may be excluded or varied by express stipulation between the landlord and tenant according to the legal maxim, "*Modus et conventio vincunt legem:*" see Broom Max. 661; *Naylor* v. *Collinge*, 1 Taun. 19; *Thresher* v. *East London Waterworks Co.*, 2 B. & C. 608. And such express agreement will override any customary rights in respect of fixtures: see *Wiltshear* v. *Cottrell*, 1 E. & B. 374.

What a determination of a lease for certain purposes.

The question most frequently arising on the construction of clauses entitling the lessee to remove fixtures, or to be paid for crops, &c., at the end of the term has been, whether such clauses apply to the determination of the lease by any means, or are confined to the event of its expiration by effluxion of time or in any other particular manner.

Bankruptcy and rejection of lease by assignees, held to be such.

In *Ex parte Nixon*, 1 Rose, 446; 2 Madd. 319, the question was, whether, under a covenant to leave all the hay, &c., on the demised premises, at "the end or sooner determination of the term," the bankruptcy of the lessee and the refusal of his assignees to take the lease was to be considered a "determination" of the lease within the meaning of this covenant; and the Court of King's Bench certified, on a case from Chancery, that it was.

Whether lessees entitled to remove machinery, on the determination of the lease, by the issuing of an extent.

In *R.* v. *Topping*, 1 M'Clel. & Y. 544, in a lease of lands, with power to work mines, &c., for thirty-two years subject to an earlier determination, the lessees covenanted to repair the said lands, engines (though engines were not mentioned before), &c., and the same, at the end or sooner determination of the term, to yield up; and to erect proper engines for working the mines. The lease also contained a

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proviso for re-entry on breach of covenant, and in case the lease should be extended or taken in execution. This was followed by a clause authorising the lessees to erect certain engines for draining the mine, and at any time during the term, or within twelve months after the expiration or sooner determination thereof, to take down, remove, and dispose of the same; "except as in the cases and events thereinbefore mentioned," unless the lessor should be desirous of purchasing the same; and further authorising them, at the end of the term, or sooner, if they should so please, except as in the cases aforesaid, to take down, remove, carry away, and convert to their own use all such engines, &c., as had theretofore been erected, and also all such engines, &c., as should be by them erected. The lease gave a power to the lessees to determine the lease at a certain period, but provided that the engines and works should in that event become the property of the lessor. An extent issued against the lessees, and one of the questions was, whether this was "a taking in execution" so as to determine the lessee's interest, which was decided in the affirmative. Another point raised was, whether the Crown, as representing the lessees, was entitled to remove certain engines which they had, on entering, purchased of the former occupiers, and others which they had erected. And the Court held that, in the event which had happened, being one of the excepted cases referred to in the covenants, the lessees were not, and *e consequentiâ* the Crown was not entitled to remove any of the fixtures, whether purchased or erected by them, but the whole belonged to the lessor.

Effect where the previous valuation of the fixtures to be purchased by the lessor is rendered impossible by the act of the tenant.

Where a colliery, with machinery and implements necessary for working it, comprised in an inventory and valuation referred to in the lease, was leased for a term of years, with a proviso for re-entry on non-payment of rent, and a covenant on the part of the lessee, at the expiration or other sooner determination of the demise, to deliver up the machinery and implements; and that a valuation should be made thereof three months previously, and the difference

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between that and the valuation then made should be paid by the tenant if the second valuation were less, and by the landlord if it were more, than the valuation made at the commencement of the lease; the landlord obtained a judgment in ejectment, in Trinity Term, by reason of a forfeiture for non-payment of the rent, but did not execute the writ of possession until the 8th of November, and the tenant committed an act of bankruptcy on the 9th of November; it was held, that the landlord was entitled to take possession of all the machinery and implements (some of which had been erected by the tenant during the term), he accounting for the excess of value above the former valuation, though no previous valuation had been made: *Storer* v. *Hunter*, 3 B. & C. 368.

The preceding cases will suggest some of the obscurities to be avoided in framing clauses of this nature.

A specification of the fixtures about two dwelling-houses, in a mortgage of those houses and a foundry, has been held to exclude the machinery in the foundry, which would otherwise have passed: *Hare* v. *Horton*, 2 N. & M. 428.

Other cases relating to the construction of stipulations in leases respecting fixtures are: *Horn* v. *Baker*, 9 East, 215; *Martyr* v. *Bradley*, 9 Bing. 24; *Dumergue* v. *Rumsey*, 2 H. & C. 777; *Earl of Mansfield* v. *Blackburne*, 6 Bing. N. C. 426; *Thresher* v. *East London Waterworks Co.*, 2 B. & C. 608; *Haslett* v. *Burt*, 18 C. B. 893; *Wilson* v. *Whateley*, 1 J. & H. 436; *West* v. *Blakeway*, 2 M. & Gr. 729; *Foley* v. *Addenbroke*, 13 M. & W. 174; *Stansfield* v. *Mayor of Portsmouth*, 4 C. B. N. S. 120; *Bishop* v. *Elliott*, 11 Ex. 113; *Moss* v. *James*, 38 L. T. N. S. 595; *Cornish* v. *Stubbs*, L. R. 5 C. P. 334.

What are contracts for the sale of interests in lands within the Statute of Frauds.

Contracts for the sale of crops or fixtures, which the tenant may remove during the tenancy (though neither, until severed, are goods and chattels, or recoverable in trover) are not contracts for the sale of any interest in lands, within the Statute of Frauds: *Evans* v. *Roberts*, 5 B. & C. 829; *Hallen* v. *Runder*,

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1 Cr. M. & R. 266 : see *Minshall* v. *Lloyd*, 2 M. & W. 459 ; *Mayfield* v. *Wadsley*, 5 D. & Ry. 233 ; *Jones* v. *Flint*, 2 Per. & D. 594. See further as to contracts within the Statute of Frauds, *ante*, vol. 1, tit. "AGREEMENTS." As to mortgages of fixtures, see *post*, tit. "MORTGAGES."

3. EMBLEMENTS.

Tenant's right to emblements.

If a lease or tenancy (*f*), determinable on a contingency, expire after the lessee has sown the ground, he, or his representative, is entitled to enter and reap the crops thus sown : see *Knivet's Case*, 5 Rep. 85 a ; *Oland's Case*, 5 Rep. 116 ; *Geanes* v. *Portman*, Cro. Eliz. 314 ; *Latham* v. *Atwood*, Cro. Car. 515 ; *Grantham* v. *Hawley*, Hob. 132 ; *Arnold* v. *Skeale*, Noy. 149 ; *Graves* v. *Wild*, 9 B. & Ad. 105 ; *Strickland* v. *Maxwell*, 2 Cr. & M. 539 ; *Caldecott* v. *Smythies*, 7 Car. & P. 808. The rule applies where the demise is determined as well by the act of the lessor, as by any collateral event, but not where the term ceases on a given day by effluxion of time ; Co. Litt. 55. a.; or where it is determined by the act or default of the lessee. Thus, where a lease contained a condition, authorising the lessor to re-enter if the lessee contracted a debt on which he should be sued to judgment, which should be followed by execution ; and the lessor re-entered by virtue of this condition in consequence of a judgment and execution against the lessee ; the lessor was held to be entitled to the emblements : *Davis* v. *Eyton*, 4 Moo. & P. 820. See *Thorpe* v. *Eyre*, 3 N. & M. 234 ; *Davis* v. *Eyton*, 7 Bing. 154. The statement of the rule implies that an under-lessee shall not lose his emblements by the act of the mesne landlord determining the tenancy : *Bulwer* v. *Bulwer*, 2 B. & Al. 470 : see *Nicholas* v. *Simonds*, 2 Roll. R.

Under-lessee.

(*f*) The question of emblements is here considered only as affecting the relation of landlord and tenant. It also affects tenants for their own lives or *pur autre vie ;* also persons possessed of glebe lands by virtue of their benefices, as to whom, see stat. 28 Hen. 8, c. 11, and *Bulwer* v. *Bulwer*, 2 B. & Al. 470.

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468. As to the respective rights of mortgagor and mortgagee, *vide infra*, tit. "MORTGAGES."

Contracts and customs respecting outgoing tenants.

The right of the outgoing tenant, in regard to crops sown by him, is generally regulated by express contract, or by local custom, of which the most usual is, that the outgoing tenant shall leave the last year's manure, and, not unfrequently, the last year's crops, on the land, on being paid their value by the landlord or the succeeding tenant. As to the reasonableness, &c., of such customs, see *Dalby* v. *Hirst*, 1 Br. & B. 224; *Senior* v. *Armitage*, Holt, N. P. 197; *Bevan* v. *Delahay*, 1 H. Bl. 5: *Hutton* v. *Warren*, 1 M. & W. 466; *Roberts* v. *Barker*, 1 Cr. & M. 808. As to the customs of particular places, see Woodf. L. & T. p. 727. Evidence of such customs is admissible although the lease is under seal, if there is no inconsistency: *Wigglesworth* v. *Dallison*, 1 Doug. 201: and see the notes on this case in 1 Smith, L. C. 594. See also *Holding* v. *Pigott*, 5 Moo. & P. 427; *Caldecott* v. *Smythies*, 7 Car. & P. 808; *Hartley* v. *Burkett*, 6 Scott, 497; *Hallifax* v. *Chambers*, 4 M. & W. 663. As to the effect of particular stipulations in excluding the custom of the place (respecting which the general rule is, that such customs are binding so far as they are not inconsistent with the provisions of the instrument of demise, although that instrument is under seal), see *Webb* v. *Plummer*, 2 B. & Al. 746; *Roberts* v. *Barker*, 1 Cr. & M. 808; *Hutton* v. *Warren*, 1 M. & W. 466; *Clarke* v. *Roystone*, 13 M. & W. 752; *Wiltshear* v. *Cottrell*, 1 E. & B. 674; *Muncey* v. *Dennis*, 1 H. & N. 216.

Where by the custom of the country or the terms of the lease an outgoing tenant is entitled to retain possession of part of the premises after the expiration of the term for threshing out his crops or other like purposes the right operates as a prolongation *pro tanto* of the term as to the part retained, so as to continue the landlord's right to distrain: *Knight* v. *Bennett*, 3 Bing. 364. So the outgoing tenant will have a good defence to an action of trespass by the incoming tenant in respect of his entry on the part so retained, to thresh or remove the crops: *Griffiths* v. *Puleston*, 13 M. & W. 358; or to an

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action of ejectment at the suit of the landlord: *Alcock* v. *Wilshaw*, 2 E. & E. 633. So also a covenant to leave manure on the farm, and sell it to the incoming tenant at a valuation, gives the outgoing tenant a right of onstand, so that he may maintain trespass against the incoming tenant, who removes it before the valuation: *Beaty* v. *Gibbons*, 16 East, 116.

Where the tenant was entitled, by the terms of the lease, to enter and reap the last year's crops, so as the land was summer-fallowed, &c., it was held, that the succeeding tenant could not maintain an action against him for carrying away the crops, on the allegation, that the terms of the covenant, as to the cultivation, had not been complied with on his part, since this did not change the property in the crops, but formed the ground for an action by the landlord: *Boraston* v. *Green*, 16 East, 71; *Smith* v. *Chance*, 2 B. & Al. 753; *Harvey* v. *Grabham*, 5 A. & E. 61.

What are emblements.

The term emblements has been defined as expressing "a right which the law gives, in certain cases, to the tenant of an estate of uncertain duration, and which has unexpectedly determined without any fault of his, to take crops growing upon the land where his estate determines, although his estate is itself come to an end:" Smith L. & T. 394. The term is derived from the French word "emblavement," meaning corn sprung up above ground, but the right extends not only to wheat, oats, barley, &c., but to roots, hemp, flax, and vegetables which yield their profit within the year; "but if [the lessee] plant young fruit-trees, or young oaks, ashes, elmes, &c., or sow the ground with acornes, &c., the lessor may put him out because they will yeeld no present annuall profit:" Co. Lit. 556. But hops growing out of ancient roots have been held to be like emblements and to go to the personal representatives of a tenant for life and not to the remainderman: *Latham* v. *Atwood*, Cro. Car. 515. Clover has been held not to be emblements because the crop was not to be taken within a year after the time when it was sown, the right being confined to those products only which

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ordinarily repay the labour by which they are produced within the year in which that labour is bestowed, though the crop may, in extraordinary seasons, be delayed beyond that period: *Grames* v. *Weld*, 5 B. & Ad. 105. Natural products of the soil, such as growing grass, are not emblements; 1 Roll. Abv. 728; Com. Dig. *Biens*, (G. 1).

Stat. 14 & 15 Vict. c. 25.

The importance of the doctrine of emblements is in practice greatly diminished between landlords and tenants by the stat. 14 & 15 Vict. c. 25, which substitutes for claims to emblements a right of occupation until the end of the current year of the tenancy. The term "farm" in this Act has been held to include premises held under a yearly tenancy and consisting of a cottage with about an acre of land partly cultivated as a garden and partly sown with corn, potatoes, &c.: *Haines* v. *Welch*, L. R. 4 C. P. 91.

This Act, after reciting in the preamble that it is expedient to amend the law to prevent or lessen the evils of the right to emblements and the loss and injury arising therefrom, enacts as follows:—

On determination of leases or tenancies under tenant for life, &c., instead of emblements, tenant to hold until expiration of current year, &c.

Sect. 1. "Where the lease or tenancy of any farm or lands held by a tenant at rack-rent shall determine by the death or cesser of the estate of any landlord entitled for his life, or for any other uncertain interest, instead of claims to emblements, the tenant shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy, and shall then quit, upon the terms of his lease or holding, in the same manner as if such lease or tenancy were then determined by effluxion of time or other lawful means during the continuance of his landlord's estate; and the succeeding landlord or owner shall be entitled to recover and receive of the tenant, in the same manner as his predecessor or such tenant's lessor could have done if he had been living or had continued the landlord or lessor, a fair proportion of the rent for the period which may have elapsed from the day of the death or cesser of the estate of such predecessor or lessor to the time of the tenant so quitting, and the succeeding landlord or owner and the tenant respectively shall, as between themselves and as against each other, be entitled to all the benefits and advantages, and be subject to the terms, conditions, and restrictions, to which the preceding landlord or lessor and such tenant respectively would have been entitled and subject in case the lease or

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tenancy had determined in manner aforesaid at the expiration of such current year: Provided always, that no notice to quit shall be necessary or required by or from either party to determine any such holding and occupation as aforesaid."

4. Compensation for Improvements, &c.

Custom of country not excluded by lease, unless inconsistent therewith.

Custom of the Country.]—Ever since the decision in *Wigglesworth* v. *Dallison*, in 1799 (1 Doug. 201; *S. C.* 1 Smith L. C. p. 594) it has been established that tenancies of agricultural land, even when created by lease under seal, are subject to local agricultural customs, or "customs of the country" as they are usually called.

The rule of law on this question is thus stated by *Parke*, B., in *Hutton* v. *Warren*, 1 M. & W. 466,—"It has been long settled that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages. Whether such a relaxation of the common law was wisely applied where formal instruments have been entered into, and particularly leases under seal, may well be doubted; but the contrary has been established by such authority, and the relations between landlord and tenant have so long been regulated upon the supposition that all customary obligations not altered by the contract are to remain in force, that it is too late to pursue a contrary course; and it would be productive of much inconvenience if this practice were now to be disturbed." See also *Webb* v. *Plummer*, 2 B. & Al. 746; *Roberts* v. *Barker*, 1 Cr. & M. 808; *Clarke* v. *Roystone*, 13 M. & W. 752 (*g*).

(*g*) As to what stipulations in a lease will negative the appli-

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An agricultural custom must be reasonable, but it need not have subsisted from time immemorial; it must, however, have subsisted for a reasonable length of time, and it must be adequately proved by the party setting it up, that is to say "it must be col- "lected, not from what the witnesses say they think "the custom is, but from what was publicly done "throughout the district:" Per *Jessell*, M. R. in *Tucker* v. *Lingen*, 21 Ch. D., at p. 34; see also *Caldicott* v. *Smythies*, 7 Car. & P. 808. A custom when proved (*h*) will be considered as tacitly incorporated in all tenancies of agricultural land in the district to which it applies, whether such tenancies have been created by lease or agreement (either written or oral), except it be expressly excluded by or is inconsistent with the terms of the lease or agreement: *Tucker* v. *Lingen*, 8 App. Cas. 508; and in so far as the custom and the lease or agreement are not inconsistent with each other they may both apply to the tenancy. It is for the Court to decide whether or not a custom is reasonable, and whether or not it is excluded from or is inconsistent with the terms of a lease or agreement: see *Tucker* v. *Lingen*, *supra*, and especially, on this point, the observations of Lord *Blackburn* in 8 App. Cas. at pp. 511, 512.

What is custom of the country.

Agricultural customs vary in different parts of the country, and it is often difficult to define with accuracy the limits of any particular custom, or to say where it begins and where it ends; and, although many of them are commonly known as the customs of particular counties, yet the area of their operation is not limited by the county boundaries, but extends into adjoining counties; as is the case, for example, with the Lincolnshire custom. The custom must, therefore, be proved to exist in the immediate locality in which it is set up, and the

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cation to the tenancy of customs of the country, see *Wiltshear* v. *Cottrell*, 1 E. & B. 674; *Muncey* v. *Davis*, 1 H. & N. 216.

(*h*) The question of the admissibility or otherwise of the custom, having regard to the terms of the contract, is for the judge to determine; the question as to what is the contract created by incorporating the custom, if admissible, into the lease, is apparently for the jury: *Parker* v. *Ibbetson*, 4 C. B. N. S. 846.

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usage of a landed estate (however large) has not the same effect as a custom, and will not bind a tenant unless it is expressly brought to his notice: *Womersley* v. *Dally*, 26 L. J. Ex. 219.

Matters affected by custom of country.

The chief matters relating to the tenancy of agricultural land which customs of the country affect are—(1) the date of entry, (2) the rights of the outgoing and incoming tenants respectively as to partial occupation of the farm during the last year of the former's and the first year of the latter's tenancy, (3) the system of cultivation, (4) the sale of the produce of the farm, and (5) the allowances to be made to an outgoing tenant in respect of (a) tillages, or acts of husbandry performed during the last year of the tenancy, (b) unconsumed hay and and other farm produce, (c) unapplied manure, (d) seeds or crops sown but not reaped, and (e) improvements effected on the farm.

All customs of the country regulate the beforementioned matters more or less directly, and all provide for the payment to outgoing tenants of allowances in respect of the above-mentioned items except the last, though the regulations and allowances vary according to the situation of the farms; the latter especially, on account of the different systems of farming that are carried on in different localities, and of the different times at which farm tenancies commence. But the greatest variation in customs of the country occurs in respect of the allowances that are paid to outgoing tenants for "improvements."

To give a complete text of the various customs which prevail throughout England and Wales would be out of the scope of this work, even if it were possible to do so. So far as the editor is aware, no such complete list has ever been published, but the nearest approach to it will be found in Woodfall's "Landlord and Tenant," 12th Ed. pp. 727 *et seq.*, and in Mr. Willis Bund's "Treatise on the Law of Compensation for Unexhausted Agricultural Improvements," 2nd Ed. Chap. II. sect. 1. Both these lists appear to have been compiled from the schedules to an elaborate report made upon the

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subject by the Council of the Central and Associated Chambers of Agriculture, in 1875, but even that body, with its special opportunities for acquiring information on the subject, admits that its schedules are not exhaustive. Although these allowances are in practice generally paid by the incoming to the outgoing tenant, yet the landlord is legally liable to the outgoing tenant for them: *Mansell* v. *Norton*, 22 Ch. D. 769. See also *Faviell* v. *Gaskoin*, 7 Ex. 273; *Stafford* v. *Gardner*, L. R. 7 C. P. 242; and an alleged custom or usage that the outgoing tenant should look to the incoming tenant for payment of them to the exclusion of the landlord's liability cannot be supported: *Bradborn* v. *Foley*, 3 C. P. D. 129 (*i*).

Compensation for improvements under custom.

In view of the recent Act of Parliament on the subject, it will not be out of place briefly to consider the several classes of "Improvements" for which some customs of the country allow compensation. They may be classified under the three heads of (1) Permanent, (2) Durable, and (3) Temporary. In the first class are included building, draining, laying land down to permanent pasture, and the like; and for this class of improvements, which as a rule are made by landlords and not by tenants, hardly any custom allows compensation. One or two, indeed, *e.g.*, the Lincolnshire, allow tenants compensation for draining. In the second class may be included the application to the land of bones, chalk, clay, and such like substances, the effect of which continues for a considerable period. For this class some customs allow compensation on a more or less liberal scale. The third class consists of the application to the land of purchased artificial or other manures, and the consumption by cattle, sheep or pigs on the farm of purchased feeding stuffs. Very many customs of late years have allowed compensation for improve-

(*i*) In practice the outgoing tenant generally sells the growing crops, &c., to the incoming tenant, which is apparently a sale of an "interest in land," the contract for which must be reduced to writing, as required by the Statute of Frauds, sect. 4. See *ante*, Vol. I., tit. AGREEMENTS, p. 282, *et seq.*

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ments of this class; but very few of them agree as to the scale upon which such allowances should be made, and some allow for some sorts of manures and feeding stuffs, and others for other sorts.

Statutory rights to compensation for improvements, &c.

Compensation under the Agricultural Holdings Act, 1883.]—The Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), effects, with respect to holdings to which it applies, important changes in the law as to the mutual rights and obligations of landlords and tenants respecting improvements executed by the latter on their holdings, during their tenancies, and after the commencement of the Act, *i.e.* the 1st of January, 1884 (*k*).

To what holdings the Act applies.

This Act applies generally to holdings of whatever size which are either wholly agricultural or wholly pastoral, or partly the one and partly the other, and to all holdings wholly or in part cultivated as market gardens, but not to any holdings let to the tenant during his continuance in any office, appointment, or employment under the landlord: see sect. 54. The term "market garden" will require to be judicially defined. The operation of the Act to allotments let to labourers, &c., may be excluded by making the tenancy terminate with the determination of the employment: see Bund's Agri. Hold. Acts, p. 281. This Act (like the Act of 1875) applies to Crown lands, and to lands belonging to the Duchies of Lancaster and Cornwall: see sects. 35—37. And the powers of landlords under the Act are exerciseable by archbishops, bishops, incumbents of benefices, and charity trustees, with the consents prescribed in sects. 38—40 of the Act.

Operation of the Act cannot generally be excluded.

The operation of the Act of 1875 might be excluded or modified by agreement between the parties; but by sect. 55 of the present Act, all agreements depriving the tenant of his right to compensation under the Act in respect of the im-

(*k*) As to the provisions of this Act with regard to improvements executed before the commencement of the Act, see sect. 2 of the Act.

provements mentioned in the first schedule thereto are to be void, except in cases where substituted compensation is allowed by the Act. Compensation for Improvements, &c.

To this general rule, however, there are four exceptions :— Exceptions.

(i.) Where the tenant desires to execute any improvement mentioned in the first part of this schedule, *i.e.*, building or other improvement of a permanent character, to which the consent of the landlord or his agent is requisite, such consent may be given conditionally on such terms as to compensation or otherwise as may be agreed upon; and any compensation thus agreed upon is to be deemed as substituted for compensation under the Act: sect. 3. The landlord thus retains under the Act a certain amount of control over the execution by the tenant of permanent works on the land: he may refuse or withhold his consent altogether, in which case, if the tenant executes the works, the ordinary rules of law will apply with respect to them (as to which see *ante*, p. 313); or he may prescribe that only certain works shall be executed, or that they shall be executed in a certain way, or within a certain time, or under certain conditions, or to the satisfaction of his agent or surveyor; or that the amount of compensation to which the tenant shall be entitled in respect of such works shall not exceed a specified amount, or generally as to the amount and time and mode of payment of such compensation. Such stipulations may be embodied in the instrument creating the tenancy, or may be the subject of a subsequent agreement on the tenant requesting the landlord's consent to the improvements: see sect. 3.

(ii.) Where the tenant gives notice to the landlord of his intention to execute an improvement mentioned in the second part of the schedule, *i.e.*, to drain the land, the parties may agree on the terms as to compensation or otherwise on which the improvement is to be executed, and any compensation so agreed on is to be deemed as substituted for compensation under the Act; but in default of such agreement, or unless the landlord elects to drain the

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land himself, the tenant may do so, and will thereupon become entitled to compensation under the Act. The parties may, however, by agreement in the lease, or otherwise, dispense with notice and stipulate, as to terms of compensation or otherwise, with respect to the drainage (sect. 4). On receipt of the notice the parties may either agree as to compensation, and otherwise with regard to the work, or the landlord may, unless the notice is previously withdrawn, elect to do it himself, and charge the tenant with payment of 5*l.* per cent. on the outlay, or require the tenant to repay him the outlay with 3*l.* per cent. in twenty-five years by annual instalments; such payments to be recoverable as rent. The Act leaves to the parties full liberty to enter into any agreement, whether contained in the lease or entered into subsequently, which they may think proper with regard to the mode in which the work is to be done and the time within which it is to be done, and how it is to be paid for. A parol agreement will be sufficient, but apparently it must be between the landlord personally, and not by his agent, and the tenant. It will generally be advisable that agreements with respect to drainage should be reduced to writing: see sect. 4.

(iii.) Where any particular agreement in writing secures to the tenant, for any improvement mentioned in the third part of the schedule, *e.g.*, manuring, boning, or liming the land, &c., fair and reasonable compensation, having regard to the circumstances existing at the time of making such agreement, such compensation is to be deemed as substituted for compensation under the Act: see sect. 5.

(iv.) Where, in the case of a tenancy current at the commencement of the present Act, any agreement in writing, or custom, or the Act of 1875 provides specific compensation for any improvement mentioned in the schedule, though executed after the commencement of the present Act, such compensation is to be deemed to be substituted for compensation under the Act (sect. 5). This exception will be of limited application, as, after the 1st of January, 1886, all tenancies, except those for terms

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of years created by leases, will have ceased to be tenancies current at the commencement of the Act, and also because leases, &c., have not hitherto generally provided specific compensation for improvements. The effect of the provision appears to be, that where, in the case of a current tenancy, the tenant is entitled to compensation by agreement, custom, or the Act of 1875, he shall not be entitled to claim compensation under the present Act: see sect. 5.

The landlord and tenant may agree on the amount and mode and time of payment of compensation under the Act: but in case of difference the matter is to be settled by reference: see sect. 8 (*l*).

The Act enacts, generally, with regard to a tenant's right to compensation, that :—

Sect. 1. "Where a tenant has made on his holding any improvement comprised in the first schedule hereto, he shall, on and after the commencement of this Act, be entitled on quitting his holding at the determination of a tenancy to obtain from the landlord as compensation under this Act for such improvement such sum as fairly represents the value of the improvement to an incoming tenant: Provided always, that in estimating the value of any improvement in the first schedule hereto there shall not be taken into account as part of the improvement made by the tenant what is justly due to the inherent capabilities of the soil."

The first schedule to the Act is as follows :—

PART I.

Improvements to which Consent of Landlord is required.

(1.) Erection or enlargement of buildings.
(2.) Formation of silos.
(3.) Laying down of permanent pasture.
(4.) Making and planting of osier beds.
(5.) Making of water meadows or works of irrigation.
(6.) Making of gardens.
(7.) Making or improving of roads or bridges.

(*l*) As to proceedings on a reference under this Act, see *ante*, Vol. II., p. 115, sub. tit. ARBITRATION, where will also be found forms of claims, notices, &c., for use in such references.

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(8.) Making or improving of watercourses, ponds, wells, or reservoirs, or of works for the application of water power or for supply of water for agricultural or domestic purposes.
(9.) Making of fences.
(10.) Planting of hops.
(11.) Planting of orchards or fruit bushes.
(12.) Reclaiming of waste land.
(13.) Warping of land.
(14.) Embankment and sluices against floods.

PART II.

Improvement in respect of which Notice to Landlord is required

(15.) Drainage.

PART III.

Improvements to which Consent of Landlord is not required.

(16.) Boning of land with undissolved bones.
(17.) Chalking of land.
(18.) Clay-burning.
(19.) Claying of land.
(20.) Liming of land.
(21.) Marling of land.
(22.) Application to land of purchased artificial or other purchased manure.
(23.) Consumption on the holding by cattle, sheep, or pigs of cake or other feeding stuff not produced on the holding.

From the foregoing remarks it would seem that in all cases of farm tenancies in which the parties desire that the allowances to be made to the tenant at the expiration of the tenancy for any of the improvements mentioned in the third part of the first schedule to the Act should be specific and defined, it will be necessary that the agreement or lease should define such allowances with precision, and that in default of this being done the tenant will be able to claim compensation for any such improvement on the basis of its value to an incoming tenant. The Act, it will be observed, does not affect the allowances which the various customs of the country give out-going tenants for tillages, &c., all of which, as well as

allowances for such improvements as are not mentioned in the schedule to the Act, will, it is conceived, remain unaffected by the Act, and will still be regulated by custom. As regards the scheduled improvements, however, it would appear that where a tenant would, but for the Act, have been entitled to a claim by custom, the Act compels him, in the absence of a particular agreement affording him fair and reasonable compensation, if he claims for them at all, to claim under the Act.

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CHAPTER XI.

Stamps on Leases.

By the Stamp Act, 1870 (33 & 34 Vict. c. 97), the following duties are imposed on leases :—

"Lease or Tack—

	£	s.	d.
"(1.) For any definite term less than a year :			
"(a.) Of any dwelling-house or tenement, or part of a dwelling-house or tenement, at a rent not exceeding the rate of 10*l.* per annum	0	0	1
"(b.) Of any furnished dwelling-house or apartments where the rent for such term exceeds 25*l.*	0	2	6
"(c.) Of any lands, tenements, or heritable subjects except or otherwise than as aforesaid	The same duty as a lease for a year at the rent reserved for the definite term.		
"(2.) For any other definite term or for any indefinite term :			
"Of any lands, tenements, or heritable subjects—			
"Where the consideration, or any part of the consideration, moving either to the lessor or to any other person, consists of any money, stock, or security (*a*) :			
"In respect of such consideration . . .	The same duty as a conveyance on a sale for the same consideration.		
"Where the consideration or any part of the consideration is any rent :			
"In respect of such consideration :			
"If the rent, whether reserved as a yearly rent or otherwise (*b*), is at a rate or average rate :			

(*a*) Formerly the *ad valorem* duty on leases applied only to considerations moving from the lessee to the lessor : *Boone* v. *Michell*, 1 B. & C. 18.

(*b*) Under the former Stamp Acts it was held that the stamp duty depended on the rent expressly reserved by the lease, and not on that which was actually paid : *Duck* v. *Braddyl*, 13 Pri. 455.

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	If the term is definite, and does not exceed 35 years, or is indefinite.			If the term, being definite, exceeds 35 years, but does not exceed 100 years.			If the term, being definite, exceeds 100 years.		
	£	s.	d.	£	s.	d.	£	s.	d.
Not exceeding 5*l.* per annum	0	0	6	0	3	0	0	6	0
Exceeding—									
5*l.* and not exceeding 10*l.*	0	1	0	0	6	0	0	12	0
10*l.* „ „ 15*l.*	0	1	6	0	9	0	0	18	0
15*l.* „ „ 20*l.*	0	2	0	0	12	0	1	4	0
20*l.* „ „ 25*l.*	0	2	6	0	15	0	1	10	0
25*l.* „ „ 50*l.*	0	5	0	1	10	0	3	0	0
50*l.* „ „ 75*l.*	0	7	6	2	5	0	4	10	0
75*l.* „ „ 100*l.*	0	10	0	3	0	0	6	0	0
For every full sum of 50*l.*, and also for any fractional part of 50*l.* thereof . . .	0	5	0	1	10	0	3	0	0
"(3.) Of any other kind whatsoever not hereinbefore described							0	10	0

With regard to duplicates and counterparts it is enacted by the same Act that :— Counterparts.

Sect. 93. "The duplicate or counterpart of an instrument chargeable with duty (except the counterpart of an instrument chargeable as a lease, such counterpart not being executed by or on behalf of any lessor or grantor,) is not to be deemed duly stamped unless it is stamped as an original instrument, or unless it appears by some stamp impressed thereon that the full and proper duty has been paid upon the original instrument of which it is the duplicate or counterpart." When duly stamped.

And as to stamps on leases and agreements for leases, it is thereby further enacted as follows :— Agreements.

Sect. 96. "(1.) An agreement for a lease or tack, or with respect to the letting of any lands, tenements or hereditable subjects for any term not exceeding thirty-five years (*c*), is to be charged with the same duty as if it were an actual lease or tack made for the term and consideration mentioned in the agreement. Agreements for not more than thirty-five years to be charged as leases.

(*c*) Having regard to the decision in *Walsh* v. *Lonsdale*, 21 Ch. D. 9 (see *ante*, p. 99), a considerable saving in respect of stamp duty (without prejudicing the lessor's rights and remedies with respect to rent, &c.) may perhaps be effected in the case of demises of lands for terms exceeding thirty-five years, *e.g.*, for building or mining purposes, by effecting such demises by means of agreements for leases *under seal* instead of by leases.

Stamps on Leases.

"(2.) A lease or tack made subsequently to, and in conformity with such an agreement duly stamped, is to be charged with the duty of sixpence only."

Leases how to be charged in respect of produce, &c. (*d*).

Sect. 97. "(1.) Where the consideration, or any part of the consideration, for which any lease or tack is granted or agreed to be granted does not consist of money, but consists of any produce or other goods, the value of such produce or goods is to be deemed a consideration in respect of which the lease or tack or agreement is chargeable with *ad valorem* duty, and where it is stipulated that the value of such produce or goods is to amount at least to, or is not to exceed, a given sum, or where the lessee is specially charged with, or has the option of paying after, any permanent rate of conversion, the value of such produce or goods is, for the purpose of assessing the *ad valorem* duty, to be estimated at such given sum, or according to such permanent rate.

Effect of statement of value.

"(2.) A lease or tack or agreement made either entirely or partially for any such consideration, if it contains a statement of the value of such consideration, and is stamped in accordance with such statement, is, so far as regards the subject matter of such statement, to be deemed duly stamped, unless or until it is otherwise shown that such statement is incorrect, and that it is in fact not duly stamped."

Directions as to duty in certain cases.

Sect. 98. "(1.) A lease or tack, or agreement for a lease or tack, or with respect to any letting, is not to be charged with any duty in respect of any penal rent, or increased rent in the nature of a penal rent, thereby reserved or agreed to be reserved or made payable, or by reason of being made in consideration of the surrender or abandonment of any existing lease, tack, or agreement of or relating to the same subject matter.

"(2.) No lease made for any consideration or considerations in respect whereof it is chargeable with *ad valorem* duty, and in further consideration either of a covenant by the lessee to make, or of his having previously made, any substantial improvement of or addition to the property demised to him, or of any covenant relating to the matter of the lease, is to be charged with any duty in respect of such further consideration (*e*).

(*d*) Formerly a lease containing a distinct contract for sale of goods could not be produced as evidence of such contract unless stamped both as a lease and as a contract under seal: see *Crayton* v. *Burtenshaw*, 5 B. & C. 41; *Stone* v. *Rogers*, 2 M. & W. 443.

(*e*) The contrary had been decided under the former Stamp Acts in *Re Bolton's Lease*, L. R. 5 Ex. 82; in consequence of which the stat. 33 & 34 Vict. c. 44, was passed, the effect of which is retrospective. The prospective part of that statute is here virtually re-enacted.

Stamps on Leases.

"(3.) No lease for a life or lives not exceeding three, or for a term of years determinable with a life or lives not exceeding three, and no lease for a term absolute not exceeding twenty-one years, granted by an ecclesiastical corporation aggregate or sole, is to be charged with any higher duty than thirty-five shillings."

Duty in certain cases may be denoted by adhesive stamp.

Sect. 99. "The duty upon an instrument chargeable with duty as a lease or tack for any definite term less than a year of—

"(1.) Any dwelling-house or tenement, or part of a dwelling-house or tenement, at a rent not exceeding the rate of ten pounds per annum;

"(2.) Any furnished dwelling-house or apartments;

"Or upon the duplicate or counterpart of any such instrument, may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is first executed.

Penalty in certain cases.

Sect. 100. "(1.) Every person who executes, or prepares or is employed in preparing, any instrument upon which the duty may, under the provisions of the last preceding section, be denoted by an adhesive stamp, and which is not, at or before the execution thereof, duly stamped, shall forfeit the sum of five pounds.

Proviso.

"(2.) Provided that nothing in this section contained shall render any person liable to the said penalty of five pounds in respect of any letters or correspondence."

By the stat. 39 & 40 Vict. c. 16, sect. 11, it is enacted that:—

Instruments increasing rent to be chargeable with stamp duty as leases at the additional rent.

"An instrument whereby the rent reserved by any other instrument chargeable with stamp duty as a lease or tack and duly stamped accordingly is increased, shall not be chargeable with stamp duty otherwise than as a lease or tack in consideration of the additional rent thereby made payable.

The amount of rent may be stated by reference.

Where the amount of rent is stated by reference to another instrument the *ad valorem* duty attaches: *Turner* v. *Power*, 7 B. & C. 625. So where a dwelling-house was demised at a certain rent, and two fields were demised by the same instrument at the same rent which the lessor received from the persons who then occupied them, the lease was held sufficiently stamped with an *ad valorem* stamp on the aggregate amount of the two rents: *Parry* v. *Deere*, 5 A. & E. 551.

Several rents.

Where several distinct rents are reserved (*f*) by

(*f*) As to whether a reservation is of one entire rent, or of several rents, see *Tanfield* v. *Rogers*, Cro. Eliz. 340; *Beare* v.

Stamps on Leases.

the same lease, it has been repeatedly decided that a duty in respect of each rent does not attach; it is sufficient that the stamp is adapted to a rent of the aggregate amount: *Boase* v. *Jackson*, 6 Moo. 489. See also *Blount* v. *Pearman*, 1 Scott, 55; *Reg.* v. *Hockworthy*, 2 N. & P. 383.

Where two distinct rents are reserved, one for a house and land, and the other for the furniture, &c., the stamp must be sufficient to cover both rents: *Coster* v. *Cowling*, 7 Bing. 456.

Where a landowner entered into a general agreement with his tenantry for the letting of their respective farms upon the same terms as to each, excepting the rent, extrinsic evidence was admitted to connect the stamp with a letting to a particular tenant: *Doe* d. *Copley* v. *Day*, 13 East, 241.

Additions after signature.

Where a fresh clause is inserted in the instrument after signature by one party, but before it is signed by the other, no additional stamp is required: *Knight* v. *Crockford*, 1 Esp. 189; see *Doe* d. *Waters* v. *Houghton*, 1 M. & Ry. 208; unless a substantially new contract between the parties is thereby created: see *Reid* v. *Deere*, 7 B. & C. 261.

A lease containing a clause giving the lessee the option of purchasing the reversion requires merely to be stamped as a lease: *Worthington* v. *Warrington*, 5 C. B. 636.

It may be here observed that where a stamp is affixed after the execution of an instrument, the amount of the stamp duty is to be "in accordance with the law in force at the time when it was first executed:" see sect. 17 of the Stamp Act, 1870. See also *Clarke* v. *Roche*, 3 Q. B. D. 170.

Woodley, Cro. Car. 154; *Knight's case*, 5 Rep. 54 b; Gilbert on Rents, 26.

PRECEDENTS.

I. *AGREEMENT for the letting of a* FARM *from* YEAR *to* YEAR, *containing Stipulations as to the* MODE *of* HUSBANDRY, *&c.*

MEMORANDUM OF AGREEMENT (*a*) made this —— day of ——, 18—, BETWEEN [*landlord*], of ——, in the county of ——, Esquire, of the one part, and [*tenant*], of ——, in the county of ——, Farmer, of the other part; WHEREBY the said [*landlord*] agrees to let, and the said [*tenant*] agrees to take, ALL the farm and lands called ——, situate in the parishes of —— and ——, in the county of ——, excepting a small plantation called —— Coppice (*b*), from Michaelmas-day, 1885, upon the terms following: that is to say, the tenancy to be from year to year; the tenant to enter on fallows at Lady-day, 1886, on the other lands, and the house and buildings (except barns) at Michaelmas, 1885, and on the barns at May-day, 1886; either party to be at liberty to determine the tenancy by a notice in writing of six calendar months or upwards expiring on any Michaelmas-day (*c*): And it is hereby agreed that section 33 of the Agricultural Holdings (England) Act, 1883, shall not apply to this tenancy. Tenant to quit in like manner as before expressed concerning his entry. Rent, £—— per annum, payable half-yearly, at Lady-day and Michaelmas-day, without any deduction on account of any tax, rate, assessment or other outgoings whatsoever, except the tithe rent-charge (*d*), and the land-tax, and landlord's property tax,

Demise of certain lands from year to year.

Times of entry on the different parts.

Rent.

(*a*) Stamp *ad valorem* on amount of rent. Stamp.

(*b*) As to this exception, see *ante*, p. 132.

(*c*) As to this stipulation, see *ante*, p. 286.

(*d*) By the Tithe Commutation Act, 1836 (6 & 7 Will. 4, c. 71), a commutation rent-charge was substituted for tithes; this rent-charge imposes no personal liability on either landlord or tenant, but is charged upon the land alone, and is recoverable by distress; but a tenant who has paid the rent-charge is entitled to deduct the amount from his rent, unless he has expressly agreed with his landlord to pay the charge himself: see sects. 67, 80, 81, Tithes.

I. Agreement for Letting a Farm from Year to Year.

which are to be paid or allowed by the landlord. Landlord, at his own costs, to cause the repairs to the barns mentioned in the First Schedule hereto, to be done as soon as conveniently can be after Lady-day, 1886, and to do the other repairs mentioned in the same Schedule before Christmas, 1886. Landlord to keep buildings in tenantable repair: tenant to keep the gates, stiles, bars, and fences in good repair, landlord providing rough timber. Tenant not to lop or top any timber tree, or teller, or sapling on the premises, except pollards usually and of right lopped and topped; tenant to cut and plash the quick-set hedges and other fences on the premises, in a husbandlike manner, to throw up the soil to the roots of such quick and other fences, and to keep the ditches cleaned and scoured, and the drains and water-courses free and open. Tenant not to mow any grass or meadow land above once in any one year of his tenancy, and if he break up any old meadow or old pasture land, unless by the landlord's consent in writing, then to pay the further yearly rent of £10 for every acre so broken up, and so in a proportion for any less quantity than an acre. Tenant to crop the arable land in each year as follows (*e*): namely, one equal third part thereof, with wheat or barley, one other equal third part with beans, peas, tares, clover, or oats, and the remaining third part to lie in fallow. All turnips grown on any part of the farm, to be consumed by sheep or cattle on the premises. Same land not to be cropped with wheat twice, or barley twice, or with wheat and barley in any period of three years. Tenant to use and consume on the

As to taxes and repairs.

As to timber, fences, and grass land.

As to course of husbandry.

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and 85 of the Act: see also *Willoughby* v. *Willoughby*, 6 Q. B. 722; *Griffinhoofe* v. *Daubuz*, 5 E. & B. 746; *Bedford* v. *Sutton Coldfield*, 3 C. B. N. S. 449, 472; *Jeffrey* v. *Neale*, L. R. 6 C. P. 240. An outgoing tenant, if liable to pay the tithe rent-charge, may be sued for the amount by the landlord or incoming tenant who has been compelled to pay it: see stat. 14 & 15 Vict. c. 25, s. 4.

Conditions as to cultivation, &c.

(*e*) The particular stipulations contained in this and the following precedents of husbandry leases, are to be considered as specimens merely of the manner in which such clauses may be framed; the progress of agriculture, and the varying customs and capabilities of different counties and farms, make it impossible to anticipate the provisions that would be appropriate in particular cases.

The conditions as to cultivation and management in the above agreement are somewhat stringent, but having regard to the state of agriculture at the present time, it may perhaps not be generally advisable for landlords to seek to impose excessive restrictions in this respect.

I. Agreement for Letting a Farm from Year to Year.

farm all hay and straw made and grown thereon; and to use and spread dung and manure arising or made on the farm, in such manner that every acre in tillage of the farm may be well manured once in every three years of his tenancy. Except that all hay and wheat straw on the farm unconsumed at the expiration of the tenancy, may be purchased by the landlord or succeeding tenant, at a fair valuation by two indifferent persons, one to be named by each party or their umpire; and that the tenant is to leave on the premises, without compensation, not only all Lent and white straw arising upon or from the premises, and remaining unconsumed thereon at the expiration of his tenancy, but also all dung and manure arising or made on the farm, and then remaining unconsumed. Tenant to keep clean by well hoeing, twice at the least, and weeding, all the land whilst cropped with beans, peas, tares, or clover. Tenant to endeavour to prevent any injury by persons, cattle, or sheep, to any of the hedges or trees, or fences, and to preserve the same, and not to do any injury to any timber or other trees, in taking such loppings as before allowed to him. Landlord, alone or with any other or others in his company, may shoot game on the estate. Tenant to permit all cottagers to continue personally to hold the cottages on the farm, at the present rents of 40*s*. per annum respectively, and conformably to the conditions on which they now hold the same respectively. Tenant not to crop or sow any of the land with rape, flax, hemp, or woad. Tenant not to under-let or assign the premises or any part thereof, (except the cottages). Tenant on quitting the farm, to receive such compensation for improvements as is mentioned in the Second Schedule hereto, at the rate therein specified: And the parties hereto declare that such compensation is fair and reasonable compensation having regard to the circumstances existing at the time of making the agreement, and that the same shall accordingly be deemed to be substituted for compensation under the Agricultural Holdings (England) Act, 1883, for improvements mentioned in the 3rd part of the First Schedule to that Act. In witness whereof, the parties hereto have set their hands, the day and year first aforesaid.

Landlord may shoot game.

Tenant not to under-let;

—to receive compensation for improvements.

The First Schedule above referred to.

Enumeration of repairs.

Repair the tiling and under-pinning of the house: repair the under-pinning of the stable, three barns and granary: and

I. Agreement for Letting a Farm from Year to Year.

fresh thatch the barns and granary: repair thatching of the out-buildings; repair or replace defective weather boarding of barns, and set up —— gates, —— sets of bars, and —— stiles in places where landlord and tenant shall consider most proper.

THE SECOND SCHEDULE ABOVE REFERRED TO (*f*).

II. *AGREEMENT for the Letting of a FARM, from* YEAR TO YEAR. MICHAELMAS *letting; half year's notice to quit. Special conditions as to* CULTIVATION, &c. REPAIRS *to be done by tenant.* COMPENSATION *for improvements, &c., according to* SCHEDULE. SPECIAL PROVISIONS.

Parties.

AN AGREEMENT (*g*) made the —— day of —— 18—, BETWEEN [*landlord*] of &c., of the one part; and [*tenant*] of &c., of the other part.

Interpretation Clause.

Interpretation clause.

1. In this agreement (unless a contrary intention appears) the expression "landlord" means the person for the time being entitled to the rents reserved hereby, whatever be the nature or extent of his interest; the expression "tenant" means the holder for the time being of the premises the subject of this agreement; the expressions "landlord" and "tenant" respectively, include the agents duly authorized to act for the respective parties: the expression "parties" includes all persons comprised in the respective expressions "landlord" and "tenant": and the expression "premises," unless otherwise restricted, includes the whole of the farmhouse, lands, and buildings, the subject of this agreement.

As to Parcels and Reservations.

Agreement to let and take. Parcels.

2. The landlord agrees to let, and the tenant agrees to take, ALL THAT farmhouse, homestead, and lands, with the

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(*f*) As to the matters to be inserted in this Schedule, see *post*, p. 356, note (*n*), p. 364, note (*s*), and p. 368, note (*v*).

Stamp.

(*g*) Stamp *ad valorem* on amount of rent; no additional stamp is required for penal rents, see *ante*, pp. 337, 338.

cottages; and all appurtenances thereto belonging, situate at ——, in the county of ——, which premises contain together —— acres, or thereabouts, and consist of the several buildings, closes, and fields, mentioned in the First Schedule hereto.

Reservations.

3. All game, wild fowl [rabbits], and fish (subject only to the concurrent rights of the tenant under the Ground Game Act, 1880), are excepted and reserved to the landlord; with the exclusive right for himself, his friends, and servants, of hunting, coursing, shooting, fowling, fishing, and sporting over the premises (subject only as aforesaid); and also all timber and other trees, pollards, and saplings, and all mines and minerals, coprolites, stones, clay, or gravel; with full liberty of access for all persons authorized by the landlord to cut, win, quarry, work, and carry away the same, and carry out drainage, or repairs, or other work respectively: Provided always that the landlord shall pay to the tenant reasonable compensation, to be assessed in manner hereinafter provided, for damage done to growing crops in so doing; And also with full liberty of access as aforesaid to the premises for viewing the state of repair, and management, and cultivation, or for any other reasonable purpose; and also the right to take and resume possession of land for the purpose of exchange or sale as well as for the purpose of working or executing any of the improvements or works mentioned in the forty-first section of the Agricultural Holdings (England) Act, 1883: Provided always that the landlord shall allow a proportionate reduction from the rent for any land so taken, and pay compensation for damage, such reduction and compensation to be ascertained in manner hereinafter provided.

As to Tenancy and Rents.

Term of tenancy.

4. The tenancy shall be for one year, commencing on the 29th day of September, 18—, and shall continue thenceforth from year to year: Provided always, and it is agreed between the parties hereto, that the thirty-third section of the Agricultural Holdings (England) Act, 1883, shall not apply to the present contract of tenancy in respect of the premises or any part thereof, but the same shall be determinable at the end of any year thereof, by either party giving to the other one half-year's previous notice in writing to determine the

II. Agreement for Letting a Farm (*Michaelmas*).

tenancy (*h*); And the tenancy shall also be determinable as is hereinafter provided.

Yearly rent.

5. The tenant shall pay the yearly rent of £—— clear of all tithes, rent-charges, and other deductions (except as is hereinafter mentioned), which shall become due and be payable by equal half-yearly payments on the —— day of ——, and the —— day of —— in every year except the last half-year's rent, after a notice to determine the tenancy, which shall become due and be payable on the —— day of —— next before the determination of the tenancy.

Additional rent for landlord's improvements.

6. The tenant shall also pay interest at the rate of £5 per cent. per annum on any sum or sums of money expended by the landlord, pursuant to any notice by or at the request of the tenant, in draining the premises, or any part thereof, in altering or erecting buildings, in making roads, or in otherwise improving the premises, after the works agreed to be done at the commencement of the present tenancy are completed, of which completion the certificate of the landlord's agent shall be conclusive evidence.

Mode of payment of such additional rent.

7. The interest on any money expended by the landlord in drainage or other improvements shall accrue due from the end of the current half-year in which the work shall be completed, and shall be treated in all respects as additional rent, and shall become due and payable during the remainder of the term on the same days, and in the same manner as the original rent is payable, and shall be subject to the same conditions and remedies, by way of distress and otherwise, for the recovery thereof; a memorandum made on this agreement, and signed by the landlord's agent for the time being, stating the sum spent, and the interest chargeable thereon, shall be conclusive evidence of such amounts respectively.

Additional rents for breaking up, &c.

8. The tenant shall also pay the additional rents following,

(*h*) As to determining the tenancy by six months' notice, see *ante*, p. 286.

The question as to whether the proviso should be inserted in the agreement depends upon the custom of the particular district. Generally, in the case of a Michaelmas tenancy, the proviso to limit the period for giving notice to quit would not be acceded to by the tenant; but in Lincolnshire, and some other counties, where Lady-day tenancies prevail, the tenants prefer that it should be open to either party to determine the tenancy at the end of any year, by a six months' notice. See the report of Mr. Druce (Report of the Agricultural Commission, 1882, p. 105).

that is to say: A rent at the rate of £20 per annum per acre for any land described in the First Schedule hereto as pasture or meadow land, which he shall break up or convert into tillage without the landlord's previous consent in writing; Also a rent at the rate of £10 per annum per acre for any land described in the same Schedule as arable land which in any year shall be left by the tenant uncultivated, or be cross-cropped, or over-cropped; such additional rents respectively shall commence from the quarter day next preceding such breaking up or conversion, leaving uncultivated, cross-cropping, or over-cropping, as aforesaid, and shall continue during the then residue of the tenancy, and be payable half-yearly with the other rents of the farm, and be subject to the same conditions and remedies, by way of distress or otherwise, for the recovery thereof.

Additional rent for under-letting.

9. The tenant shall also pay an additional rent at the rate of £10 per annum per acre for any part or parts of the premises which shall be assigned, or under-let, or the actual or beneficial possession whereof shall be in anywise parted with, without the previous consent in writing of the landlord; such additional rent shall commence with, and continue during the continuance of the under-letting, and shall be payable and subject in manner mentioned in the last preceding clause: Provided that neither the under-letting of any part of the premises for cottages and gardens for the tenant's labourers, nor the letting of grass keeping in the last six months of the tenancy for healthy sheep or neat cattle shall cause such additional rent to become payable.

To pay tithe rent-charge, rates, &c.

10. The tenant shall pay all tithe rent-charge, all existing and future rates, including poor rate, county rate, highway rate, sanitary rate, and education rate, and all taxes, including —— Valley drainage tax, if any, and all other assessments and outgoings whatsoever, except land tax and landlord's property tax, which if paid by the tenant shall be allowed to him by the landlord out of the next half-yearly payment of rent.

To occupy the premises personally, and not to assign, &c.

11. The tenant shall personally reside in the farm-house, and shall not assign, under-let, or part with the possession of the premises, or any part thereof, except the cottages (which may be let to weekly tenants) without the previous consent in writing of the landlord, nor without such consent let or set

II. Agreement for Letting a Farm (*Michaelmas*).

the keeping, except in the last six months of the tenancy, nor sell the growing crops of grass or clover thereon.

Reservation as to rights of outgoing tenant.

12. The tenant shall allow the outgoing tenant to retain until the —— day of —— after the commencement of the term hereby created, the use of the yards for the consumption of the straw, hay, roots, and other produce, which are to be consumed on the premises, together with the barns and dressing rooms necessary for the threshing and dressing of the corn grown during the previous harvest; and also half the house to live in, with a sufficient portion of the cart-horse stable. And if the tenant shall not agree with the outgoing tenant for the purchase of the root crop then growing on the farm, the outgoing tenant, or any person or persons appointed by him, shall have the right of entry and occupation upon and of the lands upon which such root crops are growing, and upon and of the yards and land in or upon which the root crops should, under the 16th clause of this agreement, be consumed, to the —— day of —— next following the commencement of the term hereby created.

Outgoing tenant's compensation for fallow, &c.

13. The tenant shall pay to the outgoing tenant all the rent, rates, and taxes paid in respect of so much of the land as was, and in the ordinary course of husbandry ought to have been dead fallow in the preceding summer, and also for all ploughing and acts of husbandry done thereon, and for all other things for which the outgoing tenant may be entitled to payment, under or by virtue of the lease or agreement under which the farm is or has been held, or under or by virtue of any custom or statute.

As to Cultivation and Management (*i*).

General course of husbandry.

14. The tenant shall during the tenancy occupy the premises in a good and husbandlike manner, and so as not to impoverish them, but to keep them in good heart and condition. And particularly he shall not cross-crop nor over-crop the land, and shall not take two white grain crops two years in succession therefrom, except when after the first crop the land shall be free from twitch, couch, and weed, in good and clean condition, and in fit and proper state to produce another white grain crop.

(*i*) As to stipulations with regard to cultivation and management, see *ante*, p. 342, note (*e*).

15. One-fifth of the whole of the arable land shall in each year be a good, clean, summer fallow, or properly cleaned for turnips or other vegetable crops, to be consumed upon the farm; and so much of that fifth as is fit and suitable for lair for sheep shall be sown with turnips, and one-tenth, at least, of the arable land shall in every year be in clover grass, and another tenth either in clover grass, seeds, peas, or beans: Provided that in reckoning the above proportions due allowance shall be made for the inequality of the areas of the several fields. Management of arable lands.

16. All the straw of oats, barley, peas, or beans grown upon the farm shall be consumed with neat beasts and other cattle, and converted into dung in some part of the premises; and upon such part of the land as is suitable for lair for sheep the tenant shall consume one-half of the turnips that may in any year be grown thereon, not more than one-half of such turnips being drawn off the land on which they are grown, and such turnips drawn off the land shall be consumed on some other parts of the premises. Consumption of straw, &c., on the premises.

17. The tenant shall year by year spend, spread, and bestow all the manure and compost which shall arise, or be made from or upon the premises, on such part of the premises as may have most occasion for the same, at the most reasonable time after such manure or compost shall have arisen or been made, except such manure or compost as shall arise or be made during the last twelve months of the tenancy, which manure shall be left in stacks or heaps in the most convenient places on the premises for the use of the landlord (*k*) [to be paid for by valuation, in the manner hereinafter provided, on the fifth of April preceding the termination of the tenancy, and that which may be produced on the premises between that time and the termination of the tenancy to be valued at such termination]. Spreading manure.

18. The tenant shall not mow any grass land not described as meadow in the First Schedule hereto, nor shall he mow any meadow land twice in any year. Mowing.

19. The tenant shall cut or geld all the anthills on the said farm as often as occasion shall require, and also twice in every Anthills, &c.

(*k*) *Or* "without compensation except for carting and labour of turning."

II. Agreement for Letting a Farm (*Michaelmas*).

year at least well and sufficiently cut, spud, or draw all the thistles upon the premises.

Brooks, watercourses and fences.

20. The tenant shall also clean out and scour all brooks which are considered by the landlord to belong to the premises, and remove the drift therefrom at some convenient period, as often as occasion shall require, and also shall from time to time, and as often as occasion shall require, cut and plash the hedgerows, and scour the ditches, in a proper and workmanlike manner, leaving the ditch a sufficient depth and width for the purpose of proper drainage and protection to the fence. The soil or material taken from any ditch or watercourse shall not be left on the edge or side so as to prevent the flow of surface water into the ditch or watercourse.

Vermin.

21. The tenant shall effectually destroy all [rabbits], moles, and rats upon every part of the farm, but no traps shall be used for catching rabbits, nor any firearms used or carried by the labourers or servants of the tenant, or other persons (except such one person as may be duly authorized by the tenant so to do under the provisions of the Ground Game Act, 1880), for such purpose, except with the special consent in writing of the landlord.

As to alteration of fences, &c.

22. The tenant shall not remove nor alter any fences, landmarks, or boundaries, nor erect or alter any buildings, without the consent in writing of the landlord, nor cause or suffer any new roads, footpaths, or ways to be made over any part of the premises.

To preserve game, &c.

23. The tenant shall use his best endeavours to preserve foxes, game, and the young and eggs of game, wild fowls, and fish, for the landlord and all persons authorized by him, subject only to the exercise by the tenant of his concurrent rights hereinbefore mentioned.

To prevent trespass.

24. The tenant shall permit the landlord to bring actions or take any legal proceedings against trespassers or poachers in the tenant's name, and shall (if required, and upon being indemnified by the landlord) lay informations and give evidence, and sign and serve notices to trespassers and others to keep off the premises.

As to cutting and damaging timber.

25. The tenant shall pay £5 for every timber, timberlike or other tree which he shall cut down, crop, or lop, or injure by grubbing the roots thereof, without the previous consent in writing of the landlord, such payment to be in addition to the market value of the tree so cut or injured.

Garden, &c.

26. The tenant shall keep and leave the garden, orchard, and shrubberies well and sufficiently stocked, planted, manured, cleansed, and preserved, and well and sufficiently cherish, nail up, prune, and preserve all the fruit trees, bushes, vines, and shrubs, standing or growing in the garden, orchard, or shrubberies.

As to Repairs.

General repairs.

27. The tenant shall from time to time and at all times keep the farm-house and buildings, and all the landlord's fixtures, windows, lights, gutters, drains, closets, cesspools, and privies occupied therewith, or belonging thereto, in good and tenantable repair, order, and condition, and properly scoured, cleansed, and emptied, as often as may be necessary, and shall cause the outside woodwork, ironwork, and spouting, to be painted with three coats of good oil paint once in every five years, and the inside woodwork and ironwork to be painted in the like manner once in every seven years, if considered necessary by the landlord, and further shall keep all the thatched roofs in good order and repair, and all slated and other roofs water-tight, and shall keep and maintain all gates, gate irons, stiles, posts, pales, rails, pump wells, bridges, tunnels, drains, watercourses, gripes, and all fences belonging to the premises, in good and tenantable repair, order, and condition, and properly scoured, cleansed, and kept open, and shall deliver up the whole of the premises well and sufficiently repaired, maintained, and kept, at the end of the tenancy, he being allowed, on request, timber in the rough, and the bricks, tiles, or slates necessary for the purpose of all repairs of buildings; but the tenant shall not be liable to reinstate damage done by accidental fire, storm, or tempest.

To carry materials.

28. The tenant shall fetch and carry all materials to be used in repairing the buildings, or in erecting new buildings upon the farm, by agreement during the term, and all tiles used in draining upon the premises.

Damages by neglect.

29. The tenant shall make good at his own expense, both as to material and labour, all injuries to the farm-house, buildings, and premises occasioned through the fault or neglect of himself, or his servants, or by the horses or cattle on the premises.

II. Agreement for Letting a Farm (*Michaelmas*).

Insurance.

30. The tenant shall insure the farm-house and cottages and all buildings for the time being on the premises in some respectable office, to be approved by the landlord, for insurance against fire, and will, if and whenever required so to do, produce to the landlord the receipts for the premium of such insurance for the current year.

As to last Year of Term and Tenant's Compensation.

Sowing spring corn in last year of tenancy.

31. The tenant shall give ten days' notice to the landlord of his intention to sow barley or spring corn in the last year of the tenancy, and the landlord shall have liberty to sow grass or clover seeds on the land so to be sown; which seeds the tenant shall harrow in, being paid for such harrowing; but in case the landlord shall not sow such seeds, he shall at the expiration of the tenancy, pay the tenant for the clover planted and sown by the tenant in the previous spring and then growing on the farm; Provided that such clover plant shall have been sown in a proper manner with good seed and shall not have been stocked or in any way injured after harvest.

Crops to be cleaned.

32. The tenant shall have all the crops upon the farm properly cleaned and weeded during the last year of the tenancy; Provided that if such cleansing and weeding shall not, in the opinion of the landlord, be effectually done it shall be lawful for the landlord to enter upon the land and clean and weed the crops at the expense of the tenant, upon giving fourteen days' notice in writing of his intention to enter for this purpose.

Tenant to leave hay and straw.

33. The tenant shall leave on the farm at the end of the tenancy all the hay and straw which shall not have been consumed in the manner required by the 16th clause, and the landlord shall take the same at consuming price; Provided that the tenant shall not be entitled to be paid for any hay or straw which in the ordinary course of husbandry, as regulated by this agreement, ought to have been consumed as provided by the 16th clause.

To provide hay, &c., for incoming tenant.

34. The tenant shall provide at consuming price for the use of the landlord, or incoming tenant, so much hay or straw as may be necessary for the littering and feeding of the number of horses sufficient for the cultivation of the land, up to the following Lady-day; also so much straw as may be necessary

for thatching the next year's crops; such hay and straw to be properly thatched, stacked, and protected from the weather.

Rights of out-going tenant.

35. At the end of the tenancy the tenant shall be entitled to the same right of retaining possession of part of the house, yards, and buildings, and to the other rights and privileges which are reserved by the 12th clause for the benefit of the now out-going tenant, and for the like period, and on the like conditions, to the intent that in respect of his away-going rights, the rights and privileges of the tenant (except as hereby expressly altered) shall be the same as those afforded to the out-going tenant.

Payment for rent, rates, taxes, and fallows.

36. The landlord or the incoming tenant shall, at the end of the tenancy, allow or repay to the tenant all the rent, rates, and taxes paid by him in respect of so much of the land as shall be, and in the ordinary course of husbandry ought to be dead fallow in the preceding summer, and also for all ploughing and acts of husbandry done thereon; but no such payment shall be made for any such fallows, or acts of husbandry, unless the said fallows be clean, and the work thereon done in a proper and husband-like manner.

Payment for fixtures.

37. The landlord or incoming tenant shall also, at the end of the tenancy, pay the tenant for all fixtures, which he, with the consent in writing of the landlord, may have purchased from the out-going tenant at the commencement of the tenancy hereby created, and for all such other fixtures, if any, as he may, with the like consent, have erected or put up on the premises during the period of his occupation, the same being valued according to their worth at the end of the tenancy.

For unexhausted improvements.

38. The landlord or the incoming tenant at the end of the tenancy shall also pay or allow to the tenant fair and reasonable compensation in respect of the particular matters and according to the scale of allowance set forth in the second Schedule hereto respectively; And the parties hereto declare that the compensation therein specified, as modified by the provisions of the next two following clauses, is fair and reasonable compensation, having regard to the circumstances existing at the time of making this agreement, and shall be deemed to be and shall be substituted for compensation under the Agricultural Holdings (England) Act, 1883, in respect of the several particular matters specified in such Schedule.

Provisions as to compen-

39. The compensation to be paid or allowed to the tenant

II. Agreement for Letting a Farm (*Michaelmas*).

under or by virtue of the last preceding clause shall be ascertained and paid or allowed subject to the following provisions:—

sation for improvements.

(i.) No allowance shall be made for any bones applied to grass land, except on a certificate duly signed on behalf of the landlord, specifying the quantity and cost of the bones supplied, and the date of their application.

(ii.) None of the other allowances specified shall be authorised by the arbitrators, except on the production to them of proper receipts or invoices, with satisfactory evidence of the cost incurred, and of the date of the outlay, application, or consumption.

(iii.) Manure applied to a second consecutive corn crop, or used in substitution for hay, straw, or green or root crops, if any, sold off or removed, whether with or without the landlord's consent, shall not be the subject of any allowance.

(iv.) In the ascertainment of the amount of compensation to be paid or allowed in respect of artificial or other purchased manures, or in respect of the consumption on the premises by cattle, sheep, or pigs, of cake or other feeding stuffs not produced on the premises, no allowance shall be made where, after the execution of such improvement, there has been taken from the portion of the premises on which the same was executed a crop of corn, potatoes, hay, or seed, or any exhausting crop: and there shall not be taken into account any larger outlay during the last year of the tenancy, than the average amount of the tenant's outlay for the like purposes during the three next preceding years of the tenancy, or other less number of years for which the tenancy shall have endured (*l*).

(v.) All money due to the landlord for rent, dilapidations, breaches of agreement, or otherwise, shall be treated as a set-off against the tenant's claim for compensation.

Compensation to landlord.

40. When any valuation shall be made of the hay and roots, or acts of husbandry, or other matters in respect of which

(*l*) This provision in part re-asserts the principles laid down in sects. 13 and 15 of the repealed Agricultural Holdings Act, 1875.

the tenant is entitled to receive compensation at the expiration of his tenancy, the person or persons making such valuations shall take into consideration the state, condition, and usage of the farm and premises, and the state of repair of the buildings and fences, and determine whether the tenant has carried out all the terms and conditions which on his part are to be observed and performed, and whether the farm is then in a clean and creditable state, and, if not, shall determine what sum of money shall be paid to the landlord as compensation therefor, and shall deduct such sum from the amount which would otherwise be or become payable to the tenant under this agreement; and the landlord shall also be entitled to deduct from such valuation any rent due and owing to him at the expiration of the tenancy, and any rates, tithe rent-charges, taxes, or other payments which ought to have been made by the tenant.

Delivery of possession.

41. At the end of the tenancy the tenant shall give up possession of all the premises, except that portion which he is entitled to retain under the 35th clause, and of such reserved portion he shall give up possession on the —— day of —— next succeeding the end of his tenancy.

Proviso for Re-entry.

Determination of tenancy on insolvency, &c.

42. In case the tenant shall become bankrupt or insolvent (such insolvency being evidenced by any arrangements or attempted arrangements with creditors, whatsoever be the nature thereof, and whether the same be voluntary or involuntary, by process of Court or otherwise), or if any execution, distress for rent, or other distraint shall be levied on his goods and chattels, or if the said yearly rent or any additional rent (including additional rent by way of interest on any such outlay by the landlord for improvements as aforesaid) or any part thereof respectively shall be in arrear for —— days (whether the same be lawfully demanded or not), or if the tenant shall fail to observe, keep, and perform all or any of the clauses and stipulations hereinbefore contained, and which on his part ought to be observed and performed, then, and in every or any such case, it shall be lawful for the landlord immediately, or at any time after the happening of any such event, or after any such omission or default, or after any such breach or non-performance, by notice in writing served at any period of the current year, to determine the tenancy at the

II. Agreement for Letting a Farm (*Michaelmas*).

expiration of the current year of the term hereby created, and upon the giving of such notice, at whatever period of the year the same may be served, the rent accruing due up to the day of the termination of the tenancy as fixed by such notice, shall be considered as having become due at the time of the giving of such notice, and as being then payable in advance: And the landlord, notwithstanding such notice, and without prejudice thereto, may enter and distrain for such rent so payable in advance, as well as for any other rent, if any, that may then be due.

Arbitration Clause.

Arbitration.

43. If any dispute, difference, account, or question, shall arise between the landlord and the tenant, with respect to the tenancy, or with respect to any valuation or any claim for compensation, or as to the amount or extent of accommodation to be given or allowed to or by any incoming or out-going tenant or otherwise as to the rights and liabilities of the respective parties under this agreement, then, and in every such case, the difference shall be settled by reference, according to the procedure and in the manner provided by the Agricultural Holdings (England) Act, 1883, but in accordance with the stipulations as to compensation and otherwise herein contained; PROVIDED that there shall be no appeal to the County Court by either party under the 23rd section of that Act, but that the award shall be final; And no provisions in the said Act contained relating to notices by the landlord or tenant or to the appointment of referees or of an umpire by the Local Commissioners or the County Court, or relating in anywise to an appeal to the County Court shall be applicable to this tenancy (*m*).

THE FIRST SCHEDULE ABOVE REFERRED TO.

THE SECOND SCHEDULE ABOVE REFERRED TO (*n*).

Exclusion of appeal to county court.

(*m*) The right to appeal to the County Court given by sect. 23 of the Agricultural Holdings (England) Act, 1883, may be excluded as in the text, inasmuch as in the present case the tenant will claim compensation, not under that Act, but under this "particular agreement." (See sect. 5 of the Act.) Sect. 8 enacts that "the landlord and the tenant may agree on this amount, and mode and time of payment of compensation under this Act."

Substituted scales of allowances.

(*n*) The first Schedule will contain particulars of the land demised. The second Schedule will contain the scale of allowances

for tenant's improvements to be substituted for the compensation allowed by Part. III. of the first Schedule of the Agricultural Holdings (England) Act, 1883. The particular matters to be included in this Schedule will vary so much according to the nature of the land, and the custom of the district, that they are proper rather to be agreed upon by the parties in each individual case, than to be set out in a book of legal precedents. It may, however, be useful to give here, and in the notes to the two following precedents, a few specimens of scales of allowances which have been recommended for adoption.

With regard to item No. 23 in the first Schedule to the Act, viz., "Consumption on the holding by cattle, sheep, or pigs, of cake or other feeding stuff not produced on the holding," the following is recommended by the Committee of the Central and Associated Chambers of Agriculture, in their Report dated the 17th June, 1884, as a fair and reasonable scale of compensation applicable to the country generally :—

> For one-third of the cost of linseed cake and meal, cotton cake and meal, rape cake or malt culm, and one-sixth of the cost of corn cake, malt, or other manufactured feeding stuffs of similar manurial value, which have been consumed on the farm during the last year of the tenancy; and for one-sixth of the cost of linseed cake and meal, cotton cake and meal, rape cake, or malt culm, and one-twelfth of the cost of corn cake, malt, or other manufactured feeding stuffs of similar manurial value, which have been consumed on the farm during the year preceding the last year of the tenancy, and providing that the quantity allowed for shall not exceed the average of the two next preceding years. For hay, straw, roots, and pulse purchased, one-fourth of the last year's consumption, and for corn one-sixth.

With regard to the other items (Nos. 16 to 22) of the first Schedule to the Act, the committee reported that though they recognised a common principle in the various scales submitted to them, they thought that a wide divergence in details, resulting from differences of soil and other conditions is inevitable; and they were therefore unable to report that any one scale was of general application.

The following scale of allowances for improvements specified in the third part of the first Schedule to the Act, is adapted to a Michaelmas holding, and is based on the recommendations of a committee of valuers appointed by the Norfolk Chamber of Agriculture :—

Scale of Allowances.

1. For boning land with undissolved bones (bones not less than quarter of an inch) where applied to arable land, upon a four years' principle; where applied to pasture land, eight years.
2. For chalking, claying, and marling land, upon a twelve years' principle; the entire cost to be allowed for the first four years, and after that period one-eighth to be deducted

III. *AGREEMENT for the letting of a* FARM *from year to year—a Lady Day letting—special clauses as to fixtures—*LANDLORD *to do external repairs.*

AN AGREEMENT (*o*), made the —— day of ——, 18—, BETWEEN [*landlord*] of, &c., of the one part, and [*tenant*] of, &c., of the other part.

Interpretation Clause.

1. [*Interpretation clause as ante, p.* 344.]

As to Parcels and Reservations.

Parcels. 2. The landlord agrees to let, and the tenant agrees to

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yearly for the remaining eight years. Claying, chalking on fen lands on a six years' principle.

3. For clay burning, one-third of the cost where only one crop has been taken.
4. For liming land, upon a four years' principle.
5. For application to land of purchased artificial or other purchased manure, one-third of the cost of the following, namely, rape, mustard, and cotton cakes, greaves, malt culms, town-made and farmyard manures used for roots or other green crops during the last year; and where a root crop fails and the land has been properly cultivated, and is left in a clean condition, half the cost of such manures, and also half the value of the farmyard manure used thereon.
6. For consumption on the holding by cattle, sheep, and pigs, of cake or other feeding stuff not produced on the holding, one-third of the cost of linseed and cotton cake, linseed and cotton seed meals, beans and peas, and one-sixth of the cost of all other corn and feeding stuffs consumed on holding during the last year of the tenancy, also one-sixth of the cost of linseed and cotton cakes, and linseed and cotton seed meals, beans, and peas consumed in the preceding year of the tenancy. Where the unexhausted value of feeding stuff is allowed, the maximum price of farmyard manure made by cattle, sheep, and pigs should not exceed 3*s.* per load of forty cubic feet. And folding on the olland for winter corn in the last year shall be subject to a reduction of one-half where the artificial food consumed thereon has already been charged.

   In all cases of a compensation claim, under this Schedule, foulness of the land to be taken into consideration as a reduction or set-off; such foulness, however, unless excessive (over the whole or greater portion of the holding), shall not be deemed to extend beyond the lands directly affected thereby.

(*o*) Stamp *ad valorem* on amount of rent.

take the farm-house and [*parcels as at* p. 344] mentioned in the first Schedule hereto.

3. [*Reservations as at* p. 345.]

Reservations.

As to Tenancy and Rents.

4. The tenancy shall be for one year commencing on the 25th day of March, 18—, and shall continue thenceforth from year to year, but shall be determinable as is hereinafter provided (*p*).

Term of tenancy.

5. The rent shall be £—— per annum clear of all deductions (except as is hereinafter provided) and shall become due and payable by equal quarterly payments on the 24th day of June, the 29th day of September, the 25th day of December, and the 25th day of March in every year.

Yearly rent.

6. [*Additional rent for improvements by landlord, as ante*, p. 346.

Additional rent for improvements.

7. [*Provision as to mode of payment of such additional rent, as at* p. 346.]

8. In case the landlord shall, with the assent of the tenant, expressed or implied, borrow the whole or any part of the money expended for any of the above purposes, the tenant shall pay, during the residue of the tenancy, by way of additional rent payable in manner and subject as aforesaid, an annual sum equal to any interest, rent-charge, or annuity which may be chargeable upon the premises or any part thereof in respect of such loan.

Proviso in case landlord should borrow money for improvements.

9. [*Additional rent for breaking up pasture, &c., as ante*, p. 346.]

For breaking up pasture, &c.

10. [*Additional rent for underletting, as at* p. 347, *omitting the words as to letting of grass keeping.*]

For underletting.

11. [*Tenant to pay tithe rent-charge, rates, and taxes, as ante*, p. 347.]

12. [*Tenant to occupy the premises, as at* p. 347, *omitting the words* "except in the last six months of the tenancy."]

13. The tenant shall pay to the out-going tenant all the rent, rates, and taxes, paid in respect of so much of the land as was, and in the ordinary course of husbandry ought to have been dead fallow in the preceding summer, and also for

Outgoing tenant's compensation for fallows, &c.

(*p*) This tenancy will be determinable under sect. 33 of the Agricultural Holdings (England) Act, 1883, on any Lady-day by either party giving to the other a year's previous notice to determine. For a clause empowering the parties to determine the tenancy by six months' notice, which is often preferred by tenants under these Lady-day tenancies, see *ante*, p. 345.

III. Agreement for Letting a Farm (*Lady-day*).

all ploughing and acts of husbandry done thereon, and for the wheat-plant and winter bean-plant growing on the farm, and for all other such things as the out-going tenant may be entitled to payment for under or by virtue of the lease or agreement under which the farm has been held.

Cultivation and Management.

General course of husbandry (*q*).

14. The tenant shall, during the tenancy, till the arable land according to the most approved system of husbandry, but so that the same shall not at any time be more than half in white or grain crops (green or pulse crops seeded being deemed for the purpose of this stipulation to be white or grain crops), nor more than —— acres thereof in potatoes, and also so that not less than —— acres shall be in fallow, roots, or green crop, and not less that half the land sown with white or grain crops shall be sown with clover or seeds; PROVIDED that this stipulation shall be held to be absolutely binding only after a notice in writing to that effect shall have been given by the landlord.

15. [*As to management of arable lands, as ante*, p. 349.]

Consumption and sale of produce (*r*).

16. All green crops and turnips, and other root crops, and all manure produced thereby, shall be consumed on the premises; but it shall be lawful for the tenant to sell hay and straw, on condition that half the value of any hay or straw sold shall be expended in manure within a year after such sale: Provided always that no hay or straw shall be sold or removed from off the premises after notice to determine the tenancy has been given, except with the previous consent in writing of the landlord.

Mowing.

17. [*As to spreading manure, as ante*, p. 349.]

18. [*Restriction on mowing grass lands, as ante*, p. 349.]

19. [*As to removing ant-hills, &c., as ante*, p. 349.]

20. [*As to scouring brooks and water-courses and cutting hedgerows, as ante*, p. 350.]

21. [*As to destruction of vermin, as ante*, p. 350.]

22. [*As to alteration of fences, &c., as ante*, p. 350.]

23. [*As to preservation of game, as ante*, p. 350.]

24. [*As to preventing trespass, as ante*, p. 350.]

(*q*) This clause may, if desired, be in the same form as clause 14, *ante*, p. 348.

(*r*) For other stipulations as to consumption of produce, see *ante*, p. 349.

25. [*As to cutting and damaging timber, as ante*, p. 350.]

26. [*As to maintenance of garden, as ante*, p. 351.]

As to Repairs.

General repairs (*s*).

27. The tenant shall at his own expense keep and maintain, and at the end of the tenancy leave and surrender the farm-house and buildings in good repair and condition, so far as regards the interior of the same (damage by fire only excepted), and especially shall repair all the glass, lead, and lattice of the windows, the pump, well, curlings, gates, bars, posts, rails, stiles, ironwork, barn-doors, garner, and side-boards, mow-frames, cider presses, engines, hedges, ditches, fences, drains, sluices, fenders, dykes and brooks (preserving the existing courses), and shall draw materials for repair of the river banks upon or belonging to the premises, being allowed by the landlord bricks, tiles, slates, lime, and rough timber by delivery within six miles of the premises, and gates made at ——, on the tenant paying 4*s*. towards the cost of making each gate: and shall tar all exposed woodwork of the farm buildings and offices usually tarred; and clear out the eaves gutters as often as required by the landlord; and shall paint and paper the internal parts of the farm-house and cottages, where usually painted or papered, at least once in every nine years of the tenancy, and whitewash the parts usually whitewashed once in every three years of the tenancy. In case the tenant shall neglect to fulfil all or any of the obligations in this clause contained, the landlord shall be at liberty to give him two calendar months' notice of such default; and if at the expiration of such two months' notice he shall not have remedied the same, the landlord may cause the necessary work to be done, and recover the amount of the cost thereof by distress or otherwise as if it were rent in arrear.

Tenant to carry materials (*s*).

28. The tenant shall fetch and carry, gratuitously, all materials to be delivered as aforesaid to be used in repairing the existing buildings, or in erecting new buildings on the premises, by agreement during the term, and all tiles to be used in draining upon the premises.

Damage by neglect.

29. [*Tenant to make good damages caused by neglect, as ante*, p. 351.]

Insurance.

30. [*As to insurance, as ante*, p. 352.]

(*s*) For somewhat different clauses as to general repairs and carriage of materials, see *ante*, p. 351.

III. Agreement for Letting a Farm (*Lady-day*).

Last Year of Term and Tenant's Compensation.

Sowing wheat and winter beans.

31. The tenant shall, in the autumn of the last year of the term, sow wheat and winter beans at a proper time on all lands which in due course ought to be then sown, or on such lands as the landlord may think fit and direct. The tenant shall, before the expiration of the tenancy, plough all the lands which in due course ought to be fallowed at a proper time and in a husbandlike manner.

Fallowing.

Ploughing for spring corn, and sowing spring beans.

32. The tenant shall, on or before the 1st day of February preceding the termination of the tenancy, commence to plough the land proper to be sown with spring corn, and sow spring beans where required (the incoming tenant having the option of providing the seed if he shall so desire); but if he shall make default in proceeding with such work at the time aforesaid, or if the landlord or incoming tenant shall at any time be dissatisfied with the manner in which such work is being done, they or either of them shall have power to enter upon all or any such lands for the purposes required.

33. The tenant shall not sow any spring corn, except beans, in the last year of the tenancy without the previous request in writing of the landlord; but in default of such request, or in case of non-compliance therewith, he shall allow the landlord or the incoming tenant to enter upon all the lands which ought to be thus sown, with the exception of one-third of the lands growing turnips, and to enter upon such lands as soon as the turnips have been eaten off.

34. [*Provision as to cleaning crops, as at* p. 352.]

35. [*Provision as to leaving hay and straw, &c.*, p. 352.]

Provision of straw for incoming tenant.

36. The tenant shall provide for the use of the landlord or incoming tenant so much straw as may be necessary for thatching the next year's crops, he being paid for the same at consuming price; such straw to be properly thatched, stacked, and protected from the weather.

Payment as to fallows, &c. (*ss*).

37. The landlord or the incoming tenant shall at the end of the tenancy allow or repay to the tenant all the rent, rates, and taxes paid by him in respect of so much of the land as shall be, and in the ordinary course of husbandry

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(*ss*) The terms of this clause should correspond strictly with those of the clause as to the outgoing tenant's compensation: see clause 13 of this Precedent, *ante*, p. 359.

ought to be, in dead fallow in the preceding summer, and also for all ploughing and acts of husbandry done thereon, and for the wheat-plant and winter bean-plant growing on the farm; but no such payment shall be made in respect of any such fallows, or acts of husbandry, unless the said fallows be clean and the work thereon done in a proper and husbandlike manner.

As to Fixtures.

As to fixtures.

38. The landlord or incoming tenant shall have the option of purchasing by arbitration at the termination of the tenancy the fixtures set out in the second Schedule hereto, now the property of the tenant.

39. The tenant shall be at liberty to move any fixtures comprised in the said second Schedule not purchased by the landlord or incoming tenant, making good forthwith all damages caused by such removal.

40. All other fixtures are the property of the landlord, but the tenant shall have the unrestricted use of them, subject to maintaining them during the tenancy and leaving them at the end thereof in good condition, fair wear and tear only excepted.

As to Landlord's Obligations and Rights.

To repay cost of laying down pasture with consent.

41. If during the tenancy, the tenant shall, with the consent, in writing, of the landlord, lay down to permanent pasture any part of the arable land comprised in the tenancy, the landlord will provide the grass seeds, and will pay to the tenant the cost of the labour in putting in the same, such payment in no case to exceed ——*s.* per acre.

To maintain roofs and outside walls of buildings.

42. The landlord will keep in good and substantial repair and order the main timbers, tiled roofs, and outside walls of the farm-house, cottages, and all buildings for the time being on the premises, the tenant giving timely notice that such repair has become necessary.

To supply materials for repairs.

43. The landlord will supply to the tenant on demand for all repairs to be executed by the tenant, bricks, tiles, slates, lime, and rough timber (or at the landlord's option timber in scantling and feather-edged boards), to be used by the tenant in a proper manner; and the cartage of the same from a distance not exceeding six miles to the premises to be performed by the tenant gratuitously as hereinbefore provided.

Proviso for re-entry.

44. If and whenever the said yearly rent of £——, or any

III. Agreement for Letting a Farm (*Lady-day*).

additional rent hereby reserved or any part thereof respectively shall be in arrear for —— days (whether legally demanded or not), or if and whenever there shall be a breach of any of the stipulations or conditions on the part of the tenant to be observed or performed, or if the tenant shall become bankrupt or insolvent, or make an attempt to make any composition with his creditors, or suffer execution, then and in any of the said cases it shall be lawful for the landlord to enter upon any part of the premises in the name of the whole and thereupon the tenancy shall forthwith cease and determine.

Landlord may sell by auction produce distrained.

45. If the landlord shall distrain for rent, it shall be lawful for him to sell by auction or otherwise, all hay, straw, and other fodder crops, corn, or roots, taken under such distress, and the same may be consumed (if the landlord so wishes) on any part of the premises, and the cattle or stock of any purchaser of such hay, straw, and other fodder crops, corn, or roots may be put to consume the same on the premises, for so long a period as the landlord may deem necessary, without any liability on the part of such purchaser, and without his being deemed a trespasser: and it shall be lawful for the landlord to assign to such purchaser, and thereupon the purchaser shall have exclusive right to the use and occupation of such part or parts of the buildings and other premises as the landlord shall think proper, for any time not exceeding three calendar months after any such sale.

[*Arbitration Clause, as ante*, p. 356.]

As Witness, &c.

The First Schedule above referred to.

The Second Schedule above referred to.

The Third Schedule above referred to (*t*).

(*t*) The first Schedule will contain particulars of the lands and premises agreed to be let. The second Schedule will contain a list of fixtures: see clauses 38, 39, 40. The third Schedule will contain a scale of allowances for tenant's improvements, as to which, see *ante*, p. 356, note (*n*).

The following scale, suitable for a Lady-day holding, embodies the Lincolnshire custom of tenant-right, and was approved by the Lincolnshire Chamber of Agriculture as fair and reasonable and proper to be substituted by agreements for compensation under the Act:—

IV. *AGREEMENT for letting a* GRASS FARM *from Year to Year—A Lady-day Letting.*

AN AGREEMENT (*u*) made the —— day of ——, 18—, BETWEEN [*landlord*], of, &c., of the one part; and [*tenant*], of, &c., of the other part.

Interpretation Clause.

1. [*Interpretation clause, as ante*, p. 344.]

As to Parcels and Reservations.

2. [*As to parcels, as ante*, p. 344.]
3. [*As to reservations, as ante*, p. 345.]

Scale of Allowances.

1. For one-third of the cost of linseed cake, cotton cake, rape cake, or malt culm, and one-sixth of the cost of corn cake, malt, or other manufactured feeding stuffs of similar manurial value, which have been consumed on the farm during the last year of the tenancy; and for one-sixth of the cost of linseed cake, cotton cake, rape cake, or malt culm, or one-twelfth of the cost of corn cake, malt, or other manufactured feeding stuffs of similar manurial value, which have been consumed on the farm during the preceding year of the tenancy.
2. For the cost of dry bones used with green crops consumed on the farm as follows, viz.:—The whole cost (inclusive of railway or water carriage) if used during the last year of the tenancy, and half the cost if used during the preceding year.
3. For the whole of the cost of artificial manures, of approved manurial value, used for green crops consumed on the farm during the last year of the tenancy, and for the cost of railway or water carriage of the same.

   Provided that the allowances, under clauses 2 and 3, for the cost of bones and artificial manures shall not exceed the cost per acre of the two next preceding years.
4. For the cost of lime used on the land of the farm, including the cost of carriage, cartage, and spreading thereof, on a seven years' principle, that is to say, the allowance to be reduced by one-seventh part every year, until the seven years have expired.
5. For the cost of claying, marling, or chalking the farm, on a twelve years' principle, the whole of the cost being allowed for the first four years, and after that period one-eighth part to be deducted yearly for the remaining eight years.
6. For the cost of bones used on pasture land of the farm as follows, viz.:—

   For dry bones, on a ten years' principle.

   For dissolved bones, on a five years' principle.
7. For two-thirds of the cost of other purchased manures used on pasture land of the farm, during the last year of the tenancy, and for one-third of the cost of any such manures used during the preceding year.

(*u*) Stamp *ad valorem* on amount of rent, *ante*, p. 336. Stamp.

IV. Agreement for Letting a Grass Farm.

As to Tenancy and Rents.

4 to 12. [*As to term of tenancy—Yearly rent—Additional rent for improvements—Proviso as to time of payment of such additional rent—Proviso as to moneys borrowed by landlord for Improvements—Additional rent for breaking up pastures, &c.—Additional rent for land underlet, &c.—Tenant to pay tithe rent-charge, rates and taxes—Tenant to occupy the premises: as ante*, pp. 345 to 348, (*v*).]

As to Cultivation and Management.

General course of husbandry.

13. The tenant shall during the tenancy occupy the farm lands and premises in a good and husbandlike manner, and so as not to impoverish the same, but to keep them in good heart and condition; and shall consume on some portion of the premises, with neat beasts or other cattle, all the hay produced on the farm.

14 to 23. [*Restriction as to mowing—Proviso as to spreading manure—Removal of ant-hills, &c.—Scouring brooks and watercourses and trimming hedgerows—Destruction of vermin—Alteration of fences—Preservation of game—Prevention of trespass—Cutting and damaging timber, &c.—Maintenance of garden: as ante*, pp. 349 to 351.]

As to Repairs and Insurance.

24 to 27. [*As to general repairs—Carriage of materials—Damage by neglect—Insurance: as ante*, pp. 351, 352.]

As to the last Year of the Tenancy and as to Tenant's Compensation.

Tenant to leave hay and straw.

28. The tenant is to leave on the farm, at the expiration of the tenancy, all the hay which shall not have been consumed in the manner required by the —— clause, and the landlord is to take to the same: Provided nevertheless, that the tenant is not to be entitled to be paid for any hay which in the ordinary course of husbandry, as regulated by this agreement, ought to have been consumed, as provided by the —— clause, and as to that for which the tenant is to be paid, the same is to be valued at consuming price.

Payment for fixtures.

29. The landlord or incoming tenant shall also, at the expiration of the tenancy, pay the tenant for all fixtures

(*v*) Compensation for fallows, wheat, and bean plant, and acts of husbandry will, of course, not be required in the case of a grass holding.

which he, with the consent, in writing, of the landlord, may have purchased from the outgoing tenant at the commencement of the tenancy hereby created, and for all such other fixtures, if any, as he may, with the like consent, have erected or put up on the premises during the period of his occupation, the same being valued according to their worth at the expiration of the tenancy.

Unexhausted improvements.

30. The landlord or the incoming tenant, at the expiration of the tenancy, shall also pay to the tenant fair and reasonable compensation according to the scale of allowance specified in the third Schedule for all artificial manure, or for the consumption on the premises by cattle, or sheep, of cake, or other feeding stuff, of such description as is not usually produced on the holding, during the last two years of the tenancy, such compensation to be estimated or calculated on the proportion of the sum properly laid out by the tenant for such artificial manure or food, as fairly represents the value to the incoming tenant of the improvement of the land in consequence of such outlay. And the parties hereto declare that the compensation specified in the said third Schedule, as modified by the provisions of the three next following clauses, is fair and reasonable compensation, having regard to the circumstances existing at the time of making this agreement, and shall be deemed to be, and shall be substituted for, compensation under the Agricultural Holdings (England) Act, 1883, in respect of the several particular matters specified in the said Schedule.

Proviso as to tenant's compensation.

31. The tenant shall not be entitled to the compensation provided for by the last preceding clause where, after the execution of such improvement, the portion of the holding on which the same was executed has been cut for hay.

Proviso as to tenant's expenditure.

32. In the ascertainment of the amount of compensation payable or claimed under the —— clause, there shall not be taken into account any larger outlay during the last year of the tenancy, than the average amount of the tenant's outlay for the like purposes during the three next preceding years of the tenancy, or other less number of years for which the tenancy has endured.

Compensation to landlord.

33. When any valuation shall be made of the hay or other matters in respect of which the tenant is entitled to receive compensation at the expiration of his tenancy, the person or persons making such valuation shall take into consideration

IV. Agreement for Letting a Grass Farm.

the state, condition, and usage of the farm and premises, and the state of repair of the buildings and fences, and shall determine whether the tenant has carried out all the terms and conditions which on his part are to be observed and performed, and whether the farm is then in a clean and creditable state, and if not, shall determine what sum of money shall be paid to the landlord as compensation therefor, and shall deduct such sum from the amount which would otherwise be, or become payable to the tenant under this agreement; and the landlord shall also be entitled to deduct from such valuation any rent due and owing to him at the expiration of the tenancy, and any rates, tithe rent-charges, taxes, or other payments which ought to have been made by the tenant.

Give up possession of house and yard at expiration of tenancy of land.

34. The tenant is to give up possession of the farm-house, yard, and all buildings at the date of the expiration of the tenancy of the land.

As to Landlord's Obligations and Rights.

35 to 38. [*Landlord to maintain main timbers, tiled roof, and outside walls of buildings—To supply materials for repairs—Proviso for re-entry on non-payment of rent, breach of covenant by tenant, or on his bankruptcy, &c.—Proviso for sale by auction of produce distrained: as ante*, pp. 363, 364.]

39. [*Arbitration Clause, as ante*, p. 356.]

As witness, &c.

The First Schedule above referred to.

The Second Schedule above referred to.

The Third Schedule above referred to (*w*).

(*w*) The first Schedule will contain particulars of the lands demised. The second Schedule will contain a list of fixtures: see clause 29. The third Schedule will contain the substituted scale of compensation for tenant's improvements, as to which, see *ante*, p. 356, note (*n*).

So much of the following scale as relates to grass land is suggested as a fair and reasonable scale in reference to such lands, it having been adopted by the Chamber of Agriculture for the counties of Devon and Cornwall:—

Scale of Allowances.

1. For 3*l.* per ton on all oil-cakes, and 1*l.* 4*s.* per ton on purchased corn cake, corn malt, or grain, or other feeding stuffs of similar manurial value, which have been consumed on the farm during the last year of the tenancy, and for one-half of the amount per ton on that which has been consumed on the farm the preceding year of the tenancy.

V. *OUTLINE of* TERMS *for the* LEASE *of a* FARM (*x*).

TERMS (*y*) for the lease of the —— Farm, at ——, in the county of ——, containing —— acres, —— roods, and —— poles, or thereabouts: Term, fourteen years from Lady Day, 18—: All game, wildfowl, [rabbits] and fish (subject to the Ground Game Act, 1880), and all trees, plantations, and minerals to be exclusively reserved to the landlord, with liberty for him and all persons authorised by him to enter on the land for purposes of sporting, and of cutting, digging,

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2. For three-quarters the cost (including carriage) of dry bones or other purchased manures, of approved manurial value, applied to the green crop during the last year of the tenancy, and half in case of dry bone only if used the previous year.
3. For the cost of lime used on arable land, including the cost of drawing and spreading on a five years' principle; that is to say, the allowance to be reduced one-fifth part every year until the five years is expired, and for pasture land on a seven years' principle.
4. For bones, including carriage, used on pasture land on the farm as follows:—
   For dry bones on a seven years' principle.
   For dissolved bones on a three years' principle.
5. For two-thirds of the cost of other purchased manures of lasting manurial value used on pasture land during the last year of the term, and one-third if used in the preceding year.
6. Where oil-cakes, or other purchased feeding stuffs, have been consumed on pasture land on the farm during the last five years of the term, and no hay crop has been taken off, a fair estimate should be made of the improvement to the holding, and allowance made accordingly.
7. In estimating the value of the manure that would have been produced by the consumption on the holding of any hay, straw, roots, or green crops, sold off or removed from the farm within the last two years of the tenancy, the allowance to be 15*s.* per ton for hay, 8*s.* per ton for straw, and 3*s.* per ton for roots, and a similar estimate to be made of the manurial value of any of these articles that may have have been brought on to the holding during the last two years of the tenancy.

(*x*) This precedent is intended for use where the parties wish to reduce, at once, to writing, the leading terms of their arrangement, with a view of embodying the same in a more formal instrument. Outline of terms.

(*y*) This document must be stamped as if it were an actual lease, with an *ad valorem* stamp, according to the amount of the rent. The lease granted in pursuance of the agreement will require a stamp of sixpence only: see stat. 33 & 34 Vict. c. 97, s. 96. Stamp.

V. Outline of Terms for Lease of Farm.

and carrying away timber, underwood, and minerals, and of inspecting the state of the premises: Rent, £—— a year, payable half-yearly at Michaelmas and Lady Day; landlord to pay the tithe rent-charge and land tax; tenant to pay all other taxes (except landlord's property tax) and all rates and assessments whatsoever; landlord to put the farmhouse, buildings, and gates in good tenantable repair at the commencement of the term; tenant thereafter to keep the premises and leave them at the end of the term in like repair, being allowed for the purpose rough timber to be delivered by the landlord within —— miles of the farmhouse (*z*); tenant, when required by the landlord, to execute a lease to be forthwith prepared by the landlord's solicitor in accordance with this agreement, and to contain covenants and stipulations similar to those contained in the lease under which Mr. [*outgoing tenant*] now holds the premises, including a proviso for re-entry by the landlord on non-payment of rent or breach of covenant by the tenant; tenant to pay all expenses of this agreement, and of the lease to him, and of the counterpart thereof; tenant to pay to Mr. [*outgoing tenant*] all compensation which is or may be payable to him for improvements, tillages, unconsumed produce, unapplied manure, or seeds or sown crops by custom, or under any statute, and to indemnify the landlord therefrom.

N.B.—These terms are to operate as an agreement only, and not as an actual demise; but until a lease shall be executed in accordance herewith, the rents, covenants, and conditions hereby agreed to be reserved by and contained in such lease are to be paid and observed, and all the rights and remedies of the parties are to be enforceable in the same manner as if such lease had actually been executed (*a*).

We agree to the above terms.

[*Signature of Landlord or his agent* (*b*).]

[*Signature of Tenant.*]

Stipulations as to mode of husbandry, &c.

(*z*) Here may be inserted, if desired, any special provisions, not contained in the existing lease afterwards referred to, as to mode of husbandry, &c., *e. g.* "tenant not to grow two successive white crops on the same land, nor to mow any pasture in two successive years," or "tenant to consume all hay, straw, and root crops on the premises," &c., &c., as to which, see next Precedent.

Agreement not to operate as demise.

(*a*) This clause will prevent this agreement from being deemed to be an actual lease, and therefore void under the stat. 8 & 9 Vict. c. 106, as not being under seal: see *ante*, p. 107.

Signature by agent.

(*b*) If an agent signs for the landlord, he should do so as

VI. *AGREEMENT for a* Lease of a Farm, *for Twenty-one Years, determinable at the End of the first Seven or Fourteen Years.*

AN AGREEMENT (*c*) made the —— day of ——, 18—, Between [*lessor*] of, &c. (who, and his heirs and assigns, unless the contrary appears, are hereinafter referred to as the landlord (*d*)), of the one part, and [*lessee*] of, &c. (who, and his executors, administrators, and assigns, unless the contrary appears, are hereinafter referred to as the tenant), of the other part.

Parties.

1. The landlord will (if and whenever required by the tenant) grant to the tenant a lease of All those, &c., which premises are particularly described in the First Schedule to these presents, To hold the same from the —— day of —— next, for the term of twenty-one years thereafter, determinable by either party [*or* by the tenant] at the end of the first

Term and time of entry.

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follows:—"John Brown, Agent for James Smith, Esq." In *Collin* v. *Wright*, 7 E. & B. 301; 8 E. & B. 647 (from which this precedent is adapted), it was held, that execution by an agent in this manner was an implied warranty that he had authority to sign. As to execution of agreements under seal for leases by agent, see *ante*, p. 77, and *infra*, note (*d*).

(*c*) Stamp *ad valorem* on amount of rent.

(*d*) If the lease is to be executed on behalf of the lessor by his steward or bailiff, say,

Steward, &c.

"[*the lessor*], of &c., by [A. B.], of &c., his steward or bailiff lawfully authorised for this purpose."

Though the contract itself must, by the Statute of Frauds, be in writing, an authority to treat as agent for another may in some cases be good and effectual without any writing: *ante*, p. 77.

Authority to agent to contract.

When a person has authority, by power of attorney, to do any act, he ought to do it in the name of the person who gives the authority; for he appoints the attorney to be in his place, and to represent his person; and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name and as the act of him who gives the authority: *Combes' case*, 9 Lef. 76 b.; *White* v. *Cuyler*, 6 T. R. 177; *Barford* v. *Stuckey*, 2 Br. & B. 333; but it is immaterial whether the attorney placed his own name first or last. Therefore an execution thus, "for J. B. (the principal), M. W. (the attorney), (L. S.)," is valid: *Wilks* v. *Back*, 2 East. 142. So, where an attorney enters into an agreement on behalf of his principal, the agreement should be made and signed in the name of the principal by him, as attorney; for if an attorney covenant in his *own* name, he will himself be personally bound, though he be described in the instrument as covenanting for and and on the part of his principal: *Appleton* v. *Binks*, 5 East, 148; *Kendray* v. *Hodgson*, 5 Esp. 228.

VI. Agreement for a Lease of a Farm.

seven or fourteen years, on giving one year's previous notice in writing, At the yearly rent of £——; And at the additional yearly rent of £—— for every acre of meadow or pasture land, which the tenant shall break up or convert into tillage, and so in proportion for less than an acre.

Rent.

Additional rent.

2. The said rents are to be paid quarterly (except the last quarter's rent, which shall be paid on the —— day of ——, before expiration of the said term); the first quarterly payment of the said rent of £—— to be made on the —— day of —— now next, and the first quarterly payment of the said additional rent to be made on the first of the said days, which shall happen next after such breaking up or converting into tillage, and thenceforth to be respectively paid free from all taxes, rates, assessments, and deductions whatsoever (the land-tax and landlord's property tax and the yearly rent of £——, payable to the lord of the manor only excepted, which it is hereby agreed shall be paid or allowed by the landlord.

Lease and counterpart.

Contents thereof.

3. The lease and a counterpart thereof are to be forthwith prepared by the solicitor of the landlord at the cost of the tenant; And are to contain the several covenants, provisoes, and agreements reserved and contained in the indenture of lease, dated the —— day of ——, 18—, whereby the tenant [*or* (*present lessee*)] now holds the said farm and premises [*or*, and are to contain the following covenants on the tenant, that is to say, covenants to pay the said yearly rent of £——, and also the said additional rent, if and whenever the same shall become payable, at the time and in manner aforesaid; And to pay all existing and future taxes, rates, and assessments whatsoever (except land tax and landlord's property tax and tithe rent-charge) for the time being payable either by the landlord or tenant, or chargeable upon the premises (*e*), and to keep the tillage land of the said premises in due course of husbandry [without setting potatoes in larger quantities than for the use of himself and his family; and without sowing any rape seed, mustard seed, or turnip seed, for the purpose of producing such seeds (*f*)]; And to keep and preserve the buildings and gates belonging to the said premises in good and sufficient repair during the said term (except the

Lessee's covenants.

To pay rent.

To pay taxes, &c.

Course of husbandry.

Covenant to keep the premises in good repair.

(*e*) As to covenants to pay taxes, rates, assessments, &c., see *ante*, p. 187.

(*f*) As to covenants restricting course of husbandry, see *ante*, p. 342, note (*e*). This is not a usual provision.

VI. Agreement for a Lease of a Farm.

walls, timbers, and roofs, and except when the said buildings shall be damaged by fire, tempest, or other inevitable accident; in all such excepted cases and particulars the said messuages and buildings to be repaired by the landlord; And yearly to cleanse and scour —— roods of hedging in the most necessary parts of the said premises; And not to cut, damage, or destroy any of the trees, thorns, and quicksets growing in and upon the said premises, except such as shall be necessary for the repairs of the hedges, and those only at seasonable times of the year; And to preserve the said trees, thorns, and quicksets; And also during the said term, with his cattle to eat and consume upon the premises the hay and straw that shall yearly grow thereon; And to lay and spread all the manure which, during the said term, shall arise from the said farm, upon the lands and grounds which shall be ploughed and had in tillage, in a good and husbandry-like manner; And to permit the landlord and his servants, tenants, and labourers, at the usual times in the spring next before the expiration of the said term, to enter upon the premises, or any part thereof, for the purpose of preparing the same for husbandry; And to insure the buildings on the premises in the sum of £——, in the names of the landlord and the tenant, in some office of insurance to be approved by the landlord [*mention any other special covenants*]; And also a covenant on the part of the tenant, not to assign, underlet, or part with the possession of any part of the said premises, unless with the licence of the landlord in writing, for that purpose; And also the usual qualified covenant by the landlord for quiet enjoyment; And also a condition for re-entry, on the bankruptcy or insolvency of the tenant, or on his doing any act whereby the premises may become assigned or assignable, or on his breach of any of the lessee's covenants, to be contained in the same lease]; And also a proviso substituting such compensation as is mentioned in the Second Schedule hereto (which is hereby agreed to be fair and reasonable compensation, having regard to the circumstances existing at the time of making this agreement) for compensation under the Agricultural Holdings (England) Act, 1883, for improvements mentioned in the Third Part of the First Schedule to that Act.

To cleanse hedging.

Not to cut trees, &c.

To preserve trees, &c.

To consume hay and straw on the estate.

To spread manure.

To permit lessor in the spring of the last year of the term to come upon the estate to prepare lands.

To insure.

Special covenants.

Not to assign or underlet, unless with licence.

Power of re-entry.

4. The tenant may, in the harvest next after the expiration

Tenant to have a way-going crop (*ff*).

(*ff*) This clause will be inserted only if the tenancy commences in the spring.

VI. Agreement for a Lease of a Farm.

of the said term, have and take a way-going crop of wheat or hard corn off one-third part of the land then in tillage, as the same shall fall in due course of husbandry, so as that he thrash the same in the barn of the premises before the 13th day of February then next, and leave the straw of such way-going crop and the manure to be produced in the winter and spring next before the expiration of the said term, for the use of the landlord; And pay to the landlord, or his next succeeding tenant, on demand, —— pounds an acre for such way-going crop, and so in proportion for any greater or lesser quantity than an acre.

Lessee to accept lease, execute counterpart, and pay law charges.

5. The tenant will accept such lease on the terms and conditions aforesaid; and execute a counterpart thereof when required; and pay the charges for the same when prepared, as well as the charges for these presents and a duplicate hereof.

In witness, &c.

The First Schedule above referred to.

The Second Schedule above referred to.

VII. *LEASE of a* Farm *in* Oxfordshire *for a* Term *of years* (*g*).

THIS INDENTURE (*h*) made the —— day of ——, 18—, Between [*lessor*] of &c., the one part; and [*lessee*] of &c., farmer, of the other part, WITNESSETH as follows:—

Interpretation clause.

1. In the construction of these presents (unless a contrary intention appears), the expression "the landlord" means the said [*lessor*], his heirs and assigns; the expression "the tenant" means the said [*lessee*], his executors, administrators, and assigns; and the expression "the premises" (unless otherwise restricted), includes the whole of the farmhouse and buildings, lands, and hereditaments, hereinafter described and hereby demised.

Demise.

2. In consideration of the rents hereinafter reserved, and of the covenants and stipulations hereinafter contained, and on the part of the tenant to be observed and performed, the

Parcels.

landlord demises unto the tenant All that and those, the

Agricultural Holdings Act, 1883.

(*g*) In this Precedent no mention is made of the Agricultural Holdings (England) Act, 1883; the rights of parties on the determination of the lease will therefore be wholly governed by the provisions of that Act.

Stamp.

(*h*) Stamp *ad valorem* on amount of rent.

VII. Lease of Farm in Oxfordshire for Term of Years.

messuage or tenement, buildings, cottages, lands, and hereditaments, situate in the parish of ——, in the county of Oxford, called or known by the name of the —— Farm, and which are more particularly, described in the [First] Schedule hereunder written, and in the plan thereof hereunto annexed; EXCEPT AND RESERVING to the landlord FIRST, all stone, gravel, clay, sand, mines and minerals, with liberty to work, convert, and carry away the same; AND SECONDLY, all timber trees, and trees likely to become timber, saplings, tellers, and pollards of every description, with full power of entry on the premises, to cut down, convert, and carry away the same, but so that the tenant may lop for his own use the pollards in the usual way, and subject to the restriction hereinafter contained; AND THIRDLY, all game, wild fowl, snipes, woodcocks, quails and landrails, and all fish, and the exclusive right for the landlord, and his friends and servants, and all other persons authorised by him, to enter upon the premises, to hunt, course, shoot, fish, and sport, and to preserve and kill and carry away the same, subject only to the concurrent rights of the tenant under the Ground Game Act, 1880; AND FOURTHLY, liberty at all times for the landlord, his agents, servants, workmen, and other persons by his authority, with horses, carts, and carriages, or otherwise, to enter and be upon the premises, or any part thereof, for the purpose of inspecting the state and condition of the same, or for any other reasonable purpose: TO HOLD the same unto the tenant from the 29th day of September, 18—, for the term of —— years therein next ensuing; YIELDING AND PAYING yearly, and so in proportion for any less period than a year (*i*), the following rents, viz.:—FIRST, the yearly rent of £——, to be paid clear of all deductions (except land tax, landlord's property tax, tithe rent-charge, and half the school board rate), by equal half-yearly payments, on the —— day of ——, and the —— day of ——, in every year, the first payment to be made on the —— day of ——, 18—; AND, SECONDLY, an additional rent, at the rate of £50 per acre, for all land described as meadow or pasture in the schedule hereto, which the tenant shall break up or convert into tillage, without the previous consent, in writing, of the landlord; AND, THIRDLY, an additional rent of £10 per acre

Exceptions and reservations.

Minerals.

Timber, &c.

Game.

Habendum.

Reddendum.

Yearly rent.

Additional rent for pasture land broken up.

Additional rent for land

(*i*) See as to this, *post*, p. 444, note (*s*).

VII. Lease of Farm in Oxfordshire for Term of Years.

for every acre which shall in any year be left uncultivated or be cropped contrary to the covenants by the tenant, hereinafter contained, and a proportionate sum for any less quantity than an acre so broken up, or left uncultivated, or cropped, such additional rents respectively to be paid half-yearly on the aforesaid days, and the first payment thereof to be made on the first of such days which shall happen after such breaking up or conversion, leaving uncultivated, or cropping as aforesaid, and to continue payable as aforesaid during the residue of the said term.

not properly cultivated.

Tenant's covenants.

THE TENANT HEREBY COVENANTS with the landlord during the said term, and in all respects to observe and perform the following stipulations on his part, that is to say:—

To pay rents and taxes, &c.

3. The tenant will pay all rents for the time being payable at the times and in manner aforesaid, and will also pay all taxes, rates, charges, and assessments whatsoever, except as aforesaid, payable during the term in respect of the premises, or the said rents, or any part thereof respectively.

To reside on premises, and not assign, &c.

4. The tenant will personally by himself and his family at all times occupy the farmhouse as his usual or general residence, and will not assign, underlet, or part with the possession or the actual and beneficial occupation of the premises or any part thereof, except the cottages.

General course of husbandry (*h*).

5. The tenant will at all times well cultivate and manure, and also at all times keep clean and free from docks, thistles, and other noxious weeds, and in good heart and condition all

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(*h*) If it is desired to leave the tenant unrestricted as to the mode of cultivation until the last four years of the term or until notice by the landlord, the following clause may be substituted for clause 5.

General course of husbandry.

5*a*. The tenant will at all times cultivate and manure in a husbandlike manner, and will also at all times keep clean and free from docks, thistles, and other obnoxious weeds, and in good heart and condition all the lands of every description, and will leave the same in like condition at the end of the term, and will during the last four years of the term farm the arable lands upon the four-course system of husbandry, that is to say, one-fourth part in fallow or root crops, one-fourth part in Lent corn, one-fourth part in clover or good grass seeds, and the remaining fourth part in wheat. [PROVIDED ALWAYS that it shall be lawful for the landlord at any time during the term to give to, or leave upon, the premises for the

VII. Lease of Farm in Oxfordshire for Term of Years.

the lands of every description, and will leave the same in like manner at the determination of the term, and will also sow or crop the arable lands as at all times one full tenth part thereof shall be in clover or seeds. The tenant will not sow more than two white straw crops in succession, (rye-grass or vetches seeded to be computed for every purpose as a white straw crop), and in the last year of the tenancy will leave one-fifth in fallow for roots, one-tenth in clover or seeds, no part of which shall be seeded, and one part at least shall be made into hay and not fed off, one-tenth in beans or peas, and not more than two-fifths in barley or oats, and one-fifth in wheat.

Management of grass lands.

6. The tenant will not plough or convert into tillage any part of the meadow or pasture hereby demised, nor mow any of such land twice in any one year, nor mow such of the pasture-land as has not been usually mown, and will not mow any of such land in two successive years without in the interval dressing the same in a proper manner with good rotten dung, and will in the last year of the tenancy mow all the grass-land usually mown and make the produce into hay and rick and stack the same in the best manner.

Tenant to consume roots, hay, &c., on premises.

7. The tenant will spend and consume in every year of the term, except the last year thereof, all the roots grown on the farm, and will stack, rick, or house, in every year, all the crops of corn, grain, and hay upon the accustomed part of the premises, and will replace all hay and straw sold off the premises, by manure or cake to be consumed on the premises, equal in value to the price of the hay or straw so sold; and in the last year of the term will not sell off or remove from the premises any hay, straw, chaff, or fodder, but will consume on the premises all the hay, straw, chaff, and fodder then thereon. And will yearly spend on the farm all manure made thereon, at the proper season after the same shall have been made, excepting in the last year of the term, when the tenant shall spend only so much thereof upon such part of the premises and in such manner as shall be proper for the fallow and root-crop, and the residue of such manure shall be left in the yards for the landlord or incoming tenant.

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tenant a notice in writing, requiring him at the expiration of —— years from the date of such notice to adopt the four-course system aforesaid, and the tenant shall upon giving or leaving of such notice as aforesaid adopt the said system accordingly.]

VII. Lease of Farm in Oxfordshire for Term of Years.

8. The tenant will not cause or permit any stock fed upon the premises or any part thereof, to be housed, folded, or foddered elsewhere.

Tenant not to house stock elsewhere.

9. The tenant will not cut, lop, top, or crop any of the timber, or other trees, or saplings (except pollards), but will preserve the same from damage by cattle or otherwise, and will not cut, lop, top, or crop any pollards under eight years' growth.

Not to cut timber, &c.

To preserve hedges.

10. The tenant will preserve all the hedges from injury by sheep and stock, and, at the proper season, will either trim them every year, or plash them at least once in every ten years, and will effectually protect them from sheep and stock, for the space of two years at least after every plashing.

To destroy vermin.

11. The tenant will destroy rats and moles, and keep and leave the garden well stocked, planted, manured, and cleaned; and will prune, trim, and properly preserve all fruit-trees, plants, and shrubs, and also all withy-pollards upon the premises, and replace those that shall die by others.

To preserve game, &c.

12. The tenant will use his best endeavours to preserve game, and the young and eggs of game, wild-fowl, and fish for the landlord, and all persons authorised by him to hunt, shoot, fish, or sport in or upon the premises, subject only to the exercise by the tenant of his covenant rights as aforesaid.

To prevent trespass.

13. The tenant will, when required by the landlord, sign notices to warn off trespassers, and will permit his name to be used in any prosecution or action to be brought against such trespassers, the landlord paying the expense of any such prosecution or action.

Tenant to paint, &c.

14. The tenant will paint once in every four years in a proper manner all outside parts of the farmhouse, cottages, and buildings (including the spouting), and gates usually painted, and will gas varnish once in every four years all wire fencing and gates not painted, and will paint, paper, colour, and whitewash once in every eight years all the interior parts of the farmhouse, cottages and buildings usually painted, papered, coloured, or whitewashed.

Tenant to keep and leave premises in tenantable repair.

15. The tenant will repair, amend, cleanse, and scour, and keep, and at the end of the term leave in good and tenantable repair and condition the farmhouse, cottages, and other buildings, and all the leadwork and glass of windows, and the walls, thatch, slating, eaves, gutters, spouts, pipes, pumps, wells, cisterns, sheep and cattle pens, stiles, posts, rails, ditches, bridges, drains, roads, ways, and watercourses, and all land-

VII. Lease of Farm in Oxfordshire for Term of Years.

lord's fixtures in or upon the premises, damage by fire or tempest only excepted, and will at his own expense fetch and carry the materials necessary for all repairs (except for repairs required in consequence of fire or tempest), from a distance not exceeding —— miles from the farmhouse.

Tenant to repair on notice.

16. If the landlord or his agent shall at any time give or leave on the premises for the tenant a notice in writing of any want of painting, gas varnishing, papering, colouring, whitewashing, repairing, amending, cleansing, or scouring, that shall be found on the premises, the tenant will make good the same within six weeks after such notice shall have been given or left as aforesaid.

As to insurance.

17. The tenant will pay to the landlord every year [half] the amount paid by him for fire insurance, and will not do or permit any act or thing which may invalidate the policy.

Tenant to cultivate land for roots in last year of term.

18. The tenant will in the last year of the term cultivate, manure, sow, and hoe the land then in course for roots in a husbandlike manner, being paid by the landlord or incoming tenant for all necessary seed, sowings, tillages, labour of manuring, and hoeings, provided the same shall have been properly provided and executed respectively, and of proper quality and at proper seasons respectively, but not otherwise, the value thereof respectively to be ascertained by valuers or an umpire as herein mentioned.

Tenant to allow landlord or incoming tenant to sow Lent corn, grass seeds, &c.

19. The tenant will allow the landlord or the incoming tenant to sow in his Lent corn at the proper time in the last year of the term, and clean clover or other grass seeds, the tenant to harrow in the same, being paid therefor by valuation as aforesaid, and will not afterwards feed such seeds with sheep or otherwise, but will use his best endeavour to protect the same from injury.

Tenant to give up possession on determination of term.

20. The tenant will on the —— day of —— in the last year of the term, or as soon as the crops on the premises ought to be cleared, give up to the landlord or incoming tenant the land in course for wheat, in clover hay, bean or pea stubble, and will allow the manure to be carried out from the yards, and also furnish stable room for —— horses, and give possession of one of the said cottages, and will provide hay and straw for such horses at a spending price to be ascertained by valuation as herein provided; and will give up possession of the farmhouse, buildings, and remaining cottages and premises on the 29th day of September of that year.

VII. Lease of Farm in Oxfordshire for Term of Years.

Tenant to leave hay, &c., at spending price.

21. The tenant will, on the determination of the term, leave on the premises, in convenient ricks, stacks, or heaps, all the hay, straw, chaff, fodder, and cavings of the last year's crop, being paid for the same at a spending price, to be ascertained (in case of difference) by valuation as herein provided.

Landlord's covenants.

And the landlord hereby covenants with the tenant as follows:—

To pay land tax, &c.

22. The landlord will pay or allow the land tax, landlord's property tax, and tithe rent-charge, and also half the school board rate due and payable or to become due and payable in respect of the premises.

To provide materials for repairs.

23. The landlord will find and provide within —— miles of the farmhouse all sawn timber, bricks, slates, lime, tar, paint, and sand for such repairs as the tenant is hereby bound to execute, and in case of any of the buildings being destroyed or damaged by fire or tempest, the landlord will rebuild or reinstate, at his own expense, including the carriage of materials, within a reasonable period.

To permit tenant to use barns, &c., after end of term.

24. The landlord or the incoming tenant will permit the tenant, after the expiration of the tenancy by effluxion of time, but not on any other determination thereof, to have, for the purpose of thrashing and breaking off his corn, the use, until the 25th day of March next after such determination, of the barns, one of the cottages, stable room for —— horses, and cart shedding, to be assigned respectively by the landlord or his agent, and the landlord or incoming tenant shall allow the tenant to have at a spending price, to be ascertained by valuation as herein provided, hay and straw for the use of the said —— horses.

For quiet enjoyment.

25. The tenant paying the rents hereby reserved as and when the same shall become payable respectively, and performing the covenants on his part herein contained, shall and may peaceably possess and enjoy the premises for the term hereby granted, without any interruption or disturbance from or by the landlord or any person claiming by, from, or under him.

Provisoes and powers.

Provided always and it is hereby agreed as follows:—

Proviso for re-entry.

26. If the rents herein expressed to be reserved, or any of them, or any part thereof respectively, shall be in arrear for twenty-one days after the same shall become due, or if there shall be any breach by the tenant of any of the covenants, conditions, or stipulations herein contained, and on his part to be

VII. Lease of Farm in Oxfordshire for Term of Years.

observed or performed, or if the tenant shall become bankrupt or make any assignment for the benefit of his creditors, or shall under any Bankruptcy Act for the time being, or otherwise, make or enter into, or attempt to make or enter into any composition or scheme of arrangement for the liquidation of his debts or any of them, or if the tenant shall do any act whereby his effects upon the premises may be or become liable to be taken in execution or become vested in any other person, or if the tenant shall absent himself from the farm for any period or periods of time together exceeding —— months in any one year of the term, or for any consecutive period exceeding —— months, then and in any of the said cases it shall be lawful for the landlord to re-enter upon the premises, or any part thereof in the name of the whole, and upon such entry the said term hereby created shall forthwith absolutely cease and determine, but without prejudice to any right of the landlord against the tenant by way of distress under or by virtue of these presents.

Power for landlord to resume cottages.

27. It shall be lawful for the landlord to determine the tenancy of the cottages included in this demise, or any of them, upon giving to the tenant one month's notice at any time to that effect, and in such case a proportionate abatement of rent shall be made in respect of the cottages or cottage, the tenancy whereof is so determined.

In witness, &c.

VIII. *LEASE of a* Farm *in* South Wales *for a Term of —— Years:* Clauses *as to* Drainage *and* Compensation *for* Improvements: *Clause giving* Lessee *the option to* Purchase *the* Fee.

THIS INDENTURE (*j*), made the —— day of ——, 18—, Between [*lessor*] of, &c., of the one part, and [*lessee*] of, &c., of the other part, witnesseth as follows:—

Interpretation clause.

1. [*Interpretation clause, ante*, p. 374.]

Demise, &c.

2. [*Demise of parcels; Exceptions and reservatins; Habendum; Reddendum of yearly rents and additional contingent rents, ante*, p. 374.]

Lessor's covenants.

The tenant hereby covenants with the landlord during

(*j*) Stamp *ad valorem* on amount of rent. Stamp.

VIII. Lease of Farm in South Wales.

the said term and in all respects to observe and perform the following stipulations on his part, that is to say:

To pay rent, taxes, &c.

3. [*Covenant to pay rent and taxes, &c., ante*, p. 376.]

Not to assign or underlet.

4. The tenant will not assign, underlet, or part with the possession of the premises, or any part thereof, without the consent in writing of the landlord for that purpose first obtained.

Management of farm.

5. The tenant will not commit or cause to be committed any wilful waste, spoil, or damage upon the premises, and particularly will not plough or convert into tillage any part of the meadow or pasture hereby demised, nor fell, cut down, lop, top, stop up, or take, or carry away, spoil, or destroy any of the excepted timber, timber-like trees, willows, saplings, alders, pollards, coppice woods, or underwoods which may be standing or growing in or upon any part of the premises.

To preserve trees, &c.

6. The tenant will use his best endeavour to preserve the coppice, woods, underwoods, young and other trees, layers and quicksets of all kinds now standing or growing, or which during this demise shall stand or grow in or upon any part of the premises.

Cropping.

7. The tenant will not grow more than two white straw crops in succession on any part of the premises.

To consume hay, &c., on premises.

8. The tenant will consume on the premises all the hay, straw, chaff, turnips, fodder, and haulm grown thereon, and will yearly lay all dung made therefrom on the premises, on such part thereof as may be most in need of the same, and will keep and leave the premises at the expiration or sooner determination of this present lease in proper fair proportions of seeds and fallows, clean and in good condition.

To repair buildings, &c.

9. The tenant will maintain and keep all the buildings, tenements, with the gates, posts, stiles, and all appurtenances belonging to the premises, in good and sufficient repair, he being allowed by the landlord a sufficient quantity of slates, tiles, and unsawn timbers for that purpose, and will at all times, when needful, duly cleanse and scour all the ditches, drains, and watercourses belonging to the premises.

To permit lessor to view premises.

10. The tenant will permit the landlord and all persons authorised by him, at all reasonable times, to enter into and upon the premises, to examine the condition thereof, and to give notice of any repairs which may be required, and after such notice left on the premises, will well and sufficiently make good and amend the same accordingly.

VIII. Lease of Farm in South Wales.

11. It shall be lawful for the landlord and for the incoming tenant or tenants in the spring season of the last year of the said term to enter upon the lands hereby demised, and with summer corn to sow the same or such of them as he or they shall think proper, or with clover and grass seed; and also to have all the dung made from the said lands and premises during the last year of the said term thrown up in heaps for the use of the incoming tenant or tenants without any compensation for the same (*k*).

To permit lessor in last year of the term to sow, and take manure.

12. The tenant shall sell to the landlord, at a valuation to be made in the usual way, all the hay produced in the last year of the said term at a consuming price, and all the green crops on the premises at the expiration of the term, and also all the corn in the straw produced in the last year thereof: PROVIDED ALWAYS that notice of the desire of the landlord to purchase such corn in the straw shall be given on or before the first day of July in the same year: PROVIDED ALSO that if no such notice shall be given, or if no agreement to purchase shall be entered into, the tenant shall be at liberty to inbarn and stack upon the premises all such corn in the straw as aforesaid, and to thrash out the same at his own expense, leaving the straw for the incoming tenant without any compensation for the same: PROVIDED ALWAYS that the whole of such corn shall be thrashed out and removed before the 24th day of December next after the expiration of the said term.

To sell to lessor hay, &c., at valuation.

AND THE LANDLORD HEREBY COVENANTS with the tenant as follows:—

Landlord's covenants.

13. [*To pay land tax, &c., ante*, p. 380.]

to pay land tax, &c.,

14. [*For quiet enjoyment, ante*, p. 380.]

for quiet enjoyment.

PROVIDED ALWAYS, and it is hereby agreed and declared:—

Provisoes, &c.

15. [*Proviso for re-entry, ante*, p. 380.]

Proviso for re-entry.

16. The tenant may underdrain any of the lands hereby demised, and the landlord or the incoming tenant will, on the tenant quitting his holding at the end of his tenancy, pay to him such compensation for his outlay in manner following, that is to say: [*here state the terms of payment which may*

Agricultural Holdings Act: drainage.

(*k*) A tenant is not entitled under the Agricultural Holdings (England) Act, 1883, to compensation for natural manure produced in the holding: see Sched. I. Part 3.

VIII. Lease of Farm in South Wales.

be agreed upon]: And that no notice need be given by the tenant of any intention to drain under Sect. 4 of the Agricultural Holdings (England) Act, 1883, and that the payment provided for in this clause shall be in full satisfaction and be substituted for compensation in respect of drainage under the said Act: PROVIDED ALWAYS that the tenant shall not be entitled to any compensation under this clause or otherwise unless the drainage shall have been completed to the satisfaction of the landlord's surveyor.

Agricultural Holdings Act: compensation for improvements.

17. [*Proviso as to compensation for improvements mentioned in the third part of the First Schedule to the Agricultural Holdings (England) Act*, 1883, *ante*, p. 353 *or* 357.]

Proviso that lessee shall have option of purchasing the fee.

18. In case the tenant shall, at any time before the —— day of ——, 18—, be desirous of becoming the purchaser of the premises and the reversion and inheritance thereof in fee simple, free from incumbrances, at the price or sum of £——, and shall give to the landlord, or leave at the last or most usual place of his residence in England, seven days' notice in writing of such his desire, then, and in that case, the tenant shall be entitled to become the purchaser thereof at that sum; And in case the tenant shall, on or before the said —— day of ——, pay to the landlord the said sum of £—— (and pay all arrears of rent up to that time), then the landlord, and all other necessary parties, if any, will, at any time upon such payment as aforesaid, on the request and at the cost of the tenant, make and execute all such conveyances for effectually assuring the premises, with their appurtenances, unto and to the use of the tenant in fee simple, or to the use of such other person or persons, and in such other manner as he shall direct, free from incumbrances, as by the tenant shall be reasonably required; And thenceforth the said lease and every covenant, matter, and thing therein contained, shall cease and be void (*l*).

IN WITNESS, &c. (*m*).

THE SCHEDULE [*or* SCHEDULES] ABOVE REFERRED TO.

(*l*) It has been decided, that where, under a contract of this nature, the election to purchase is made by the lessee after the decease of the lessor, the effect of such election is to convert the property, as between the lessor's real and personal representatives, into personalty, taking it from the heir or devisee to whom it had descended or come at the death of the lessor as real estate, and who was held entitled to the rents up to the time when

IX. *LEASE of a* Farm *for Twenty-one Years, determinable at the End of Seven or Fourteen Years; Covenants by Landlord to Drain.*

THIS INDENTURE (*n*), made the —— day of ——, 18—, Between [*lessor*], of, &c. (who and his heirs and assigns, unless the contrary appears, are hereinafter called the landlord), of the one part, and [*lessee*], of, &c. (who and his executors, administrators, and assigns, unless the contrary appears, are hereinafter called the tenant), of the other part; WITNESSETH, that in consideration of the rent

Parties and interpretation clause.

Testatum.

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the option was declared; from which time the rent ceased, and the interest on the purchase-money was payable to the lessor's personal representatives, and thenceforth impressing it with the quality of personalty, for the benefit of the persons taking the personal estate: *Townley* v. *Bedwell*, 14 Ves. 591; see *Wright* v. *Rose*, 2 Sim. & S. 323.

It has been held that time is of the essence of the contract as regards the exercise by a tenant of an option to purchase: *Lord Ranelagh* v. *Melton*, 2 Dr. & S. 278.

Where the option is exercised after the death of a lessor who is seised of the demised premises in fee simple, the purchase-money goes to his personal representatives: *Weeding* v. *Weeding*, 1 J. & H. 424.

Stipulations giving an option of purchase are obviously altogether in the interest of the tenant, and accordingly limited owners and trustees ought not to insert such stipulations in leases granted under a power, unless expressly authorized by the instrument creating the power.

(*m*) If executed by a steward or bailiff, say,

Execution by steward, &c.

"In witness whereof, the said [*lessor*], by the said [*steward, &c.*] as his attorney lawfully authorized for this purpose, and the said [*lessee*] himself, have hereto set their hands."

[A. B. *the lessor*]
by
[C. D. *the steward, &c.*]
[E. F. *the lessee.*]

Sometimes it may be advisable for the lessor to approve the agreement, thus:—

"I hereby declare my approbation of the within (*or* above) written agreement; (*or if on a separate paper*, the agreement made between my agent [A. B.] and [C. D.] bearing date the —— day of ——, 18—); and do hereby agree to grant the lease upon the terms therein mentioned. Witness my hand the —— day of——, 18—."

Approbation of an agreement made by an agent.

(*n*) Stamp, *ad valorem* on amount of rent.

IX. Lease of Farm for Twenty-one Years.

and covenants by the tenant hereinafter reserved and contained, he, the landlord, hereby demises unto the tenant ALL THAT messuage or farm-house situate in the parish of ——, in the county of ——, called —— Farm, with all those three cottages, and all those several pieces or parcels of land particularised in the schedule hereunder written, containing by estimation —— acres or thereabout, and now or late in the occupation of ——; EXCEPT and always reserved unto the landlord all timber and timber-like trees, pollards, and saplings now or hereafter growing on the said demised premises, and also liberty for him and them, with workmen and others, at all reasonable times, with horses, carts, and carriages, to fell, cut down, square, saw, and carry away the same, and to re-enter, pass, and re-pass unto, upon and from the same premises, compensation being paid for any damage done to the corn, grain, or seeds growing on the same: TO HOLD the premises unto the tenant from the —— day of —— next for the term of twenty-one years thence next ensuing; YIELDING AND PAYING therefor yearly during the said term, and so in proportion for any less period than a year, the yearly rent or sum of £—— by equal half-yearly payments, on the —— day of —— and the —— day of —— in each year, clear of all deductions, except for land tax, landlord's property tax, and quit-rent; AND THE TENANT HEREBY COVENANTS with the landlord that he, the tenant, will pay the said rent of £—— hereby reserved, on the days and in manner hereinbefore mentioned for payment thereof; AND ALSO will, at all times during the said term, pay and discharge all tithe-rentcharge, and also all taxes, rates, duties, and assessments at any time during the said term assessed or imposed on the premises, except land tax, landlord's property tax, and quit-rents; AND ALSO will from time to time and at all times during this demise well and sufficiently repair the said premises (damage by fire or tempest excepted); AND ALSO will fetch and bring to the premises all materials necessary for the repair thereof, from any distance not exceeding five miles therefrom; AND the said messuage and premises, and every part thereof, being so repaired, will, at the end or other sooner determination of the said term, peaceably leave and yield up, damage by fire or tempest excepted; AND ALSO will purchase, bestow, and bring upon the said lands one load of good manure for every ton of hay or clover sold off the premises; AND ALSO will leave one-fourth of the arable land

Parcels.

Exceptions of timber, &c.

Habendum.

Reddendum.

Covenants by lessee:

to pay rent,

rates and taxes,

to repair;

to leave in repair.

Hay and clover.

IX. Lease of Farm for Twenty-one Years.

hereby demised fallow, or in pea or bean stubble, at the end of the said term; AND ALSO will at all times during the said term manage and cultivate the said lands in a good and husband-like manner, except that the tenant, shall be at liberty to break up any of the pasture-land hereby demised, without compensation or increased rent therefor; AND ALSO that it shall be lawful for the landlord, with or without workmen and others, to enter upon the premises twice or oftener in every year of the said term, to view the state of repair and condition thereof, and to do all such painting and repairs as he or they may have occasion to do; AND THE LANDLORD HEREBY COVENANTS with the tenant, that he, the landlord, will repair all the buildings, gates, fences, and hedges, and paint and tar the same whenever required before the —— day of —— next; AND ALSO will grub in a proper manner all the hedgerows belonging to the premises when required by the tenant; AND ALSO that he will paint the external part of the said messuage, with the buildings and cottages on the said farm, and all the gates and fences twice during the said term if required by the tenant; AND ALSO that he will drain with proper drain-tiles one rod apart —— acres of the land now in rye-grass at his or their costs, except the carriage of the said drain-pipes, which is to be borne and paid by the tenant; and will drain the remainder of the lands hereby demised in manner aforesaid and except as aforesaid (*nn*) upon being paid a further yearly rent of £4 for every £100 so expended, and so in proportion for any less sum expended, and which the tenant hereby agrees to pay accordingly from the time of such draining; AND ALSO that the landlord will find and provide all such materials as may be necessary for repairs, and all rough timber within five miles of the said premises, and will pay one-half part of the cost of labour on such timber and repairs, the tenant paying the other half part; AND ALSO that he, the landlord, or the incoming tenant will take and pay the tenant for the growing crops [and all hay, clover, straw, and manure at sale prices, and all machinery necessary for carrying on a farm of —— acres that shall have been erected by the tenant on the

Fallows.

To manage and cultivate in a husband-like manner.

Liberty to break pasture.

Liberty to lessor to enter and view state of repair.

Covenants by lessor:

to do certain repairs, &c.;

to grub hedgerows;

to paint external parts twice or oftener;

to drain part;

also residue upon certain terms;

to find materials and rough timber for repairs, &c.;

to purchase at end of term the growing crops, stock-in-trade, &c.;

(*nn*) In case of a breach of this covenant by the landlord, a question may arise as to the rights of parties under the 4th section of the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61): see *ante*, p. 331.

IX. Lease of Farm for Twenty-one Years.

for quiet enjoyment.

Proviso for re-entry.

Proviso enabling lessor to determine term as to part of the land.

Proviso enabling lessee to determine in seven or fourteen years.

said premises, and which shall be in, upon, and about the said lands, and premises at the expiration of the said term, at a fair valuation thereof to be made by two valuers, one to be chosen by each party, or, in the event of their differing, then by a third person to be chosen by such valuers; And also that the tenant paying the rents, &c. [*continue at ante*, p. 380, cl. 25]; Provided always that if the rents, &c. [*continue at ante*, p. 380, cl. 26]; Provided also, that in the event of the landlord being desirous of putting an end to this demise as far as it affects part of the said land called ——, containing about —— acres at the end of the first —— years of the said term, it shall be lawful for him so to do upon giving to the tenant notice of such desire at any time; and thereupon a reduction of —— shillings per acre and so in proportion for less than an acre shall be made for the said rent of £——; Provided also, that if the tenant shall be desirous of putting an end to this demise at the end of the first seven or fourteen years of the said term of twenty-one years, it shall be lawful for him so to do, upon giving to the landlord six calendar months' notice in writing of such desire, whereupon this demise shall cease, determine, and be at an end as if by effluxion of time, anything hereinbefore to the contrary notwithstanding. In witness, &c.

The Schedule above referred to.

X. *AGREEMENT for a* Building Lease *of* Freehold *or* Copyhold (*o*) *Premises for* 99 *years. Concise form adapted to the construction of a single Dwelling-house.*

Parties and interpretation clause.

AN AGREEMENT (*p*) made the —— day of ——, 18—, Between [*lessor*], of, &c. (who and his heirs and assigns, unless the contrary appears, are hereinafter called the lessor), of the one part, and [*lessee*], of, &c. (who and his executors, administrators, and assigns, unless the contrary appears, are

Equitable tenants of copyholds.

(*o*) As to leases by copyholders, see *ante*, p. 85. The lord of a manor cannot authorize a person having only an equitable interest in copyhold lands to demise, because there is no privity of estate between them, the person having the legal estate being the copyholder.

Stamp.

(*p*) This agreement will require a sixpenny stamp; the lease granted in conformity therewith will require to be stamped according to the *ad valorem* duty payable: see *ante*, p. 337.

X. Agreement for a Building Lease.

hereinafter called the lessee), of the other part: WHEREBY it is agreed as follows:

1. When and so soon as the lessee shall have erected, built, and finished the dwelling-house and buildings mentioned in the 5th clause of this agreement, the lessor will (*q*) grant to the lessee, a lease of ALL THAT piece or parcel of land, &c., situate, &c., and the messuage and buildings to be erected thereon with the appurtenances, which premises are delineated with the abuttal in the plan annexed to this agreement, from the —— day of ——, 18—, for the term of 99 years; AT the yearly rent of a pepper-corn, if demanded, for the first year of the said term, and at the yearly rent of £——, during the residue thereof, payable quarterly, on the —— day of ——, the —— day of ——, the —— day of ——, and the —— day of ——, free and clear of and from the sewers, main drainage, land-tax, and all and every other rate, tax, charge, duty, assessment or imposition whatsoever, whether parliamentary, metropolitan, or parochial, to which the landlord, tenant, or premises is or are, or hereafter shall or may be, liable, except only the landlord's property tax; the first quarterly payment of the said yearly rent of £——, to be made on the —— day of ——, 18—.

Parcels.

Term.

Rent.

2. The lease and a counterpart thereof shall be prepared by the solicitor of the lessor, at the expense of the lessee, And shall contain (*r*) covenants by the lessee to pay the said yearly rent of £——, at the times and in manner aforesaid, and also to pay and discharge all the said rates, taxes, charges, duties, assessments, and impositions, except as aforesaid; and also to keep the said dwelling-house and premises insured against fire in the sum of —— pounds at the least in the joint names of the lessor and lessee, in some or one of the public offices of insurance in London or Westminster; and also to paint twice in oil colours, all the outside wood and iron

Lease and counterpart to be at lessee's expense.

Usual covenants to be contained in lease.

And to insure;

to paint outside.

(*q*) If the premises are of copyhold tenure say,

Copyhold.

"at his own expense, procure from the lord or lords, lady or ladies of the manor or manors, of which the premises hereinafter mentioned are held, a license or licenses, if the same shall be necessary, enabling him to demise, and he the lessor will thereupon."

To procure license to demise.

(*r*) See as to form and contents of the intended lease, *post*, p. 394, note (*u*).

X. Agreement for a Building Lease.

work of the said premises once in every third year of the said term; and also to paint and paper the interior of the said premises once in every seventh year of the said term; and also not to set up any engine or machinery, nor exercise or carry on any sort of manufactory thereon: and not to carry on any [noisome, dangerous, or offensive] trade or business therein or thereupon, [but to use the said premises only for the purposes of a private dwelling-house, and of the offices, outbuildings, and stabling thereof]; and also, covenants by the lessee to repair and keep in repair the said premises and every part thereof; and to yield and deliver up the same at the end or other sooner determination of the said term, in good and substantial repair, with all and every the fixtures, erections, and improvements which shall or may be made, fixed, or fastened, or set up in, upon, or about the premises, which shall or may come under the denomination of landlord's fixtures; and to pay and contribute a rateable or reasonable proportion of the expenses of making, repairing, amending, and cleansing all roads, pavements, party-walls, fences, sewers, drains, pipes, water-courses, and other conveniences which shall belong to or be used for the said premises in common with other adjoining or neighbouring premises, such proportion to be ascertained by the lessor's surveyor, and to be paid to the lessor on demand and to be recoverable by him as rent in arrear; and to permit the lessor with or without workmen, or other persons, to enter and view the said premises twice or oftener in every year, and to give notice of repair, and that the lessee will repair accordingly within three months after every such notice; and the usual qualified covenant on the part of the lessor for quiet enjoyment by the lessee; and the usual proviso for re-entry on non-payment of rent or on breach or non-performance of covenants; and the said lease shall also contain all other covenants, conditions, and provisions (if any), as are usually contained in leases of houses in London or Westminster (*s*).

to paint and paper inside;

not to carry on a manufactory,

or any offensive trade;

to repair;

to deliver up premises at the end of term,

with all fixtures, &c.

Liberty for lessor to enter to view repairs.

Proviso for re-entry.

3. The lessee will accept such lease, on the terms and con-

Lessee to accept lease, and

(*s*) If the premises are copyhold or leasehold add,

Copyhold.

"but shall not contain any covenant or clause which may by any means cause a forfeiture of the said premises;"

Not to contain any clause to cause a forfeiture.

As to what are "usual covenants," see *ante*, p. 116.

X. **Agreement for a Building Lease.**

ditions aforesaid, and execute a counterpart thereof, when required, and pay the charges of and incidental to the preparation and execution of the same, as well as the charges of and incidental to these presents and a duplicate hereof.

execute counterpart and pay charges.

4. Until such lease shall be granted, the lessee will pay the rents agreed to be thereby reserved and all such rates, taxes and assessments as hereinbefore mentioned (except as aforesaid), and will as far as circumstances will admit observe and perform the covenants and conditions to be contained in the said lease as if the same had been actually granted, and the lessor shall have all such remedies for recovering rent and breach of covenant, as if the said lease had actually been granted.

Lessee to pay rent, &c., until granting of lease.

5. The lessee will, on or before the —— day of —— next, at his own costs and charges, pull down and remove the messuage and buildings now standing and being on the said piece of ground, and on the site thereof in a good, sound, substantial, and workmanlike manner, and with fit and proper materials of all kinds, to be approved by the architect or surveyor of the lessor, and under the direction and inspection of such architect or surveyor and to his satisfaction, erect, build, and complete, and in a workmanlike manner finish, one good and substantial brick messuage or tenement, fit for habitation, and in all things conformable and agreeable to the specification thereof hereunder written; and will lay out and expend thereon the sum of —— pounds and upwards; and also, will bear, pay, and discharge the said architect's or surveyor's fees of 5 per cent. on the expenditure, for superintending and directing the same.

Lessee to build a dwelling-house, &c.

6. The lessor or his architect, surveyor, or agent, may at all reasonable times during the continuance of this agreement enter upon the said premises to view the state and progress of the works and operations hereby agreed or authorized to be executed and carried out.

Lessor may enter and view works.

7. The lessee will carry on the said works and operations in such manner as to create as little disturbance or nuisance as possible to the owners or occupants of adjoining property.

Lessee not to create nuisance.

8. The lessee shall be entitled to take for his own absolute use and benefit all materials of the said messuage and buildings so to be pulled down and removed as aforesaid.

Old materials to belong to lessee.

9. The lessee shall not assign, or sublet, or otherwise part with the benefit of this agreement, except with the consent in writing of the lessor first had and obtained.

Lessee not to assign.

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10. In case the lessee shall not erect, build, complete, and cover in, and in all respects finish and make fit for habitation such dwelling-house and buildings as aforesaid to the satisfaction of the lessor's architect or surveyor on or before the said —— day of ——, 18—, (in which respect time shall be of the essence of the contract), or if the said yearly rent of £—— shall be in arrear for the space of thirty days after the same shall have become due (whether payment thereof shall have been formally or legally demanded or not), or in case of breach of any of the stipulations herein contained, or if the lessee shall not proceed with the works with proper diligence, then and in any such case it shall be lawful for the lessor, if he shall think fit, to re-enter and take possession of the premises hereby agreed to be demised, and of all buildings, erections, plant, and materials which may be thereon, without making to the lessee any allowance or compensation in respect thereof (*t*).

Proviso that agreement shall not operate as demise.

11. This agreement shall not, nor shall anything herein contained or to be done in pursuance hereof, except the granting of a lease as aforesaid, operate as an actual or present demise of the premises or any part thereof or to create any leasehold interest therein or tenancy thereof: But the lessee shall only have a right to enter upon the premises for the purpose of performing this agreement. Any rents or yearly sums hereby agreed to be paid by the lessor, which shall be in arrear, shall be recoverable by the lessor as if the same were rent in arrear and the lessee were the tenant of the premises.

In witness, &c.

The Specification above referred to.

(*t*) With regard to the enforcement of the right of entry given by this proviso, the power given by the Conveyancing and Law of Property Act, 1881, to the Court to relieve against forfeiture, must be borne in mind.

See as to this, *ante*, p. 255. But see *Wallis* v. *Smith*, 21 Ch. D. 243.

Neither the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), nor the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), affect the power here given to seize plant, &c., belonging to the lessee, inasmuch as it is not an agreement conferring a right in equity, nor a license to take possession of chattels as "a security for any debt": see sect. 4 of the Act of 1878, and see sect. 3 of the Act of 1882; see also *Ex parte Newitt*, 16 Ch. D. 522; *Reeves* v. *Barlow*, 12 Q. B. D. 436. And see *post*, tit. Mortgages.

XI. *AGREEMENT for a* BUILDING LEASE, *or* SEVERAL BUILDING LEASES, *at Rents to be apportioned, with Special Provisions for an extensive Undertaking in London.* [OPTION *to Lessee to* PURCHASE *the Reversion.*]

AN AGREEMENT (*tt*) made the —— day of ——, 18—, BETWEEN [*lessor*], of &c. (who, and his heirs and assigns, unless the contrary appears, are hereinafter called the lessor), of the one part; and [*lessee*], of &c., builder (who and his executors, administrators, and assigns, unless the contrary appears, are hereinafter called the lessee), of the other part: WHEREBY it is agreed as follows:— Parties and interpretation clause.

1. When and so soon as the messuages or dwelling-houses, erections, and buildings hereinafter agreed to be erected and built, shall be erected, built, and covered in and completely finished, and made fit for habitation, to the approbation and satisfaction of the architect or surveyor for the time being of the lessor, as hereinafter mentioned, and such architect or surveyor shall have certified in writing to that effect, the lessor will upon the request of the lessee, by a good and sufficient lease, or by several good and sufficient leases, demise unto the lessee, or to such persons or person as he shall nominate and direct, ALL THAT piece or parcel of land, situate at &c., and containing &c., and bounded &c., and particularly delineated with the abuttals in the plan hereto annexed, and therein coloured red and green respectively, subject, nevertheless, as to the portion coloured red of the said piece of land, to rights of way thereover for the occupants of the adjoining property of the lessor, and subject as to the portion coloured green of the said piece of land to the tenancy thereof of [*tenant*] which will become determined on the 25th day of March, 18—; And the messuages or dwelling-houses, erections, and buildings, to be erected and built upon the said piece or parcel of land, with the appurtenances, from the —— day of ——, 18—, for the term of ninety-nine years thence next ensuing; AT the several yearly rents following, that is to say, for the first two years of the said term a peppercorn rent, if demanded; for the third year thereof the rent of £——; and, for the fourth and every subsequent

Lessor to grant leases when works finished.

Parcels.

Term.

At the rent of a peppercorn for the first two years; and £—— for the

(*tt*) As to stamp, see *ante*, p. 388, note (*p*). Stamp.

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year during the said term the full yearly rent of £——, the said yearly rents of £—— and £—— respectively to be payable quarterly, on the 24th day of June, the 29th day of September, the 25th day of December, and the 25th day of March in every year, clear of land-tax, sewers-rate, and all other rates, taxes, duties, assessments, and impositions, of what nature or kind soever, parliamentary, metropolitan, parochial, or otherwise, to which the landlord, tenants, or premises, or any part thereof is, or are, or hereafter shall, or may be liable, except landlord's property tax; the first quarterly payment of the said rent of £—— to be made on the 24th day of June, 18—, and the first quarterly payment of the said rent of £—— to be made on the 24th day of June, 18—.

remainder of the term, payable quarterly.

Form of lease.

2. Every lease to be granted by the lessor in pursuance of this agreement shall be in the form and to the effect set forth in the First Schedule hereunder written so far as circumstances will permit (*u*); And every such lease and a counterpart thereof shall be prepared by the lessor's solicitor, at the expense of the lessee, who shall execute every such counterpart, and deliver the same to the lessor (*x*).

Form of lease.

(*u*) It is often, and particularly when several leases are intended to be granted in pursuance of an agreement, advisable that a full form of lease should be set out in a schedule to the agreement, so as to avoid the possibility of dispute as to the contents of the leases. If preferred, however, an epitome of the covenants, &c., of the intended leases may be given in the body of the agreement, *ut ante*, p. 389.

Production of lessor's title.

(*x*) In the absence of express stipulation to the contrary, the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), sect. 2, precludes a lessee taking a lease from a freeholder from calling for the title to the reversion. Where, therefore, the lessee contemplates a large outlay on the premises, it may be prudent for him to protect himself by requiring some such stipulation, as follows, for the production of the lessor's title to be inserted in the agreement:

Lessor to deliver abstract of his title.

2*a*. "The lessor will, at his own expense, within —— days from the date hereof, deliver to the solicitor of the lessee an abstract of the title of the lessor enabling him to grant the said lease of the premises hereby agreed to be demised, and at his own expense produce the deeds and other evidences therein mentioned, at the office of the solicitor of the lessee, to be examined therewith."

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3. The lessee will, on or before the —— day of ——, 18—, at his own costs and charges, and to the satisfaction of such architect or surveyor as aforesaid, erect, cover in, and complete fit for habitation upon the pieces or parcels of land hereby agreed to be demised, with stock bricks, and other good and proper materials of all sorts, in a substantial and workmanlike manner, according to the specification and plan and elevation thereof, contained in the Second Schedule hereunder written (*y*), —— messuages or dwelling-houses of the first rate of building, to be covered with slate, and to have leaden gutters weighing at least seven pounds to the superficial foot; the front and back walls of each messuage or dwelling-house to be two bricks and a half thick in the cellar story; two bricks thick in the parlour and one pair of

Lessee to build under architect's inspection.

Dwelling-houses, &c., of the first rate.

Stipulations as to delivery of requisitions, &c., may be added, if desired, for which see *ante*, tit. AGREEMENT, Vol. I. p. 404 *et seq.*; for a stipulation that the taking of possession of the premises shall not be deemed an acceptance of title, see *ibid.* p. 431.

It must be borne in mind in considering whether a lessee should be advised to insist on a stipulation for the production of the lessor's title, that it has been decided that the Act above referred to has not altered the rule that a lessee has constructive notice of the lessor's title, but that a lessee is now in the same position as regards notice as if he had, before the Act, stipulated not to inquire into the lessor's title: *Patman* v. *Harland*, 17 Ch. D. 353. Where the property intended to be demised forms part of estates, the title of which has been frequently investigated, and may be regarded as well known, it is not generally considered necessary that the lessor should be required to produce his title.

As regards underleases, the right of an intending lessee to call for the title to the immediate leasehold reversion is not affected either by the Vendor and Purchaser Act, 1874, or by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41): see sects. 3 (1) and 13 of the latter Act. It may, therefore, in the case of an agreement for an underlease be well to insert in the agreement the following stipulation:

2*b*. "The lessor shall not be called upon to show his title to grant the said lease of the premises hereby agreed to be demised."

Lessor not to deliver abstract of title.

(*y*) Add, if such is the intention,

"and conformably, or as near as may be, to the houses already built by [C. D.] in the said intended street, a range of —— messuages, &c." (*as above.*)

Conformably to other houses.

XI. Agreement for several Building Leases.

stairs story; and at least one brick and a half thick above the one pair of stairs story (except the parapets), and the parapets to be coped with Portland stone, and all the cross partitions to be carried on brick walls the height of the cellar story.

Possession of land to be given to lessee.

4. For the purpose of erecting and building the said —— messuages or dwelling-houses, and carrying out the works and operations incident thereto, possession of the land coloured red on the said plan, subject to the right of way hereinbefore referred to, will be given to the lessee forthwith after the execution of this agreement; possession of the land coloured green on the said plan will be given to the lessee on or immediately after the determination of the said existing tenancy thereof.

Lessee to erect hoardings, &c.

5. The lessee shall immediately on possession being given him of the respective portions of the said site, and before commencing to pull down any buildings which may then be standing thereon, enclose the same with sufficient hoards and fences in accordance with the directions of such architect or surveyor as aforesaid, and shall from time to time remove, alter, and set up again such hoards and fences as such architect or surveyor may require. The lessee shall also uphold and maintain the hoards and enclosures now standing on the boundary of the site next —— Street, and shall provide others that may be necessary, and shall perform all the shoring and other works necessary to uphold the adjoining buildings.

Lessee to make compensation for damage.

6. The lessee shall be responsible and make compensation for all damage that may be done or occasioned by the execution of the works hereby agreed to be performed, and also shall be subject and liable to all claims and demands with respect to party walls and party fence-walls, and rights of air, light, and drainage, and all other rights that any person or persons may lawfully have or claim in regard to the said premises.

Lessee to protect main sewers.

7. The lessee shall take all necessary measures for the maintenance and protection of the main sewers of the Metropolitan Board of Works crossing or running under the said premises, or any part thereof, and will comply with all the requirements of such Board in respect thereof, and the lessee shall obtain all consents (if any) to the building over such sewers that may be necessary.

8. The lessee shall be entitled to all the ordinary old materials of such buildings as may be upon any part of the premises, coloured —— on the said plan, but such buildings respectively shall be accepted by him in the condition in which they may be when possession thereof shall be given him, and shall be immediately thereafter pulled down and cleared away, and all drains and cesspools upon the premises which drain only the buildings so to be pulled down and cleared away shall, immediately after the buildings respectively shall have been pulled down, be cleared out, and solidly filled in with concrete.

Old materials to belong to lessee.

9. All articles of antiquity or curiosity which shall be found in or on any part of the said piece or parcel of land shall remain the property of the lessor, and immediately on any such articles being found, notice thereof shall be given to such architect or surveyor as aforesaid, and such course shall be taken with respect thereto and the excavations around as he may direct, and all articles so found shall be handed over to him or be disposed of as he may direct.

Articles of antiquity, &c., to belong to lessor.

10. The lessee may make and open and lay out such roads, ways, streets, and squares in, through, over, or upon the said piece or parcel of land as he shall think proper, the plans of all such proposed roads, ways, streets, and squares being first submitted to and approved by such architect or surveyor as aforesaid, and it is hereby expressly agreed that the lessee shall at his own cost complete all such roads, ways, streets, and squares, and the approaches thereto, and the sewers and drains connected with the houses to be built as aforesaid within —— years of the date of this agreement, to the satisfaction in all respects of such architect or surveyor as aforesaid.

Lessee may lay out roads, &c.

11. The lessee will, in erecting and building the said messuages or dwelling-houses, make and leave an area six feet wide, and fix a stone curb eight inches by six inches, with iron railing five feet high thereon at the level, to be respectively ascertained and approved of by such architect or surveyor as aforesaid; And will pave the footway in the front thereof with Yorkshire Ealand-edge paving; and lay a curb thereto of Cornish-moor stone, the whole to be seven feet and six inches wide.

Lessee to leave area.

To pave the footway.

12. The lessee will bear and pay a just and fair proportion with the other tenants, lessees, and occupiers,

To pay a proportion of the expense of a

XI. Agreement for several Building Leases.

common sewer and of pavements, &c.

To pay expenses of making common sewer.

of any other lands, tenements, or hereditaments of the lessor, or of any other person or persons whomsoever, near or adjoining to the premises hereby agreed to be demised, of all expenses to be incurred in building and making a common sewer under ground, in front of the said messuages or dwelling-houses, and of all costs, charges, and expenses incurred, or to be incurred, in the cutting, dividing, building, or making of all or any other pavements, ways, channels, public sewers, waydraughts, drains, and gutters, in, upon, through, under, or about the premises hereby agreed to be demised, or any part or parts thereof; such proportions to be respectively ascertained by such architect or surveyor as aforesaid.

Lessee may build mews or stables and coach-houses.

13. It shall also be lawful for the lessee, at any time or times hereafter during the said term, to erect and build a mews of stables and coach-houses at a proper and convenient distance behind the said messuages or dwelling-houses covenanted to be erected and built as aforesaid: And also, to erect and build other coach-houses and stables, to be attached to the gardens of or belonging to the said messuages or dwelling-houses: Provided, that all and every such coach-houses and stables be erected and built of good and proper materials, in a substantial and workmanlike manner, and covered with slate, and be situated and finished to the satisfaction of such architect or surveyor as aforesaid, but not otherwise.

Lessee to erect houses under inspection of lessor's architect, &c.

14. The lessee shall erect, complete, and finish the said messuages or dwelling-houses with the appurtenances thereto, fit for use and occupation under and subject to the inspection of such architect or surveyor as aforesaid, who shall be at liberty for that purpose to enter upon the premises at all reasonable times, and also in conformity with the provisions of the Metropolitan Building Acts, the Metropolis Local Management Acts, and all other Acts or regulations affecting the same (*z*).

Lessee not to underlet nor assign agreement.

15. The lessee shall not underlet the premises or any part thereof for any temporary purpose before the said messuages or dwelling-houses shall have been erected, nor use any por-

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Metropolitan Building Acts.

(*z*) As to the regulations for construction of buildings within the metropolitan area, see the Metropolitan Building Acts (18 & 19 Vict. c. 122; 25 & 26 Vict. c. 102; and 43 & 44 Vict. c. 14).

tion of the premises, or the hoards, scaffolding, or anything connected therewith as an advertising station, or for the display of boards, posters, or notices, nor make any excavations upon any part thereof, nor remove any solid gravel, clay, or brick-earth therefrom, except for the purpose of making the foundations of the said messuages or dwelling-houses, or vaults, sewers, drains, or other works to be executed under this agreement, nor make any assignment, except by way of mortgage, of this agreement, unless with the previous consent in writing of the lessor.

Lessee to be entitled to have separate leases, when work finished.

16. When and so soon as such architect or surveyor as aforesaid shall have made his report in writing to the lessor, certifying that the said messuages or dwelling-houses are erected, built up, and covered to his satisfaction, the lessee shall be entitled to have, at his option or election, either one lease of the entirety of the premises hereby agreed to be demised, or separate leases of each messuage or dwelling-house, with the ground and appurtenances thereunto belonging, for the term of ninety-nine years, or so much thereof as shall be then to come and unexpired, and if he shall elect to have separate leases as aforesaid, then at such rents as shall be respectively ascertained by such architect or surveyor as aforesaid, in a just and fair proportion to the said gross rent of £——, on executing counterparts of such leases respectively, and paying for each of such leases and a counterpart thereof respectively, a sum not exceeding £—— in respect of the costs and expenses of and incident to the preparation and execution thereof respectively.

Lessee to pay rents until execution of leases.

17. Until a lease or leases shall have been granted of the entirety of the said premises under the last preceding article, the lessee will pay to the lessor the several rents or yearly sums following, that is to say: For the first year of the said term from the —— day of ——, 18—, the rent of a peppercorn, if demanded; for the second year thereof the rent or yearly sum of £——; for the third year thereof the rent or yearly sum of £——; and for the fourth, and for each and every subsequent year during the continuance of this agreement, the full rent or yearly sum of £——, all such several rents or yearly sums to be paid quarterly on the usual quarter-days, the first payment of such rents or yearly sums to be made on the —— day of——, 18—, and such several rents or yearly sums to be clear of all land-tax, tithe-rentcharge,

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main drainage rate, and all existing taxes, rates, charges, duties, assessments, and deductions whatsoever, whether parliamentary, parochial, metropolitan, or otherwise, to which the lessor or lessee respectively in respect of the premises are or hereafter shall or may be liable, except only the landlord's property tax, provided always, that the rent or rents payable under any lease or leases to be granted pursuant to this agreement shall from time to time be set off against, and be accepted in or towards satisfaction, as the case may be, of the rent or yearly sum for the time being payable under this article for the entirety of the said premises, but so that when ases shall have been granted of the entirety of the said premises, the aggregate of the rents thereby reserved shall amount to the full rent or yearly sum of £——.

Lessee to observe covenants and insure unfinished houses.

18. Until all the said intended leases shall have been granted, the lessee will pay all the said taxes, rates, charges, duties, assessments, and deductions, except as aforesaid, and will, as far as circumstances will admit, observe and perform the covenants and conditions which the respective lessees would be bound to observe and perform if the said leases had been granted respectively, and the lessee shall keep the unfinished dwelling-houses and buildings, so soon as the same shall have reached the height of 20 feet above the level of the ground, insured in the joint names of the lessor and lessee to the amount of three-fourths of the value for the time being in one of the public offices of insurance, to be approved by the lessor, and will when required produce to the lessor the policy and the last receipt for the premium in respect of every such insurance.

Lessee to accept leases and execute counterparts.

19. The lessee will accept and take a lease or leases of the said pieces or parcels of land, with the messuages or dwelling-houses, erections, and buildings, to be thereupon erected and built as aforesaid, under the terms and conditions hereinbefore expressed, and execute a counterpart or counterparts thereof respectively, and pay such sum of money as aforesaid for each and every such leases and counterparts; and also the expenses of preparing and executing these presents and the counterpart thereof.

Lessee to pay surveyor's charges.

20. The lessee will also pay all reasonable fees and charges of the lessor's surveyor for inspecting and approving of plans and elevations of the intended buildings and works, and for inspecting and superintending the progress thereof, and for

giving certificates, and for drawing the plans to be annexed to the said leases and counterparts thereof.

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21. In case the lessee shall make default in erecting, completing, and covering in the said messuages or dwelling-houses, erections, and buildings, to be erected and built as aforesaid, or any of them, in manner and within the time hereinbefore provided, or if the lessee or any of his nominees shall neglect or refuse to accept any such lease or leases as aforesaid, and to execute a counterpart or counterparts thereof, or to pay the costs and expenses of and incident to the preparation and execution of the same respectively, within one calendar month after he or they shall have been requested by the lessor so to do, in all of which respects time shall be of the essence of the contract, or in case of breach of any of the stipulations herein contained, or if the lessee shall not proceed with the works with proper diligence, then and in any such case it shall be lawful for the lessor, if he shall think fit, to re-enter and take possession of the premises hereby agreed to be demised, or such part of the same whereof no such lease as aforesaid shall have been actually granted, and of all buildings, erections, plant, and materials (*a*), which may be thereon, without making to the lessee, or his nominees or nominee, any allowance or compensation in respect thereof, and thereupon this agreement, and everything herein contained shall, as regards the whole or such part of the premises as shall be so re-entered upon, cease and become void.

Power of re-entry on lessee's default to complete works.

22. In case the said [*lessee*] shall die before the messuages or dwelling-houses, buildings, and other works hereby agreed to be erected and executed shall have been fully completed, the lessor may at his option either require the executors or administrators of the said [*lessee*] to complete the same according to the stipulations of this agreement, or may by notice in writing to such executors or administrators determine this agreement: Provided always, that if the lessor shall elect so to determine this agreement he shall pay to the executors or administrators of the said [*lessee*] such a sum as shall recoup his estate for all such monies as shall be certified by such architect or surveyor as aforesaid to have been properly laid out by the said [*lessee*] in carrying out the works and operations aforesaid.

Option for lessor to determine agreement on lessee's death.

(*a*) See as to this clause, *ante*, p. 392, note (*t*).

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Arbitration clause.

. 23. If any dispute or difference shall arise touching the said messuages or dwelling-houses, buildings, and works hereby agreed to be erected and executed, or touching the construction or effect of this agreement or of any clause or stipulation herein contained, or the rights and liabilities of the lessor and lessee respectively hereunder, the said dispute or difference shall be referred to the determination and award of two indifferent persons, one to be named by the lessor, another by the lessee, or an umpire to be appointed in writing by the said two persons so to be named as aforesaid before entering on the reference; and the decision and award of the said referees or their umpire shall be final (*a*).

Agreement not to be deemed a demise.

24. [*Proviso that agreement shall not be deemed a demise, ante*, p. 392 (*b*).]

(*a*) For other forms of arbitration clauses applicable to agreements for building leases, see the precedents of building agreements (XXXI., XXXII.), sub tit. AGREEMENTS, *ante*, Vol. I. pp. 543, 547.

(*b*) If it is intended that the lessee shall have the option of purchasing the reversion, add the following clauses :—

[26. If the lessee shall at any time or times hereafter be desirous of purchasing the fee simple of all or any one or more of the said messuages or dwelling-houses with the ground and appurtenances belonging thereto, and of such his desire shall give to the lessor or leave for him at his usual or last known place of residence in England three calendar months' notice in writing ending on some one of the quarterly rent days hereinbefore mentioned, then and in such case at the expiration of such notice the lessee shall become and be the purchaser of the said messuages or dwelling-houses, or such one or more of them, with the ground and appurtenances belonging thereto as shall be specified in such notice, at the rate of £—— for each of the said messuages or dwelling-houses, with its grounds and appurtenances; and shall, on payment of the purchase-money within two calendar months thereafter, be entitled to a conveyance of the reversion in fee of the purchased premises from all proper parties; [but the title thereto up to the date of this agreement shall be admitted to be in the lessor without investigation]; and this agreement shall, upon the execution of such conveyance, cease as from the expiration of the said notice as to the premises so purchased, but not further or otherwise; and the

25. This agreement shall remain in force as to any of the conditions thereof which may not have been performed, notwithstanding the grant of all or any of the said leases.

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Agreement to remain in force notwithstanding grant of lease.

In witness, &c.

The First Schedule above referred to.

(*Form of lease.*)

The Second Schedule above referred to.

(*Specification, plan, and elevation.*)

XII. *AGREEMENT for a* Building Lease *or several* Building Leases; *special Provisions for construction of several Houses, and as to time of completion; Provisions as to* Advances *by Lessor to Lessee as the works progress.*

AGREEMENT (*c*) made the —— day of ——, 18—, Between [*lessor*], of &c. (who and his heirs and assigns, unless the contrary appears, are hereinafter called the lessor), of the one part, and [*lessee*] of &c. (who and his executors,

Parties and interpretation clause.

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costs of the said conveyance, except as to the perusal and execution thereof by the parties conveying, shall be borne by the purchaser; but the costs of deducing and proving the title to the reversion in fee as from the date of these presents, and of the perusal and execution of the conveyance by and on behalf of the parties conveying shall be borne by the lessor; and every such conveyance shall contain such restrictive covenants as to not carrying on offensive trades as are contained in the form of lease set forth in the first schedule hereunder written; but the purchaser, his heirs and assigns, shall be entitled to the like right of using the roads coloured brown on the said plan as is therein mentioned; and the purchaser shall be entitled to a statutory acknowledgment of his right to the production of all documents of title in the lessor's possession, or control, and an undertaking for the safe custody thereof.

In witness, &c.]

(*c*) This instrument will require not only an agreement stamp of 6*d.* (or, if the term does not exceed 35 years, then an *ad valorem* stamp on aggregate rent), but also to be further stamped as a mortgage with an *ad valorem* duty for the amount to be secured: see *post*, tit. Mortgages.

Stamp

XII. Agreement for Building Leases and Advances by Lessor.

administrators, and assigns, unless the contrary appears, are hereinafter called the lessee), of the other part; WHEREBY it is agreed as follows:—

Lessee may enter and build.

1. The lessee may at any time or times after the execution of this agreement, and until the determination thereof, or until such lease or leases shall have been granted as hereinafter mentioned, enter upon all that piece or parcel of land situate, &c., which premises are delineated with the abuttals in the plan annexed to this agreement, and therein coloured ——, for the purpose of executing the operations and works hereinafter mentioned.

Lessee to fence off building land.

2. The lessee shall, within —— months from the date of this agreement, at his own cost, sufficiently fence off the land hereby agreed to be demised so as to protect the adjoining land from trespass and damage, and will, previously to requiring any lease to be granted under these presents, fence off the land from time to time required to be leased from the adjoining land with a substantial wood paling, or with a brick wall of at least nine inches thick, to the satisfaction of the lessor or his surveyor or agent for the time being.

Lessee to build houses of specified value within specified time.

3. The lessee will, within the period of —— years from the date of this agreement, lay out and expend the sum of £—— at the least, by an expenditure of not less than £—— in respect of each of —— dwelling-houses, with the outbuildings and appurtenances thereto belonging, such sum or sums of money to be laid out and expended for the cost price of labour and materials alone in the erection and completion on the said piece or parcel of land of —— good and substantial messuages or dwelling-houses with their appurtenances, all such messuages to be built of solid brick or stone or brick and stone, with roofs of the best slate or ornamental tiles, with suitable gardens, outbuildings, offices, sewers, drains, fences, and other conveniences, according to the plans and specifications in the First Schedule hereunder written.

Lessee to construct houses of proper materials, &c.

4. The lessee shall construct and execute the said dwelling-houses buildings and works with good, well seasoned, and proper materials of all kinds in a substantial and workmanlike manner, and in conformity with any statutory, municipal, or local enactments or regulations applicable thereto, and under the inspection and to the satisfaction of the architect surveyor for the time being of the lessor, who is hereinafter referred to as the said surveyor.

5. [*Lessee may lay out roads, &c., ante*, p. 397.]

XII. Agreement for Building Leases and Advances by Lessor.

6. When and so soon as any plans or elevations of the said dwelling-houses, buildings, gardens, roads, ways, streets, squares, sewers, drains, and other works hereby authorised shall have been approved by the said surveyor, the lessee will at his own cost cause good and accurate copies or drawings thereof to be deposited with the said surveyor, and no dwelling-house, building, or work whatever shall be erected or constructed by the lessee upon the said piece or parcel of land or any part thereof except and only in accordance and conformity with the stipulations and provisions herein contained respecting the erection of such dwelling-houses, buildings and works.

Lessee may lay out roads, &c.

Lessee to deposit plans.

7. The lessee shall not make any bricks nor burn any clay or lime on the said piece or parcel of land, nor commit or allow any unnecessary nuisance on the premises, nor remove any stone, earth, clay, gravel, sand, or minerals without the consent of the lessor or his surveyor previously obtained for that purpose.

Lessee not to make bricks, &c.

8. The lessee shall erect and complete fit for occupation and use one of the said dwelling-houses, with the garden, offices, outbuildings, drains, fences, and other conveniences thereto belonging, on or before the —— day of ——, 18—, another of the said dwelling-houses, with such appurtenances as aforesaid, on or before the —— day of ——, 18—, and erect and complete as aforesaid each of the other dwelling-houses within —— months after the completion of the one last completed.

Time for completion of houses.

9. When and so soon as the lessee shall have erected and completed any of the said dwelling-houses, with such appurtenances as aforesaid, and the said surveyor shall have certified to that effect, the lessor will, if this agreement shall not then have been determined, grant to the lessee or his nominee a lease of such dwelling-house with the land laid out to be occupied therewith for the term of —— years from the —— day of ——, 18—, at the yearly rent specified for such dwelling-house and land in the Second Schedule hereunder written, on the lessee or his nominee executing counterparts, &c. [continue *ut ante*, p. 399].

Leases to be granted on completion.

10. [*Lessee to pay rents until execution of leases, ante*, p. 399.]

11. [*Lessee to observe covenants and insure, ante*, p. 400.]

12. The lease or several leases to be granted in pursuance of this agreement shall be in the form, and to the effect set

Form, &c., of leases.

XII. Agreement for Building Leases and Advances by Lessor.

forth in the Third Schedule hereunder written, so far as circumstances will permit.

13. [*Lessee to accept leases and execute counterparts ut ante*, p. 400.]

Lessee to accept leases, &c., to pay charges.

14. [*Lessee to pay surveyor's charges, ut ante*, p. 400.]

Lessor to make advances to lessee during progress of works.

15. The lessor will, during the progress of the works hereby agreed or authorised to be executed, from time to time on the request of the lessee, and when the said surveyor shall certify in writing that such progress has been made as is mentioned in the Fourth Schedule hereunder written, and also that all the buildings and works hereby agreed or authorised to be constructed and executed, have been properly proceeded with, make advances to the lessee at such rate of interest as is hereinafter mentioned in manner and to the extent set forth in the Fourth Schedule hereunder written.

Repayment of advances.

16. The lessee will repay to the lessor every sum advanced to him pursuant to the last preceding article at the expiration of six calendar months from the time of such advance, with interest thereon as from the time of such advance at the rate of £—— per cent. per annum, payable half yearly, the first payment thereof to be made at the expiration of six calendar months from the time of such advance, and all such principal and interest monies, and all costs of and incident to all such advances, and the securities for the same, shall, until repayment and as well after as before the granting of every such lease or leases as aforesaid, be a charge on the interest (if any) of the lessee in the said piece or parcel of land and the dwelling-houses, buildings, and works hereby agreed or authorised to be constructed and executed thereon.

Powers of sale, &c., on default of repayment.

17. In case at any time after the expiration of six months from the making of any such advance as aforesaid the lessee shall make default in the repayment of such advance after such demand thereof as is hereinafter mentioned, or in case he shall make default in any half-yearly payment of interest payable in respect of any such advance or any part thereof for the space of fourteen days after the time hereby appointed for such payment, or if the lessee shall become bankrupt or make or enter into any composition or scheme of arrangement for the liquidation of his affairs under the present or any future Act relating to bankruptcy, then and in any such case it shall be lawful for the lessor to enter into and upon the said piece or parcel of land, and to erect, complete, or execute any houses,

XII. Agreement for Building Leases and Advances by Lessor.

buildings, or works thereon which may be unfinished in such manner as he shall think proper, and for that purpose to enter into any contracts with builders or others, and engage workmen and provide scaffolding, tools, plant, and materials, or to use any scaffolding, tools, plant, or materials, which may be in or upon the premises, without making to the lessee any payment, allowance, or compensation whatever, and to let, or manage, and deal with the said piece or parcel of land as the absolute owner thereof, without being responsible for loss, or to sell the said piece or parcels of land and the dwelling-houses, buildings, and works thereon or any part thereof, either together or in parcels, and either by auction or private contract, upon such conditions and in such manner as he shall think fit, and to buy in, vary, or rescind any contract for sale, and to resell without being answerable for any loss occasioned thereby, and to give valid receipts for the purchase money, and to do all other acts and things which he may think expedient for effectuating any such sale; and the lessor shall apply any rent, proceeds of sale, or other monies to arise by the exercise of his powers aforesaid, in the first place to pay the costs and expenses incurred in or about the exercise of such power, and in the next place in or toward satisfaction of any principal or interest monies for the time being owing to him in respect of any such advance as aforesaid, including the expenses of any works executed by him as aforesaid, and shall pay the surplus (if any) to the lessee.

Protection of purchasers, &c.

18. No lessee or purchaser upon any such sale as aforesaid shall be bound or concerned to enquire whether any of the cases in which such power is hereby made exerciseable has happened, or as to the propriety or otherwise of such sale.

How demands may be made.

19. Any demand for payment of money under the 17th article hereof, may be made in writing left for or sent by post to the lessee, at his last known place of abode or business in England, or left at or affixed to any part of the said piece or parcel of land, dwelling-houses, buildings, and premises.

Power of re-entry.

20. [*Power of re-entry on lessee's default in carrying out the works, ante*, p. 401.]

Agreement not to operate as a demise.

21. [*Proviso that this agreement shall not constitute a demise, ante*, p. 392.]

22. [*Arbitration clause, ante*, p. 402.]

In witness, &c.

The First Schedule above referred to.

Plans and Specifications.

XII. Agreement for Building Leases and Advances by Lessor.

THE SECOND SCHEDULE ABOVE REFERRED TO.

Apportionment of Rents.

THE THIRD SCHEDULE ABOVE REFERRED TO.

Form of Lease.

THE FOURTH SCHEDULE ABOVE REFERRED TO.

Manner and Extent of Advances.

[*E.g.*—When the ceilings, joists, and gutter-plates of any one or more of the houses hereby agreed to be built have been fixed, and the brickwork raised all round level to the top of the same, and the sash-frames built in, the sum of £—— per house.

When any of the said houses, with all the outbuildings thereto, have been roofed in, the gutters and rain-water pipes fixed, the boundary and fence brick walls and waterclosets built, the drains laid down, the bricknogging finished, and the front and back door shutters hung, the further sum of £—— per house.

When all the joiners' work of any of the said houses, including the hanging of the room and closet doors, has been properly done, the sashes glazed and hung, the masons' work finished, and one coat of plaster laid on the walls, partitions, and ceilings, the further sum of £—— per house.

When any of the said houses have or has been properly painted, papered, and completely finished fit for occupation, and all the works connected therewith, including the footpaths, streets, drains, and sewers, constructed and performed, the further sum of £—— per house.]

XIII. *AGREEMENT for a* FINISHING LEASE *of* PART OF PREMISES *held under an Agreement by the* GROUND LANDLORD *with a* BUILDER *to grant* SEPARATE LEASES *of the Premises.*

Parties.

AN AGREEMENT (*cc*) made this —— day of —— 18—, BETWEEN [*ground landlord*], of &c. (who and his heirs and assigns, unless the contrary appears, is hereinafter called the landlord), of the first part; [*vendor*] of &c. (who is hereinafter called the vendor), of the second part; and [*purchaser*] (who and his executors, administrators, and assigns, unless the contrary appears, is hereinafter called the lessee), of the third part.

Recital of original agreement.

WHEREAS, by an agreement, dated the —— day of ——, 18—, and made between the landlord, of the one part; and the vendor, of the other part; the landlord agreed to let unto

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Stamp.

(*cc*) Stamp, 6*d.*, as the term exceeds 35 years; see *ante*, p. 388, note (*p*).

XIII. For a Finishing Lease of Part of Premises held under an Agreement for Building Leases.

the vendor ALL THAT piece or parcel of ground, &c., TO HOLD unto the vendor for the term of 99 years, from the —— day of —— then next, AT the yearly rent of —— pounds, payable quarterly, clear of the land-tax, sewers-rate, and all other rates and taxes whatsoever, except landlord's property tax: and the vendor agreed to expend the sum of —— pounds, in erecting —— dwelling-houses on the said piece or parcel of ground, within —— years from the date thereof, according to the plan and specification therein mentioned: AND the landlord agreed, that as soon as the vendor should have erected and covered in one of the said dwelling-houses, in conformity with the specification annexed to the agreement now in recital and to the satisfaction of the landlord, he the landlord would grant to the vendor, either a lease of the whole of the said premises, at the said yearly rent of —— pounds, or several separate leases of the said dwelling-houses and premises as they should be from time to time finished, or join with the vendor in agreements for building leases of the remaining part of the said premises at apportioned rents, according to their respective values, to be ascertained by the surveyor of the landlord, to such person or persons as the vendor should require; such separate leases to be granted, discharged from all connexion and liability on account of the rents, covenants, and conditions relating to the other part of the said premises not demised or agreed to be demised by such lease or agreement for a lease respectively: AND WHEREAS the vendor has erected and covered in one of the said dwelling-houses and premises in conformity with the said specification, and to the satisfaction of the landlord, but several works and matters still remain to be done and completed in order to finish the same dwelling-house and premises, and to render the same fit for habitation and use: AND the lessee has agreed with the vendor to purchase all his interest in the piece of the ground hereinafter described, for the price of £——, subject to the apportioned yearly rent of £——, which has been ascertained by the surveyor of the landlord to be the proportionate part of the said yearly rent of £——, which ought to be paid in respect of the said piece of ground; and the landlord has, upon the application and request of the vendor, testified by the execution by the vendor of these presents, consented to enter into the agreement hereinafter contained: AND WHEREAS the lessee has on or immediately before the execution of these presents paid to the vendor the sum of £——, for the purchase

Recital of contract.

XIII. For a Finishing Lease of Part of Premises held under an Agreement for Building Leases.

of his said interest in the said piece of ground, dwelling-house, and premises hereinafter described, the receipt of which sum of £—— the vendor hereby acknowledges: NOW THESE PRESENTS WITNESS and it is hereby agreed by and between the parties hereto as follows:

1. When and so soon as the lessee shall have completed and finished the several works and matters particularly mentioned in the Schedule hereunder written, the landlord will grant to the lessee a good and sufficient lease of ALL THAT piece or parcel of ground with the messuage or dwelling-house now erected and being thereon as hereinbefore is mentioned, situate on the —— side of —— Street, in the parish of, &c., and numbered —— in the same street, with the appurtenances, together with the joint use of the court or passage behind the same, in common with the occupiers of the adjoining tenements, for the term of —— years from the —— day of ——, 18—; AT the rent of £—— per annum, payable half-yearly, on Midsummer-day and Christmas-day, free and clear of and from the sewers-rate, and all and every other rate, tax, charge, assessment, or imposition whatsoever, either parliamentary, metropolitan, or parochial, to which the landlord, tenant, or premises is or are, or hereafter shall or may be liable, landlord's property tax only excepted.

Rent.

To be paid half a year free from taxes, &c.

Preparation and contents of lease.

2. The lease and a counterpart thereof shall be prepared by the solicitor of the landlord at such expense as is hereinafter provided, and shall contain covenants [*continue ut ante*, p. 389 (*d*).]

Costs of lease and counterpart.

3. The lessee will accept such lease on the terms and conditions herein set forth, and execute a counterpart thereof when required, and the costs and expenses of and incidental to the preparation and execution of the same, as well as of this agreement and a duplicate hereof, shall be paid and borne by the landlord and the lessee in equal shares (*e*).

Lessee to finish a dwelling-house, &c.,

and pay architect's fees.

4. The lessee will, on or before the —— day of —— next, at his own costs and charges, in a good, sound, substantial, and workmanlike manner, and with fit and proper materials of all kinds, to be approved by the architect of the landlord, and under the direction and inspection of the said

(*d*) See also as to the form of the intended lease, *ante*, p. 394, note (*u*).

As to production of the lessor's title, see *ante*, p. 394, note (*x*).

(*e*) The provision as to sharing these costs is not usual: the general practice is, that they shall be paid by the lessee alone.

architect, lay out and expend the sum of £—— in completing and finishing, and rendering fit for habitation, the said dwelling-house and premises hereby agreed to be demised, with such fixtures, fittings, conveniences, and necessaries to the same, as shall be requisite and proper, and in all things conformable and agreeable to the specification thereof hereunder written: And also pay the said architect's fees of five pounds per centum on the expenditure, for superintending and directing the same.

XIII. For a Finishing Lease of Part of Premises held under an Agreement for Building Leases.

5. In case the lessee shall not in all respects complete, finish, and make fit for habitation the said dwelling-house and premises in manner aforesaid to the satisfaction of the architect of the landlord, &c. [*continue ut ante*, p. 401.]

Proviso for re-entry on lessee's default.

Specification.

[*Proviso that agreement shall not be deemed a demise, ante*, p. 392.]

In witness, &c.

The Specification above referred to.

XIV. *BUILDING LEASE with* License *to Lessee to dig* Clay, &c.

THIS INDENTURE (*f*), made the —— day of ——, 18—, Between [*lessor*], of &c. (who and his heirs and assigns, unless the contrary appears, are hereinafter called the lessor), of the one part; and [*lessee*], of &c. (who and his executors, administrators and assigns, unless the contrary intention appears, are hereinafter called the lessee), of the other part, WITNESSETH that in consideration of the yearly rent hereinafter reserved, and of the covenant for building and other covenants on the part of the lessee hereinafter contained, the lessor hereby demises unto the lessee All that piece or parcel of ground situate and being in the parish of ——, in the county of ——, particularly delineated and described in the plan drawn in the margin of these presents, wherein the dimensions and boundaries thereof are specified: And also the messuage or dwelling-house and offices to be erected and built thereon pursuant to the covenant in that respect hereinafter contained, and which messuage or dwelling-house fronts on a certain street called —— Street, leading from the —— to —— in the said county, and is No. —— in the said street:

Parties.

Demise.

Parcels.

(*f*) Stamp *ad valorem* on rent reserved.

XIV. **Building Lease with License to dig Clay, &c.**

EXCEPT and reserved out of this demise the free passage and running of water and soil from other houses and buildings of the lessor and his tenants by and through the channels and drains of the premises hereby demised, the tenant or tenants of such other houses and buildings on request, paying his or their proportion of the charges for cleaning and repairing the same when need shall require: TO HOLD the said premises unto the lessee from the —— day of ——, 18—, for the term of —— years thence next ensuing: YIELDING AND PAYING therefor for the first —— years of the said term the rent of a peppercorn, and thenceforth during the residue of the said term the yearly rent of £——, and so in proportion for any less period than a year, clear of all present and future rates, taxes, and deductions, by equal half-yearly payments on the —— day of —— and the —— day of —— in every year, the first of such half-yearly payments to be made on the —— day of —— year, 18—; AND THE LESSEE HEREBY COVENANTS with the lessor in manner following, that is to say: THAT he the lessee will, on or before the —— day of —— next, at his own costs and charges, under the inspection and to the approbation of the surveyor for the time being of the lessor, well and substantially erect, build, and cover in on the —— side of the said plot of ground hereinbefore described, one messuage or tenement of —— stories, fronting —— Street aforesaid, and form and inclose the areas and vaults, and build the garden walls of the said messuage and tenement in conformity in every respect to the plan drawn in the margin of these presents, the several floors or stories of which said messuage or tenement shall respectively be of the several heights in the clear following, that is to say: the basement story —— feet, the parlour story —— feet, the one-pair story —— feet: AND that the lessee will, on or before the —— day of ——, 18—, in like manner and subject to such inspection and approbation as aforesaid, completely finish the said messuage or tenement with its appurtenances: AND will erect, build, and complete the same with such materials and in such manner as shall be reasonably required by such surveyor as aforesaid, and agreeably to the Acts of Parliament for the time being in force with respect to the building of houses in London and Westminster, so as to range even with the other houses intended to be built in the same street, and with such channels, pipes, and drains, as shall by such surveyors as afore-

Exceptions and reservations.

Habendum.

Reddendum.

Lessee's covenants:

to build house;

to finish house within specified time;

to use proper materials;

XIV. Building Lease with License to dig Clay, &c.

said be prescribed in connection with the main sewer or drain constructed by the lessor on his adjoining property, and will make the area or forecourt in front of the said house —— feet wide in the clear, and inclose the same with Portland kerb and iron rails; And will, before the said —— day of ——, 18—, make a footway of —— width immediately in front of the said messuage or tenement, and pave the same with good Yorkshire paving and a moor stone or granite kerb: And further, that the lessee, during the said term, will pay the yearly rent of £—— hereinbefore reserved on the days and in manner aforesaid; And will bear and pay all rates, taxes, and outgoings now payable or hereafter to become payable, whether by the landlord or tenant, in respect of the said premises, except landlord's property tax; And will, during the said term, when need shall require, bear, pay, and allow the share payable, or which shall become payable in respect of the said premises, of supporting, repairing, cleansing, amending, and rebuilding all party walls, gutters, sewers, drains, and cesspools, belonging to the said premises, and until taken to by the parish of ——, maintaining the footway and road in front thereof, and abide, in case of dispute in relation to the premises, by the decision of the district surveyor; And will, at the like costs and at all times during the said term, when need shall require, well and sufficiently repair, support, amend, pave, paint, cleanse, and keep the said premises, with the appurtenances, with all manner of needful and necessary reparations, painting, glazing, cleansing, and amendments whatsoever; And at the expiration or sooner determination of the said term, so yield up the same unto the lessors: And also that it shall be lawful for the lessor, and for his agents, surveyors, workmen and others employed by him, at all reasonable times during the said term, to enter upon the said premises to inspect the same, and give notice of the defects and want of reparation and amendment thereof; And that the lessee will, within three calendar months next after every such notice, well and sufficiently repair and make good all such defects and wants of reparation and amendment whereof notice shall have been so given or left; And also that no erection or building whatsoever shall at any time during the said term be erected in or over the garden or yard, areas, or forecourt of the said messuage or tenement hereby demised, or any part thereof respectively, without the consent of the lessor or his agent for

to pay rent and taxes, &c.;

to pay proportion of costs of repairing party walls, &c.;

to keep premises in repair;

and deliver up at end of term;

to permit lessor to enter;

to repair after notice;

not to erect buildings without lessor's consent;

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the time being; And that the said garden or yard shall not at any time during the said term be used in any other manner than as a garden or yard without such consent as aforesaid;

not to alter the messuage without consent;

And that no alteration or addition shall at any time during the said term be made in or to the height, sides, front, backs, roofs, walls, timbers, or elevation of the said messuage or tenement and premises hereby demised, or the yard or garden walls thereof, or the area or area rails thereof, without such consent as aforesaid; And also that the lessee will not at any time during the said term use the said messuage or tenement and premises, or any part thereof, as or for the purposes of a public-house or for the sale of beer, ale, or any spirituous liquors; And also that the lessee will not use the said premises or any part thereof, or permit the same to be used for any purpose which shall or may be or grow to the annoyance, nuisance, grievance, damage, or disturbance of the lessor or his other tenants: And further that the lessee will insure and keep insured from damage by fire the messuage, offices, and buildings hereinbefore covenanted to be erected on the said piece or parcel of land or ground hereby demised, to at least two-thirds of the value thereof, in the joint names of the lessor and the lessee, in some or one of the public offices in London for insuring against damage by fire, during all the said term; And will produce and show to the lessor the receipt and receipts for the premium and premiums for such insurance when demanded; And that if the lessee shall not produce and show the receipt for such insurance premium and premiums within one week after the same shall have been demanded, the omission so to do shall be considered as conclusive evidence that the premium or premiums, the receipt or receipts for the payment whereof shall be required to be produced, has not or have not been paid, and shall be a breach or breaches of the covenant to insure herein contained; And also that he the lessee will during the said term, as often as the buildings erected or to be erected on the said piece or parcel of ground shall be burnt down or damaged by fire, forthwith reinstate the same under the direction of the said surveyor for the time being:

not to use premises as a public-house;

nor create nuisance thereon.

To insure.

Lessor's covenant for quiet enjoyment.

And the lessor hereby covenants with the lessee that he the lessee, paying the yearly rent of £—— hereby reserved, at the days and in the manner hereinbefore appointed for payment thereof, and observing and performing all the covenants, clauses, and agreements in these presents contained on his

XIV. Building Lease with License to dig Clay, &c.

part to be observed and performed, shall peaceably hold and enjoy the premises, and every part thereof, with the appurtenances, during the said term hereby granted, without any interruption or eviction, from or by him, or from or by any person or persons lawfully claiming by, from, or under him: PROVIDED ALWAYS that if the said yearly rent of £—— shall be unpaid, in the whole or in part, by the space of twenty-one days next after the days of payment on which the same ought to be paid as aforesaid, the same being first lawfully demanded upon or at any time after the expiration of the said twenty-one days, and not paid when demanded; or if default shall be made in the observance or performance of all or any of the covenants, clauses, or agreements herein contained, on the part of the lessee, to be performed, then, and thenceforth, and in any of the said cases, it shall be lawful for the lessor, into and upon the premises, or any part thereof in the name of the whole, to re-enter, and the same to have again, and enjoy, as if this lease had never been made, but nevertheless without prejudice to any other remedy for breach of covenant to which the lessor may be entitled: PROVIDED ALWAYS, and it is hereby agreed and declared, that it shall be lawful for the lessee, at any time or times during the said term, to dig and break up any part or parts of the piece or parcel of ground hereby demised (not exceeding —— square yards), in order to get and obtain clay and materials for making bricks and tiles, for the purposes of building and erecting the said messuages and buildings hereinbefore covenanted to be erected and built as aforesaid, but to and for no other purpose whatsoever, except upon the terms and in the manner hereinafter mentioned; PROVIDED ALWAYS that the lessee shall make good and fill up to a level with the surface of the surrounding land, the ground which shall be so dug or broken up for the purpose aforesaid: PROVIDED ALSO that if the lessee shall, at any time or times during the term hereby granted, sell or dispose of any bricks or tiles to be made, got, or produced from the piece or parcel of ground hereby demised or any part thereof, or shall use the said bricks or tiles for any other purpose than that of erecting and building messuages or tenements, stables, coach-houses, or other erections and buildings in or upon the said piece or parcel of ground, or some part or parts thereof, Then, and in either of such cases, the lessee will, on demand for that purpose made by the lessor, pay to the lessor the sum of £—— for every thousand bricks or tiles

Proviso for re-entry.

Liberty to lessee to dig clay, &c.

Lessee to fill up the ground again.

If lessee sells or otherwise uses bricks, to pay £—— per thousand to lessor.

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which he shall so sell or dispose of, or use for any other purpose than that of erecting and building as aforesaid, and so in proportion for any less quantity than a thousand: The lessee shall, from time to time, enter in a book, to be provided by him for that purpose, an accurate and particular account of the bricks and tiles which shall be sold and disposed of as aforesaid; which book shall at all times, upon request, be open to the inspection of the lessor, with liberty to take copies thereof or extracts therefrom. IN WITNESS, &c.

Lessee to keep account of bricks, &c.

XV. *BUILDING LEASE by* TENANTS IN COMMON. *Covenant by* LESSEE *to* EXPEND *a certain* SUM *in* BUILDING.—ADDITIONAL RENT *for Houses to be Built.* (*A Concise Form.*)

Parties.

THIS INDENTURE (*g*), made &c., BETWEEN [*lessors*], of &c., of the one part, and [*lessee*], of &c., of the other part: WHEREAS the said [A. B.] (*one of the lessors*) is possessed of seven equal eighth parts or shares of the tenement hereinafter mentioned, and the said [C. D.] (*other lessor*) is possessed of the remaining one-eighth part thereof: AND WHEREAS the said [*lessors*] have agreed with the said [*lessee*] to grant to him a lease of the said premises upon the terms and in manner hereinafter mentioned. NOW THIS INDENTURE WITNESSETH as follows:

Recital of lessors' ownership of seven-eighths and one-eighth of the premises respectively.

Agreement for lease.

Testatum.

1. In the construction of these presents, unless the contrary intention appears, the term the lessors includes the said [*lessors*] and their respective heirs and assigns (*h*); the term the lessee includes the said [*lessee*], his executors, administrators, and assigns.

Appointment and demise.

Parcels.

2. The lessors, according to their respective estates, interests, and powers, respectively hereby demise unto the lessee, ALL that piece or parcel of land situate on the

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Stamp.

(*g*) This instrument will require an *ad valorem* stamp on the amount of the yearly rent: see *ante*, p. 336.

Trustees.

(*h*) If one of the shares is in settlement, add—

"Shall include the person or persons for the time being entitled to the reversion of the premises hereby demised, expectant on the determination of the term hereby granted.

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south side of a new street called ——, in the borough of ——, in the said county of ——, measuring in length, from north to south, —— feet, and in width from east to west, —— feet, and containing by admeasurement —— square yards or thereabouts, bounded on the east, west, and south sides by land of the lessors, and on the north by the said street, which piece of land is delineated on the map or plan indorsed on these presents, EXCEPT and always reserved out of this demise all mines and minerals, with liberty for the landlords or landlord for the time being to dig, search, and carry away the same, making reasonable recompense or satisfaction to the said lessee for the damage which shall be sustained by him or them thereby; TO HOLD the same unto the lessee, from the 25th day of March, 18—, for the term of —— years, YIELDING AND PAYING, yearly, during the said term, and so in proportion for any less period than a year, the rent of £——, by two equal half-yearly payments, on the 29th day of September and the 25th day of March (*i*); AND ALSO YIELDING AND PAYING for each messuage which shall be built on the said premises (except the messuage hereinafter covenanted to be built), the additional yearly rent of £——, to be paid half-yearly on the days whereon the first-mentioned rent is made payable, and to commence in respect of each additional messuage from the first of such half-yearly days of payment as shall next follow the roofing or covering in of such messuage; the said several rents to be paid free from all taxes, rates, assessments, and deductions whatsoever (except landlord's property-tax).

Exception and reservation of mines and liberty of mining.

Habendum.

Reddendum half-yearly.

Reddendum for houses to be built.

And the lessee hereby covenants with the lessors and also separately with each of them as follows:

Lessee's covenants:

3. The lessee will, during the said term, pay the said yearly rent of £——, and also the additional rent or rents, if any, which shall become payable, on the days and in manner hereinbefore appointed for payment thereof; AND also will pay all taxes, rates, and impositions whatsoever, (except landlord's

to pay rents and taxes;

(*i*) It is sometimes the practice in leases by tenants in common to reserve their respective proportions of rent severally, and to give to each of them express powers of distress. But as has been seen (*ante*, p. 44), this course answers no useful purpose, and is not usual. The inconveniences attending it as regards joinder of parties in an action for the rent, have, however, been remedied by the provisions in sect. 16 of the Judicature Act, 1873, and the Rules of the Supreme Court, Ord. XVI., rr. 1, 2, 11: see *ante*, p. 186.

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property tax,) which now are or shall or may become payable in respect of the premises.

to build a house and expend a certain sum;

4. The lessee will, within —— calendar months from the date hereof, at his own expense, build on the premises one brick messuage or dwelling-house, to cover a space of —— square yards at the least, and to be of the height of —— feet at the least from the ground to the lower ends of the principal rafters, and will complete the same in a substantial and workmanlike manner, and expend thereon at the least the sum of £——, and will on demand produce to the lessors all receipts and vouchers that shall be requisite to prove such expenditure.

to repair premises, and yield them up repaired.

5. The lessee will keep the premises, with all erections thereon, in good repair, and the said premises and erections so repaired, shall, at the determination of the said term, surrender and yield up to the persons then respectively entitled to possession thereof, together with all fixtures which shall be in or upon the same.

Power for lessors to enter and inspect repairs.

6. It shall be lawful for the lessors and their respective surveyors and agents, with or without workmen and others, twice in every year, at seasonable times, to enter into and upon the said premises, to examine the state of repair thereof.

That lessors may build against walls of houses to be built; such walls to be deemed party-walls.

7. The lessee shall permit the lessors and their lessees or tenants, to build against the pine-end walls of the messuage hereby covenanted to be erected, or of any other messuage which may be erected on the said premises, such walls being on the boundary of the said premises, and that such walls shall thenceforth be deemed to be party-walls.

Not to carry on offensive trades, &c.

8. The lessee will not use or carry on or permit to be used or carried on, in or upon the said premises, the trade or business of a vintner, victualler, alehouse-keeper, licensed retailer of beer or cyder, sugar-baker, distiller, hatter, soap-boiler, or tallow-chandler, or any other noisome or offensive business whatsoever, and shall not build or set up on the said premises any slaughter-house, smith's forge, farriery, or other manufactory or establishment that shall be or become a nuisance to any adjoining houses or buildings now or hereafter to be built, without the consent in writing of the lessors for that purpose.

to insure;

9. The lessee will keep insured the said premises and all erections thereon against loss by fire, in the joint names of the lessors and lessee, in some responsible insurance office, in the sum of £—— at the least, and will, upon request, produce to the lessors the policy for such insurance,

and the receipt for the annual premium, and in default thereof, it shall be lawful for the lessors so to insure or keep insured the same premises and erections, and the costs and charges of effecting and keeping on foot such insurance shall be repaid to them on demand by the lessee, or be recovered in like manner as the rent hereby reserved is recoverable; and it is mutually agreed that in case any part of the said premises and erections shall be damaged by fire, the amount received by virtue of any such insurance shall be laid out in reinstating the same; and in case the same shall prove deficient, such deficiency shall be made good by the lessee.

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to produce receipts; in default, lessors may insure and recover expenses.

10. And each of the lessors, for and against the acts and defaults of himself, and of his heirs, executors, administrators, and assigns only, hereby covenants with the lessee, that he, paying the several rents hereinbefore reserved as hereinbefore mentioned, and observing the covenants herein contained, shall peaceably enjoy the said premises without any interruption by the lessors, or any person claiming under them, or either of them.

Covenant by lessors for quiet enjoyment.

11. Provided always, that in case the yearly rent or rents hereby reserved shall be behind and unpaid for the space of thirty days after the same shall become due respectively, and the same shall be demanded at the expiration of the said thirty days, or at any time afterwards, and shall not be paid at the time of such demand, or if the lessee shall not at all times keep the covenants and agreements herein contained, then it shall be lawful for the lessors into and upon the said premises to re-enter, and this demise to determine.

Proviso for re-entry

In witness, &c.

XVI. *BUILDING-LEASE granted by a* Tenant *for Life under his* Statutory Power.—*Covenant by Lessee to* Build *Houses Uniformly with other Houses in the same Street.*

THIS INDENTURE (*ii*), made the —— day of ——, 18—, Between [*tenant for life*], of, &c., of the one part, and [*lessee*], of, &c., of the other part, Witnesseth as follows :—

Parties.

Testatum.

(*ii*) Stamp, *ad valorem* on amount of yearly rent reserved, see *ante*, p. 336.

XVI. Building Lease under a Power.

Interpretation clause.

1. In the construction of these presents, unless a contrary intention appears, the expression "the lessor" includes the said [*tenant for life*] and his successors in title, or other the persons or person for the time being entitled to the reversion of the hereditaments hereby demised, expectant on the determination of the term hereby granted; the expression "the lessee" includes the said [*lessee*] and his executors, administrators, and assigns; the expression "the premises" means the entirety of the piece or parcel of land and property hereby intended to be demised.

Lessor, by virtue of statutory power,

2. In consideration of the expense incurred and to be incurred by the lessee in and incident to the erection and completion of the messuages or dwelling-houses hereinafter mentioned, and of the yearly rent, covenants, and agreements hereinafter reserved and contained on the part of the lessee to be paid and performed, He the lessor, in exercise of the powers in that behalf given to or vested in him by the Settled Land Act, 1882, as tenant for life in possession of the lands settled by the will of [*testator*], late of, &c., deceased (*j*), and of all other powers and authorities enabling him thereunto, hereby demises unto the lessee all that piece or parcel of ground [*describe the piece of ground*], TOGETHER WITH the messuages or dwelling-houses, and all other erections and buildings which at any time hereafter, during the term hereby granted, shall be erected and built on the same piece or parcel of ground, or any part thereof; All which piece or parcel of land and premises are particularly delineated with the abuttals in the plan annexed to these presents; TO HOLD the premises, with their appurtenances, unto the lessee, from the twenty-fifth day of March, 18—, for the term of ninety-nine years thence next ensuing: YIELDING AND PAYING therefor, for the first year [*or*, for the first —— years] of the said term, the rent of one peppercorn, if demanded: AND YIELDING AND PAYING yearly during the residue of the term, and so in proportion for any less period than a year, the yearly rent of £——, such last-mentioned rent to be paid by equal quarterly payments on the —— day of ——, &c., in every year, free

demises.

Parcels.

Habendum,

Reddendum of nominal rent for first year.

Further *reddendum* for residue of term.

Reference to statutory powers.

(*j*) Although the Act does not require that reference should be made to it upon an exercise of the statutory powers which it confers, it may nevertheless be convenient that a lease by a tenant for life under the Act should show what authority he has to make the demise.

from all taxes, rates, assessments, and deductions whatsoever (except landlord's property tax).

XVI. **Building Lease under a Power.**

And the lessee hereby covenants with the lessor in manner following:—

3. The lessee will pay the said yearly rent of £——, on the days and in the manner hereinbefore appointed; And also will, during all the term hereby granted, pay, and discharge all taxes, rates, charges, duties, and impositions whatsoever, which are or shall be assessed or charged on, or in anywise imposed upon the premises, or any part thereof, or on the landlord or tenant in respect thereof, landlord's property tax only excepted.

Lessee's covenants: to pay rent and taxes;

4. The lessee will at his proper costs and charges, within the space of two years to be computed from the day of the date hereof, in a good, substantial, and workmanlike manner, erect, build, and completely finish, fit for habitation and use, upon the north side of the piece or parcel of land hereby demised, fronting upon [*A*] Street aforesaid, a good and substantial brick messuage or dwelling-house, of the same rate of building, character, and description, in every respect, as, and in an uniform manner with, the messuages or tenements ranging therewith in the same street; And also will, within the same period, and in like manner, erect, build, and finish upon the east side of the same piece or parcel of ground fronting upon [*B*] Street aforesaid, two good and substantial brick messuages or dwelling-houses, not less that fourth rates; and also will erect and build all such erections, buildings, outhouses, and other conveniences as shall be necessary and proper to be used with and for rendering the same messuages or tenements commodious and in all respects fit for habitation and use, the whole to the satisfaction of the surveyor of the lessor (*k*).

to build houses;

(*k*) Sometimes the covenant to build is in the following terms:—

4*a*. "The lessee will, within the first —— years of the term hereby granted, lay out and expend the sum of £—— at the least in labour and materials alone, in erecting and building upon the premises, dwelling-houses, and the outbuildings and offices thereof, of a substantial nature, and to the satisfaction of the architect or surveyor for the time being of the lessor, and so that not less than the sum of £—— shall be so laid out and expended upon or in respect of the said dwelling-

to expend £—— in building houses;

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to contribute towards repairing pavements, &c.

5. The lessee will, during the term hereby granted, bear, pay, and allow a reasonable share and proportion for and towards the costs and charges of making, repairing, cleansing, and amending all or any pavements, fences, and party-walls, cesspools, sewers, drains, pipes, and watercourses, belonging or which at any time during the said term shall belong to the premises, or any part thereof, in common with other property near or adjoining thereto, such proportion to be fixed and ascertained by the surveyor of the lessor, and to be recoverable in the nature of rent in arrear; And also will at all times keep indemnified the lessor against all expenses and liabilities in respect of the same.

Proportion to be fixed by lessor's surveyor.

Covenant to repair and paint.

6. The lessee will, during the said term when need shall require, keep the said messuages or dwelling-houses and buildings, externally and internally, in good and tenantable repair; And also paint with two good coats of oil-colour the external and internal wood and iron work of the same premises; And will at the expiration or sooner determination of the said term deliver up the said premises with all fixtures which now are, or hereafter during the said term shall be upon the said premises, in good and tenantable repair and condition.

To permit lessor to view premises.

7. The lessee will permit the lessor and any person or persons deputed by him, to enter into and upon the premises twice in every year during the said term, at any reasonable

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house to be erected, fronting upon [*A*] Street aforesaid, and the outbuildings and offices thereof, and that not less than the sum of £—— shall be so laid out and expended upon or in respect of each of the said dwelling-houses to be erected fronting upon [*B*] Street aforesaid; And also will previously submit all plans, estimates, and specifications of the buildings so to be erected, for the inspection or approval of the lessor, or his architect or surveyor, and also will, at the expiration of the said first —— years of the said term, when thereunto required by the lessor, or his architect or surveyor, for the time being, produce and show to him or them the bills and vouchers for the material and labour used and employed in and about the said dwelling-houses, erections, and buildings, as evidence to him or them that the said sum of £—— has been laid out and expended in such erections and buildings as aforesaid."

To submit plans, &c.

hours in the day-time, to examine the state of repair and condition thereof, and also at such reasonable time as he shall think proper in the last —— years of the said term to take a schedule or inventory of the fixtures and things to be yielded up at the determination thereof as aforesaid; And also will permit the lessor and any such person or persons as aforesaid, with or without workmen or others, twice or oftener in every year during the said term, at seasonable times in the day-time, to enter into and upon the premises, or any part thereof, to view the state and condition of the repairs thereof, and upon every such view to give or leave on the premises notice in writing of all defects and wants of reparation and amendment: And the lessee will within three calendar months next after such notice well and sufficiently repair and amend the same according to such notice so given or left as aforesaid.

to permit adjoining occupiers to enter for repairs, &c.

8. The lessee will, as often as occasion shall require, permit the lessor and the tenants or occupiers of houses of the lessor adjoining the premises, at seasonable times in the day-time, to come into or upon the premises, or any part thereof, to repair such adjoining houses, or to clean cesspools, gutters, drains, pipes, and watercourses thereof.

to insure;

9. The lessee will insure the buildings to be erected on the piece or parcel of ground hereby demised, to the full value of so much thereof as can be destroyed by fire, in one of the public fire insurance offices in London or Westminster, to be approved of by the lessor, and keep the same so insured during the said term; and upon the request of the lessor or his agent will produce the receipt for the premium for such insurance for the then current year; And also will during the said term as often as the buildings to be erected on the premises or any part thereof, shall be burnt down or damaged by fire, forthwith reinstate the same under the direction of the lessor, and will pay the said rent in the same manner as if no such accident by fire had happened.

and rebuild in case of fire.

Covenant by lessor for quiet enjoyment.

10. And the lessor hereby covenants, &c., [*ante*, p. 415], without any interruption or eviction from him the said [*tenant for life*], or any person claiming under or in trust for him or otherwise under the said will.

Proviso for re-entry.

11. [*Proviso for re-entry, at ante*, p. 419.]

Apportionment of rent.

12. Provided always and it is hereby agreed and declared that if and so soon as the —— several houses mentioned in the —— article hereof shall have been erected and completed,

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the said yearly rent of £——, hereby reserved in respect of all the premises hereby demised, shall thenceforth for all the residue then to come of the said term be apportioned so as that the sum of £——, part of the said yearly rent of £——, shall be deemed to be the rent, and as such shall be yearly payable and paid in respect of the said house to be erected fronting upon [*A*] aforesaid, and the piece or parcel of ground to be held and enjoyed therewith as delineated on the said plan and the appurtenances thereto belonging and the two several yearly rents of £—— respectively, the residue of the said yearly rent of £—— shall be deemed to be the respective rents and as such shall respectively be yearly payable and paid in respect of the said two houses respectively to be erected fronting upon [*B*] Street aforesaid, and the several pieces or parcels of land to be held and enjoyed therewith respectively as delineated on the said plan with the appurtenances thereto respectively belonging; And that such apportioned rents respectively shall be payable in the same manner and at the same times as are herein-before prescribed for payment of the said yearly rent of £—— hereby reserved; and that all the covenants and stipulations herein contained, so far as the same are applicable to or ought to be observed and performed in respect or on account of each of the said houses, and the pieces or parcels of land to be held therewith and the appurtenances thereto belonging respectively, and particularly the proviso for re-entry by the lessor in case of non-payment of rent or non-performance of covenant herein-before contained, shall be applied to each of the said three houses and the pieces or parcels of land to be held therewith and the appurtenances thereto belonging respectively, and the same shall be deemed to be held subject thereto in such and the same manner and to the same extent only as would have been the case had each of the said three houses and premises respectively been demised by a separate indenture of lease at the separate rents herein-before mentioned respectively, and such separate lease had contained such and the like clauses, covenants, and stipulations, as are herein contained concerning or in respect of the entirety of the premises hereby demised.

In witness, &c.

XVII. *AGREEMENT for the Letting of* Furnished Lodgings *with* Attendance, *&c., from* Month *to* Month *or* Week *to* Week.

AN AGREEMENT (*l*) made the —— day of ——, 18—, Between [*landlord*], of &c., (hereinafter referred as the landlord), of the one part; and [*tenant*], of &c., (hereinafter referred to as the tenant), of the other part. Whereby it is agreed as follows: Parties.

1. The landlord shall let, and the tenant shall take, All that (*m*) the ground-floor and the two front attics, with the back coal-cellar, of the dwelling-house of the landlord, situate in —— street, in the parish of ——, &c. together with the use of the front kitchen and the back yard, with the appurtenances, in common with the occupier for the time being of the other part of the said dwelling-house (*n*); together with the fixtures, furniture, utensils, and things, particularly mentioned in the schedule hereunder written, and also such attendance as is hereinafter mentioned, from the —— day of ——, 18—, from month to month [*or* from week to week], until one of the parties hereto shall give to the other in writing one month's [*or* one week's] notice to quit, such notice to expire on the —— day of any month [*or* on any Saturday]; At the rent of £—— for every calendar month [*or* week], to be paid at the end of every such month, [*or* payable on the —— day of every month, *or* to be paid on Saturday in each week], during the tenancy. Agreement. Parcels; with furniture, &c., in schedule. Term. Rent.

(*l*) Stamp 6*d.*, unless the rent exceeds 25*l.* for the term, but in that case 2*s.* 6*d.*; see *ante*, p. 336. Stamp.

(*m*) A lodger has, in the absence of stipulation to the contrary, the right to use the door bell, knocker, skylight on the staircase, and watercloset: *Underwood* v. *Burrows*, 7 C. & P. 26.

(*n*) If it be so agreed, add here—

("including gas light which is to be supplied by the landlord") Gas.

Or,

"And liberty to put the name and profession of the tenant on the front door of the said dwelling-house, in such characters, manner, and form as he shall think proper; And also to place and fix a bell with wires extending to either of the said front attics, with the words 'night bell' affixed near the handle, on the outside of the door of the said dwelling-house." Liberty to put name on door and to fix a bell.

XVII. Agreement for Letting of Furnished Lodgings.

2. The tenant will pay to the landlord the rent hereby reserved at the times and in manner aforesaid, and at the end of the tenancy will leave the premises and the said fixtures, furniture, utensils, and things, in as good state and condition as the same now are, reasonable wear and tear and damage by fire excepted; And also, will replace such part of the glass, china, and earthenware as shall be broken or missing, with other articles of the same pattern and of equal value.

After notice, tenant to quit and leave the furniture, &c., in good condition,

and to replace broken glass, &c.

3. The landlord will pay all rates and taxes of every description, and will and shall during the tenancy keep the premises and furniture in good repair and condition, and replace such part of the fixtures and furniture as shall by reasonable wear and tear be rendered unfit for use. And also shall and will indemnify the tenant against all ground and other rent which is or may become due or payable during the tenancy to the superior landlord and from all distresses claims and demands in respect of the premises, and also will not nor shall do or permit or suffer to be done anything in or on the premises of a noisy or offensive nature during the tenancy.

Landlord to repair premises and furniture.

Landlord to provide attendance and linen, plate, &c.

4. The landlord will find and provide the tenant with all necessary and proper attendance, including cooking and boot and shoe cleaning, and also will find and provide him with proper and sufficient linen, china, glass, knives, silver or plated forks and spoons, and other necessary household articles to enable him to reside comfortably in the said apartments and premises during the tenancy.

Tenant if disturbed, &c., may determine tenancy.

5. If at any time during the tenancy, the tenant shall be annoyed or disturbed by anything of a noisy or offensive nature, contrary to the stipulation hereinbefore contained, or if it shall appear that there is any embarrassment on the part of the landlord, or any danger of a distress for rent, rates, or taxes, or of an execution against the goods of the landlord, then and in any such case it shall be lawful for the tenant by notice in writing to determine the tenancy, and thereupon forthwith to quit possession of the premises, anything to the contrary herein contained notwithstanding; and in such case the tenant shall be liable to pay only a proportional part of the rent up to the day of his so quitting the premises: provided nevertheless that the tenant shall not hereby be deprived of the protection of the provisions of the Lodger's Goods Protection Act, 1871 (*o*).

Lodger's

(*o*) As to the protection of the goods of lodgers from distress for

XVII. Agreement for Letting of Furnished Lodgings.

6. If any monthly [*or* weekly] payment of rent shall be in arrear for more than —— days, it shall be lawful for the landlord to re-enter on the premises, and forthwith to determine the tenancy.

Power of re-entry.

As witness, &c.

The Schedule above referred to.

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rent due by the letter of the lodgings to his superior landlord, see the Lodger's Goods Protection Act, 1871 (34 & 35 Vict. c. 79), set out and considered, *ante*, p. 180.

Goods Protection Act, 1871.

Notwithstanding the protection afforded by the Act, it may sometimes be well to make inquiries of the collectors of taxes and parochial rates, as a distress in respect of arrears of such payments might cause the lodger considerable trouble and inconvenience: Woodfall's L. & T. 210.

The Act does not contain any definition of lodgers. In the recent case of *Ness* v. *Stephenson*, 9 Q. B. D. 245, it was laid down by Field, J., that the retaining of such control and dominion over the house as is usually retained by masters of houses let in lodgings, as distinguishable from landlords absolutely letting the tenements, indicates the existence of the relation of landlord and lodger between him and his tenant, and further that the question whether such dominion or control is retained is one of fact. See *Phillips* v. *Henson*, 3 C. P. D. 26, where a person occupying the whole of a house, except a housekeeper's room and two attics retained by the landlord, was held to be a lodger within the Act: Lindley, J., is reported to have said that "probably the Act would not apply to an under-tenant who has exclusive possession of an entire house." See also *Morton* v. *Palmer*, 51 L. J. (Q. B. D.) 7; and *Bradley* v. *Baylis*, 8 Q. B. D. 195, a registration case.

Who are "lodgers."

The following is suggested as a form of declaration under the Act:—

Form of declaration.

To Mr. [*landlord*].

I [*lodger*], of &c., hereby declare that [*mesne tenant*] has no right of property or beneficial interest in the furniture, goods and chattels, an inventory whereof is hereunder written; but that such furniture, goods and chattels are my property [*or* in my lawful possession]. And further, that I now owe to the said [*mesne tenant*] £—— on account of rent for the month expiring —— last.

The Inventory above referred to.

Dated the —— day of ——, 18—.

A. B.

It would seem that letting lodgings is a breach of usual covenant not to underlet the premises or *any part thereof*: Woodfall's L. & T. 629; see *Roe* v. *Sales*, 1 M. & S. 297: *Greenslade* v. *Tapscott*, 1 Cr. M. & R. 55; and see *ante*, p. 208. It does not seem to be settled how far letting lodgings is in contravention of a covenant not to exercise any trade, &c. on the premises: Woodf. L. & T. 634.

XVIII. *AGREEMENT* (*p*) *for* TENANCY *of a* HOUSE *and* GARDEN, *with use of* FURNITURE, PLATE, LINEN, *&c., for* SIX MONTHS (*a concise form*).

Parties.

Agreement.

Parcels.

Landlord agrees to pay taxes, &c., to repair, and provide servants.

Tenant agrees to deliver possession at end of tenancy, to replace breakages, to provide board for servants, &c.

AN AGREEMENT (*q*), made this —— day of ——, 18—, BETWEEN [*landlord*], of, &c. (hereinafter called the landlord), of the one part, and [*tenant*], of, &c. (hereinafter called the tenant), of the other part: WHEREBY the landlord agrees to let and the tenant agrees to take ALL THAT house situate and being No. ——, in —— Crescent, ——, in the county of ——, with the offices, stabling, garden, and appurtenances thereto belonging, TOGETHER WITH the use of the fixtures, furniture, plate, linen, utensils, and effects particularly mentioned in the schedule hereunder written; and also with the right to such produce of the garden as the tenant shall require for the use of himself and his household and establishment; and also with such attendance as is hereinafter mentioned, for the term of six calendar months commencing from the —— day of —— next, at a rent of £—— for the said term, payable in advance, as to one moiety thereof, upon the execution of this agreement, and as to the remaining moiety thereof, immediately on the expiration of three calendar months of the said term. The landlord agrees to pay all rates, taxes, and assessments, except gas and water rates, and to execute at his own cost all repairs of the premises (except as hereinafter mentioned) which may be necessary during the term, upon being requested by the tenant so to do: and to leave or provide —— servants who shall reside in the house and attend upon the tenant, and also a gardener, and to pay the wages of such indoor servants and gardener. The tenant agrees to pay the said rent in manner aforesaid, and to leave the premises, including the said fixtures, furniture, plate, linen, utensils, and effects, in as good state and condition in all respects as the same now are, reasonable wear and tear excepted, and to replace such of the same respectively as shall be broken, damaged, or missing, with other articles

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Payment of rent in advance.

(*p*) This form is adapted to the letting of houses at seaside and other resorts "for the season." As the furniture, &c., belongs to the landlord, he has practically no remedy by distress, it is usual to require the rent to be paid in advance, as provided in the text.

Stamp.

(*q*) Stamp 2*s.* 6*d.* if the rent exceeds 25*l.* for the term: see *ante*, p. 336; otherwise, 6*d.*

of the same pattern and equal value; and to permit the said indoor servants to reside in the house, and to provide them with proper and sufficient board and nourishment (including beer, or an allowance of —— per month respectively in lieu thereof); and to bear all expenses of washing and mending all table or house linen which he shall use; and not to assign or underlet the premises or any part thereof, without the previous consent of the landlord. PROVIDED that if there shall be any breach by the tenant of the conditions herein contained the landlord may re-enter upon any part of the premises in the name of the whole, and determine the tenancy without prejudice to his other remedies.

XVIII. Agreement for Letting Furnished House for a Short Period.

Proviso for re-entry.

AS WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

XIX. *AGREEMENT for the* LETTING *of a* FURNISHED HOUSE (*r*) *and* GARDEN *for a term of* ONE YEAR, *at* SEPARATE RENTS *for the house and furniture.*

AN AGREEMENT (*s*), made the —— day of ——, 18—, BETWEEN [*landlord*], of, &c. (who, and his heirs and assigns, are, unless the contrary appears, hereinafter called the landlord), of the one part; and [*tenant*], of, &c. (who, and his executors, administrators, and assigns, are, unless the contrary appears, hereinafter called the tenant), of the other part.

Parties and interpretation clause.

1. The landlord agrees to let and the tenant agrees to take ALL THAT furnished messuage or dwelling-house, with the stables, coach-house, [garden, shrubberies, grounds], and appurtenances belonging thereto, situate at ——, in the county of ——, and late in the occupation of ——, TOGETHER WITH the furniture, utensils, and effects mentioned in the schedule [*or* inventory] hereunder written [*or* hereunto annexed] (*t*) for the term of one year commencing from the —— day of ——, 18—, at the rents of £—— per annum for the

Agreement.

Parcels.

Furniture, &c.

(*r*) There is an implied warranty by the landlord on letting a furnished house, that the house is fit for the occupation of the tenant, and not infested by vermin, nor deficient in sanitary arrangements: *Smith* v. *Marrable*, 11 M. & W. 5; *Campbell* v. *Wenlock*, 4 F. & F. 716; *Wilson* v. *Finch-Hatton*, 2 Ex. D. 336.

Warranty that house is fit for occupation.

(*s*) Stamp *ad valorem* on aggregate amount of rents reserved: *ante*, p. 336.

Stamp.

(*t*) If it is intended that the garden, &c. should be under the

XIX. Agreement for Letting House and Furniture at Separate Rents.

messuage or dwelling-house and premises, exclusive of the said furniture, utensils, and effects, and of £—— per annum for the said furniture, utensils, and effects respectively (*u*), the said

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control of the landlord, and under the care of his gardener, omit from the parcels the words, "garden, shrubberies, grounds," and also omit the clause providing for keeping the garden in good order, *post*, and insert here—

"And also together with the right to such produce of the garden as the tenant shall require for the use of himself and his household and establishment, the gardener's wages to be paid by the landlord."

Question, where house and furniture, being let together subsequently belong to different persons.

(*u*) Where a person lets a freehold house, with furniture, it is obvious that, at his death, the house and furniture, unless disposed of by him by will or otherwise to the same individual, will belong to different persons; the former devolving to the real, and the latter to the personal representatives. In such cases (in the absence of special provision to the contrary) the rent issues out of the house alone: *Spencer's case*, 5 Rep. 17 a; *Newman* v. *Anderton*, 2 Bos. & P. N. R. 224; *Farewell* v. *Dickinson*, 6 B. & C. 251; see also *Ward* v. *Smith*, 11 Pri. 19. The person entitled to it would thus take the *whole* rent, and the person entitled to the furniture would derive no benefit from it until the termination of the lease. If the tenancy was from year to year, and not for a specific term, a nice question might arise between the owners of the house and of the furniture, in regard to the power of determining the tenancy. As the furniture, strictly speaking, constitutes no part of the demised premises, the owner of it would have no power to determine the tenancy by notice, and yet there would be a manifest injustice in permitting the owner of the house, by continuing the tenancy, to appropriate to himself the whole benefit of the property of another. In such a case, it would probably be held, that the owner of the furniture might maintain an action of trover for it, after giving such notice as the person under whom he claimed would have been bound to give, namely, six months' notice, expiring at the same period of the year as the tenancy commenced. If the goods can thus be taken from the lessee, justice obviously requires, that the tenancy should be at an end as to them, and that he should not continue liable to pay the same rent for the house alone, as he was to pay for both the house and furniture; and to this conclusion it is probable the Courts would arrive, in opposition to the doctrine of *Emott* v. *Cole*, Cro. Eliz. 255, where a tenant, to whom lands and goods were let, being deprived of the goods, was held *not* to be entitled to an apportionment. This doctrine would then rank among the many early technical rules which have been subverted by modern decisions, where those rules operated to produce injustice. The Editor has pointed the attention of the reader to these difficulties, in order that they may be provided against when houses and furniture are let together under such circumstances. An obvious mode of effecting this is, to reserve distinct rents.

XIX. Agreement for Letting House and Furniture at Separate Rents.

rents to be payable by equal quarterly payments on the usual quarter-days, the first of such payments to be made on the —— day of ——, 18—, and the last to be made in advance one calendar month before the expiration of the tenancy.

Extension of term.

2. The tenant may, at the expiration of the said term of one year, hold and enjoy the premises from six months to six months, at the said rents hereinbefore reserved respectively until one of the parties hereto shall give to the other in writing three calendar months' notice to quit.

Tenant agrees to pay rent;

to deliver possession at end of tenancy;

3. The tenant agrees to pay the said rents hereinbefore reserved respectively at the times and in manner aforesaid, and at the end of the said term or on the expiration of any such notice as aforesaid, to deliver up possession of the said messuage or dwelling-house and premises, together with all the said furniture, utensils, and effects, in accordance with the said schedule [*or* inventory], and in the same rooms in which the same now are, in as good state and condition as the same now are, reasonable wear and tear and accidental damage by fire alone excepted, and to replace all such of the said furniture, utensils, and effects which may be lost, missing, broken, or damaged during the tenancy, except as aforesaid.

to disinfect, &c., if necessary;

4. In the event of any infectious illness breaking out in the said messuage and premises, the tenant will give immediate

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Where the house and furniture are let at separate rents, it may be well to insert a clause, as in the text, authorizing the landlord to enter and distrain upon any chattels and effects of the tenant in respect of arrears of the rent reserved for the furniture, inasmuch as this payment is strictly not a rent at all, and consequently does not carry with it a power of distress. The insertion of an express power of distress, however, often proves to be of little consequence in a case of this kind, as there would probably be little or no furniture belonging to the tenant on which it could be exercised. It is therefore sometimes the practice to join a third party in the lease or agreement as a surety for the rent.

The course above suggested of reserving distinct rents with an express power of distress for the furniture rent is attended by the inconvenience, that it seems clear that, under a mere agreement, any property belonging to persons other than the tenant himself could not be distrained under the power (see *ante*, p. 100); and upon assignment of the lease or agreement on the death or bankruptcy of the tenant, the power could be of no avail. Perhaps the best way of avoiding all difficulties would be to reserve an entire rent while the ownership of the land and furniture remains in the same person, and separate rents for the time following the separation of the ownership: see *post*, p. 476, note (*k*).

XIX. Agreement for Letting House and Furniture at separate Rents.

notice thereof to the landlord or his agent, and immediately after the subsidence of such illness, will at his own expense disinfect the same and replace all such furniture or other articles which may have to be destroyed by reason of such illness; Provided always that if the tenant shall not within —— days after the subsidence of such illness, or before the sooner expiration of the tenancy, disinfect the premises, it shall be lawful for the landlord to enter upon the premises for that purpose, and in such case the tenant shall repay on demand to the landlord all expenses incurred by him of and incident to disinfecting the premises; Provided also that in default of giving notice of the breaking out of such illness as aforesaid, the tenant shall pay to the landlord the sum of £—— as liquidated damages.

to maintain garden, &c.;

5. [The tenant will keep the garden, shrubberies, and grounds belonging to the said messuage or dwelling-house in good state and condition during the tenancy, and so will deliver up the same at the end of the tenancy (*v*).]

to occupy a private house.

6. The tenant will not use the premises, nor permit the same to be used, for any purpose except that of a private dwelling-house, and will not assign or underlet the premises or any part thereof, nor remove therefrom the said furniture, utensils, and effects, or any of them, without the previous consent in writing of the landlord.

Power of distress for furniture rent.

7. Provided always that if the said furniture rent or any part thereof shall be in arrear for —— days, whether legally demanded or not, it shall be lawful for the landlord into or upon the said messuage or dwelling-house and premises or any part thereof to enter and distrain, and the distress or distresses then and there found to dispose of in due course of law, to the intent that all arrears of such rent and all costs and expenses incurred by non-payment thereof and by distraining may be thereby paid and satisfied.

Proviso for re-entry.

8. Provided also that if the rents hereby reserved respectively, or any of them or any part thereof respectively, shall be in arrear for —— days, whether legally demanded or not, or if there shall be any breach by the tenant of the conditions herein contained, it shall be lawful for the landlord to enter upon any part of the premises in the name of the whole, and thereupon the tenancy shall immediately cease and determine.

(*v*) See *ante*, p. 429, note (*t*).

XIX. **Agreement for Letting House and Furniture at separate Rents.**

9. The landlord agrees to pay all rates and taxes of every description, [except gas rate, which shall be paid by the tenant according to his consumption of gas, and shall be apportioned if necessary,] and also all ground-rents and other rent-charges and incumbrances, if any, and to indemnify the tenant therefrom respectively, and from all claims, demands, and distresses in respect thereof respectively: And also to execute all necessary repairs both outside and inside the said messuage and its appurtenances when required in writing by the tenant so to do. Landlord to pay taxes, &c., and repair.

As witness, &c.

The Schedule [*or* Inventory] above referred to.

XX. *AGREEMENT for* Sub-letting *of a* Shop *and* Rooms Unfurnished (*quarterly tenancy*).

AN AGREEMENT (*x*) made this —— day of ——, 18—, Between [*landlord*], of &c. (hereinafter called the landlord), of the one part, and [*tenant*], of &c. (hereinafter called the tenant), of the other part: Whereby it is agreed as follows: Parties. Agreement.

1. The landlord shall let, and the tenant shall take the shop and rooms following, that is to say: the shop on the ground floor and the two rooms at the back thereof, and also two rooms on the second floor, and the back kitchen, and small coal-cellar, with the use of the yard and other conveniences, and the appurtenances thereto belonging, being part of a house and premises, situate and being No. —, —— street, in the county of ——, and now in the occupation of the landlord, Together with the fixtures and fittings specified in the schedule hereunder written and the appurtenances for the term of three months from the 25th day of March next, and thereafter from quarter to quarter, but the tenancy shall be determinable on any quarter-day by either party giving to the other a quarter's notice in writing to that effect. Parcels. Term.

2. The rent shall be at the rate of £—— per annum, to be Rent.

(*x*) If the rent does not exceed the rate of 10*l.* per annum, a penny stamp will be required, otherwise the same duty as a lease for a year at the rent reserved for the definite term. Stamp.

XX. Agreement for Sub-letting a Shop.

paid quarterly on the usual quarter-days, the first quarterly payment to be made on the —— day of ——, 18—, and the last to be made in advance, one calendar month before the end of the tenancy. [PROVIDED ALWAYS, that if and whenever the landlord shall give to or leave upon the premises for the tenant notice in writing to pay the said rent weekly, the payment of the said rent shall thenceforth be made weekly on every Saturday during the continuance of the tenancy] (*y*).

Tenant to pay rent, and to leave premises in repair.

3. The tenant shall pay the said rent at the times and in manner hereinbefore provided, and shall keep the premises (except as hereinafter mentioned), together with the fixtures and fittings thereof in good and tenantable repair and condition; and when he shall quit the premises he shall leave them in as good state, condition and repair as they now are, reasonable wear and tear and damage by fire and tempest only excepted, and shall not assign or underlet the premises or any part thereof without the previous consent in writing of the landlord.

Landlord to pay rates, &c.

4. The landlord shall pay the superior rent and all rates, taxes, outgoings, and assessments which now are or shall at any time during the continuance of the tenancy be assessed or imposed upon the premises or upon the occupier in respect thereof, and shall keep the outside of the said house, and the stairs, and passages, and all parts thereof which are to be used by the tenant in common with other occupants thereof, in good repair and condition.

Quiet enjoyment.

5. The landlord further agrees that the tenant paying the rent and observing and performing the stipulations and conditions herein contained may peaceably hold and enjoy the premises during the tenancy without disturbance by the landlord or any person or persons deriving title under him.

Landlord not to sue, &c., for rent without producing receipt for payment of rent to superior landlord (*z*).

6. No action, distress, or other proceeding shall be commenced or prosecuted by or on behalf of the landlord, in respect of the non-payments of the rent hereby reserved unless

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(*y*) The words in square brackets may be inserted where there is any reason to fear that the tenant is a person likely to move his goods off the premises just before the quarter's rent is due; the landlord is thus enabled to distrain for the rent in respect of the twelve or any lesser number of weeks.

(*z*) In *Giles* v. *Spencer*, 3 C. B. N. S. 244, it was held that a provision similar to that in the text was effectual to prevent a distress until the condition therein had been performed.

and until he shall have paid the rent due from him to the superior landlord or landlady of the said house and premises, No. —, —— street, aforesaid, and shall have produced and shown to the tenant the receipt or receipts for such rent. XX. Agreement for Sub-letting a Shop.

As WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

XXI. *AGREEMENT for the* LETTING *of a* COTTAGE *from Year to Year.*

AN AGREEMENT (*a*) made the —— day of ——, 18--, BETWEEN [*landlord*], of &c. (hereinafter called the landlord), of the one part, and [*tenant*], of &c. (hereinafter called the tenant), of the other part. Parties.

1. The landlord hereby agrees to let and the tenant hereby agrees to take ALL THAT cottage, situate in the parish of ——, in the county of ——, formerly in the occupation of ——, together with the garden and appurtenances thereto belonging, for the term of one year certain from the —— day of ——, 18—, and afterwards from year to year (*b*), determinable nevertheless as is hereinafter mentioned, at the yearly rent of £——, payable quarterly on the usual quarter-days in each year, the first payment to be made on the —— day of —— next, and the last payment to be made in advance one calendar month before the expiration of the tenancy (*c*). The said rent to be paid clear of all deductions, except for land-tax and property-tax. Parcels. Term.

2. The tenant shall pay the said rent on the days and in manner aforesaid, and also all existing or future taxes, rates, assessments and outgoings of every description (except as aforesaid) for the time being payable by the tenant in respect of the premises. Tenant to pay rent, taxes, &c.

(*a*) Stamp *ad valorem* on yearly rent, *ante*, p. 336. Stamp.

(*b*) But for the qualification in the text the demise would be for a term of at least two years: see *Doe* v. *Chadborn and Greene*, 9 A. & E. 658.

(*c*) A stipulation for the payment of the last quarter's rent in advance will enable the landlord to distrain for it before the expiration of the tenancy: see *Witty* v. *Williams*, 12 W. R. 755; 4 N. R. 138; and see Woodf. L. & T. 348. Rent in advance.

XXI. **Agreement for Letting a Cottage from Year to Year.**

3. The tenant shall whitewash the cottage when required, and shall keep all cesspools and drains well cleansed, and shall keep the premises (including fixtures, but excepting the roof and outside walls) in good and tenantable repair, reasonable wear and tear excepted.

To repair.

4. The tenant shall not remove any fixtures belonging to him without first giving the landlord the option of purchasing the same at a valuation; and in case of removal of any such fixtures will repair all damages occasioned thereby.

Not to remove fixtures.

5. The tenant shall cultivate the garden and orchard in a proper manner, and shall prune and preserve all fruit-trees and shall replace any that may perish through decay or accident, and shall leave as well those now growing as any hereafter to be planted, in good order and condition.

To cultivate garden.

6. The tenant shall not assign or sublet the premises or any part thereof, nor take or retain any lodger, or allow any married son or daughter to reside with him, nor keep a shop, without the written consent of the landlord or his agent duly authorised.

Not to assign or sublet.

7. The tenant on the expiration or sooner determination of the tenancy shall deliver up the premises in such good and tenantable repair, order, and condition as aforesaid.

To leave premises in repair.

8. The landlord and his agents may have access to the premises at all reasonable times to view the state and condition of the same.

Landlord to have access.

9. The tenancy shall be determined at any time after the expiration of the first year thereof on any quarter-day upon three months' previous notice in writing by either party.

Determination of tenancy.

10. It shall be lawful for the landlord to treat the rent for the last quarter of the tenancy as due in advance, and to recover the same accordingly by distress or otherwise.

Power to treat last quarter's rent as due in advance.

11. Provided always, that if and whenever any part of the said rent shall be in arrear for —— days, whether legally demanded or not, or if and whenever there shall be a breach of any of the tenant's agreements the landlord may enter upon any part of the premises in the name of the whole and thereupon the tenancy shall determine.

Power of re-entry.

As witness, &c.

XXII. *AGREEMENT for a* LEASE *or* UNDERLEASE *of a Private House in London, with or without Furniture* (*d*).

AN AGREEMENT (*e*) made the —— day of ——, 18—, BETWEEN A. B. of &c. (who and his heirs and assigns (*f*), unless the contrary appears, are hereinafter called the lessor), of the one part; and C. D. of &c. (who and his executors, administrators, and assigns, unless the contrary appears, are hereinafter called the lessee) of the other part. Parties.

1. The lessor shall before the —— day of ——, 18—, grant and the lessee shall accept a lease of (*g*), ALL THAT messuage, tenement, or dwelling-house, with the coach-house, stables, and garden behind the same, situate, &c., with the appurtenances thereunto respectively belonging (*h*), TO HOLD the same unto the lessee henceforth [*or* from the —— day of Parcels. Term.

(*d*) The objections to letting tenants into possession under agreements of this nature, are elsewhere pointed out, *vide ante*, tit. LEASES. As soon as the terms are settled, and before the tenant enters, a lease should be executed, which (if the property is small) it may be well sometimes to deposit in the hands of a third person, to avoid the expense of a counterpart. If the term exceeds three years the agreement must be under seal; and in that case, and unless the term exceeds thirty-five years, the stamp required is the same as for a lease.

(*e*) Stamp, *ad valorem* on yearly rent reserved. Stamp.

(*f*) If the lessor has only a term for years in the premises, say, "his executors, administrators, and assigns."

(*g*) In the case of an underlease, say, Underlease.
"without calling for the title of the lessor, accept an underlease."

Notwithstanding the provisions as to dispensing with production of the lessor's title contained in the Vendors and Purchasers' Act, 1874, sect. 2, and in the Conveyancing and Law of Property Act, 1881, sect. 3 (as to which, *vide ante*, p. 89, n.), a special stipulation is necessary to preclude an *underlessee* from calling for the title to the leasehold reversion: *Stranks* v. *St. John*, L. R., 2 C. P. 376.

(*h*) If furniture be leased with the house, say,
"together also with the use of all and singular the furniture, Furniture.
in and belonging to the said messuage, tenement, or dwelling-house mentioned and comprised in the schedule or inventory hereunder written [*or* hereon indorsed, *or* hereunto annexed], and signed by the said parties hereto."

If it is desired, a separate rent may be reserved for the furniture, *ante*, Precedent XIX., p. 431.

XXII. Agreement for a Lease of a House in Town.

——, 18—], for the term of —— years, At the yearly rent of £——, to be payable quarterly, clear of all taxes, rates, and assessments whatsoever, except the land-tax and landlords' property tax, the first payment thereof to be made on the —— day of ——, 18—; And also, a proportional sum for the period, if any, which may elapse between any quarterly day of payment and the determination of the said term, if the same shall be determined under the proviso for re-entry hereinafter mentioned (*hh*).

Rent.

Covenants by the lessee:

to pay rent;

to pay taxes, rates, &c. (*i*);

to repair;

2. In such indenture of lease shall be contained covenants on the part of the lessee, to pay the said yearly rent accordingly; And also, to pay all existing and future taxes, rates, duties, and assessments whatsoever in respect of the premises; And also, once in every three years to paint twice over with good oil and colours all the outside wood, iron, and stone-work of the said messuage; And also, once in every seven years to paint twice over with good oil and colours all the inside wood, iron, and stone-work usually painted and in like manner to grain all such parts of the woodwork as are now grained; And also, to keep the said messuage, or dwelling-house and premises (*k*), during the said term, in as good plight and condition as the same are now in, and so to deliver up the same, together with the several fixtures to the premises belonging, at the end or other determination of the said term, reasonable use and wear thereof only excepted; And also, to permit the landlord on notice at all reasonable times to enter and inspect the premises, and to repair if necessary; And also, to keep the premises insured (*l*)

to deliver up at end of term;

(*hh*) See as to this clause, *post*, p. 444, note (*s*).

(*i*) Where an offer was made and accepted to grant a lease, subject to the stipulation, "a proper lease to be drawn up with all proper clauses, and to be approved by me and my solicitor," the lessor was held not to be entitled to insist on the insertion in the lease of a covenant against underletting: *Eadie* v. *Addison*, 31 W. R. 320. See further as to what are usual covenants in a lease, *ante*, tit. Leases, p. 116.

Furniture.

(*k*) If furniture be leased with the house, say,

"and also, the furniture mentioned and comprised in the schedule or inventory hereunto annexed."

Insurance of furniture.

(*l*) If furniture be leased with the house, say,

"insured in the sums following, that is to say, the house and the appurtenances thereof (except the furniture) in the sum of £——, and the furniture in the sum of £——."

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in the sum of £—— at the least, And to produce the policies of insurance and receipts for premiums when required by the landlord; Not at any time or times during the said term to remove, or cause or suffer to be removed from or out of the said messuage, tenement, dwelling-house and premises, any of the said [furniture or] fixtures on any account whatsoever; And also, not to assign or underlet the premises, or any part thereof, nor to make any alterations thereof, without the previous consent in writing of the lessor; And also, not to use the premises, or permit or suffer them to be used for any purpose except that of a private dwelling-house; And not to exhibit on any part of the premises any notice or statement of any art, profession, trade, or business or that any part less than the whole of the premises is or will be to let; And not to cause or permit to be held on the premises any sale by auction without the previous consent in writing of the landlord; And also, a proviso for re-entry on the premises on non-payment of the said yearly rent [*or* rents] by the space of twenty-one days next after the same shall become due, or on non-performance of any of the covenants to be contained in the said lease, and on the lessee's part to be performed (*m*); And

not to remove fixtures;

not to assign lease or underlet without consent;

not to exercise offensive trades.

Power of re-entry.

(*m*) If a separate rent is reserved in respect of furniture leased with the house (as to which, see *ante*, p. 430), say,

"And also, a power of distress for the recovery of the said furniture rent on non-payment thereof, by the space of twenty-one days."

Distress for furniture rent.

If the agreement be that the rent shall be suspended or abated in case of fire, &c., until the premises are restored by the landlord, omit the proviso for insurance, &c., by the tenant, and say,

Rent to be suspended or abated in case of fire, &c.

"And also, a proviso for the suspension or abatement of the said rent during such time as the premises, or any part thereof, shall remain useless, by reason of fire, storm, or tempest, the same to be referred to arbitration, or arbitration and umpirage, if any dispute should arise respecting the time or proportion of such suspension or abatement;"

"And also, a covenant on the part of the lessor to rebuild or repair, in a proper and workmanlike manner, as soon as conveniently may be, such part of the premises as shall be damaged or destroyed by fire, storm or tempest: And it is also agreed, that if the premises shall be destroyed, damaged or injured by fire, or otherwise, before the commencement of the said term, this agreement shall nevertheless

Lessor to rebuild in case of fire, &c.

Agreement to continue in force notwithstanding fire, &c., before

XXII. **Agreement for a Lease of a House in Town.**

all (*n*) other usual and reasonable covenants, including the usual covenant on the part of the lessor, for quiet enjoyment by the lessee.

Lessee covenants to accept lease, and pay the law charges.

3. The lessee will accept such lease as aforesaid, upon the terms and conditions above specified, and execute a counterpart thereof; and also, will pay the expense of these presents (and of a counterpart hereof), and of such lease and a counterpart thereof, to be prepared by the solicitor of the lessor.

Agreement not to operate as demise.

4. This agreement shall not, nor shall anything herein contained operate or be deemed to operate as an actual or present demise of the said premises, or to give to the lessee any legal estate or interest therein, until the lease hereby provided for shall be actually executed.

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

XXIII. *AGREEMENT for a* LEASE *of a* PUBLIC-HOUSE *by a* BREWER.

AN AGREEMENT (*nn*) made this —— day of ——, 18—, BETWEEN [*lessor*], of, &c. (hereinafter referred to as the lessor), of the one part; And [*lessee*], of, &c. (hereinafter referred to as the lessee), of the other part.

Parties.

Parcels.

1. The lessor shall grant and the lessee shall accept a lease (*o*) of ALL THAT messuage and public-house known as the "Crown Inn," situate in —— Street, in the parish of ——, in the county of ——, with the appurtenances thereto belonging, To HOLD the same unto the lessee for the term of 21 years, determinable at the end of the first 7 or 14 years at the option of the lessee, to be signified by not less than six calendar months' notice in writing to the lessor, at the

Term.

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commencement of term.

continue in force, and be carried into execution in the same manner as if such event had not taken place."

Under-lease. Such covenants as are in original lease.

(*n*) If the lessor has only a term for years, say, "such other covenants (except the covenant for building), as are contained on the part of the lessee in the indenture of lease under which the lessor holds the said premises; AND ALSO, all"

Stamp.

(*nn*) Stamp, *ad valorem* on yearly rent, *ante*, p. 336.

(*o*) See as to an underlease, *ante*, Precedent XXII., p. 437, note (*f*).

XXIII. **Agreement for Lease of a Public-house.**

yearly rent of £——, clear of all existing and future taxes, rates, duties, and assessments, and all other deductions whatsoever, except landlord's property tax.

Rent;

2. The said rent shall be paid half-yearly on the —— day of ——, and the —— day of ——, the first of such half-yearly payments to be made on the —— day of ——, 18—. Provided always that if and so long as the lessee shall (in pursuance of the covenant in that behalf to be contained in the said lease) take, have, and purchase from the lessor and from no other person all the ale, porter, beer, wine and spirits, and all other liquors, which the lessee shall use or sell in and about the premises, it shall be lawful for the lessee to deduct from each such half-yearly payment the sum of £——.

to be reduced if lessee trades with lessor.

3. The lease shall contain the following covenants by the lessee :—

Lessee's covenants :

To pay the said rent as hereinbefore is mentioned.

to pay rent;

To pay all existing and future taxes, duties, rates, and assessments whatsoever, except as aforesaid.

taxes, &c. ;

To keep the premises with the fixtures set forth in the Schedule hereunder written in good repair, damage by fire, tempest, or external explosion alone excepted;

to keep in repair;

And to paint with two coats of good oils the inside wood and iron work once in every seven years, and the outside like work once in every three years of the term;

to paint;

And to allow the lessor at all reasonable times as and when he shall think fit to enter for the purpose of viewing the state of repair; And to deliver up the premises with the said fixtures in good repair and condition at the end of the term.

to permit lessor to view;

to deliver up premises;

Not to assign or underlet the premises without the previous consent of the lessor, Provided always that such consent shall be granted free of charge and not be unreasonably withheld.

not to assign or under-let;

Not to permit or suffer the said public-house to be converted into a private house or shop without the previous consent in writing of the lessor.

to use as public-house;

To apply for and endeavour to obtain the licence and renewals of licences which may from time to time be necessary for the opening and keeping open during the term the premises as a house for the sale of ale, porter, beer, wine, and spirits, to be consumed on or off the premises.

to apply for licence;

XXIII. **Agreement for Lease of a Public-house.**

To reside on premises, &c.

To constantly reside on the premises during the term, and personally to conduct and manage the said public-house in such orderly, proper, and regular manner that the licence may not be taken away or renewal thereof refused.

to purchase beer, &c., exclusively from lessor.

To take, have, and purchase from the lessor, and from no other person, all the ale, porter, beer, wine, and spirits, and all other liquors and cordials which the lessee shall sell in or upon the premises.

Lessor's covenants:

4. The lease shall contain the following covenants by the lessor:—

quiet enjoyment;

The usual qualified covenant for quiet enjoyment.

to insure, &c.;

To insure and keep insured the premises against fire to the amount of £—— at the least, And to rebuild within six months in case of fire.

to supply beer, &c. (*p*).

To serve, provide, and send unto the lessee during the said term such good and palatable ale, porter, beer, wine, spirits, and all other liquors and cordials, at such and the same price and prices, and of such sort, quality, and description, according to the price, as the lessor shall usually provide for and deliver to his other publicans, customers, or dealers; And also, within (*ten*) days after notice for that purpose, to remove and take away such of the said malt liquors, wines, spirits, and all other liquors and cordials as shall be or become unfit for sale or consumption, in consequence of the bad quality thereof, and replace the same with others of a good and vendible quality.

Provisions to be contained in lease:

5. The lease shall contain the following provisoes:—

for re-entry;

For re-entry by the lessor on non-payment of rent within 28 days after demand in writing thereof; or, on the lessee becoming bankrupt, or compounding with his creditors; or [*here add any other event on which the proviso is to take effect*]; or a breach by the lessee of any covenant on his part contained in the lease.

(*p*) When the tenant of a public house enters into a covenant to purchase beer, &c., exclusively from the landlord, it would seem that there is an implied obligation on the part of the landlord in the absence of special stipulation to supply the tenant with such beer, &c. as he requires, and that in case of default the tenant is, notwithstanding his covenant, at liberty to provide himself elsewhere: see *Edwick* v. *Hawkes*, 18 Ch. D. 199.

XXIII. Agreement for Lease of a Public-house.

that lessor shall not be obliged to supply beer, &c., if tenant in debt.

That the lessor shall not be obliged or compelled to supply the lessee with any of the said malt liquors, wines, spirits, or other liquors or cordials, after such time as the lessee shall have contracted a debt with the lessor, to the amount of £——, for any such malt liquors, wines, spirits, or other liquors or cordials as aforesaid, until the same debt shall be fully paid and satisfied (or reduced under that amount).

As witness, &c.

The Schedule hereinbefore referred to.

XXIV. *LEASE or* Underlease *of a* House *and* Workshops *at a Premium, with an Inventory of the* Fixtures, usual Covenants, *and a special Agreement in case of* Destruction *by* Fire.

THIS INDENTURE (*q*) made the —— day of ——, 18—, Between [*lessor*], of, &c. (who and his heirs and assigns (*r*), unless the contrary appears, are hereinafter called the lessor), of the one part; and [*lessee*], of, &c. (who and his executors, administrators, and assigns, unless the contrary appears, are hereinafter called the lessee), of the other part: WITNESSETH, that in consideration of the sum of £——, to the lessor paid by the lessee, the receipt whereof is hereby acknowledged; and also, in consideration of the rent and covenants on the part of the lessee and conditions hereinafter reserved and contained, He the lessor demises unto the lessee, All that messuage or tenement, with the workshops behind the same, numbered ——, in —— Street, in the parish of ——, in the county of ——, now in the occupation of the lessee: To hold the premises hereby demised, unto the lessee, from the 25th day of December, 18—, for the term of twenty-one years: Yielding and Paying therefor, yearly during the said term, and so in proportion for any

Parties.

Testatum.

Demise.

Parcels.

Habendum.

Reddendum, quarterly.

(*q*) This lease will require an *ad valorem* stamp in respect of the rent, and also an *ad valorem* stamp in respect of the premium for the same duty as a conveyance on a sale for the same consideration. Stamp.

(*r*) In the case of an underlease, say,

"who and his executors, administrators, and assigns," &c. Underlease.

XXIV. **House and Workshops, with usual Covenants.**

less time than a year (*s*), the rent of £——, without any deduction (except for landlord's property-tax) by equal quarterly payments on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December, in every year, the first payment thereof to be made on the 25th day of March 18—; but subject nevertheless to the proviso and agreement hereinafter contained for the total or partial suspension of the said rent, in the events hereinafter mentioned. And the lessee hereby covenants with the lessor, that he the lessee will pay the said yearly rent hereinbefore reserved, on the days and in manner hereinbefore mentioned (without any deduction except as aforesaid): And also will pay during the said term, the sewers-rate, land-tax, and all other taxes, rates, charges, and assessments whatsoever, parliamentary, parochial, or otherwise, which now are, or hereafter shall be imposed, charged, or assessed upon, or in respect of, the premises, or payable by either the owner or occupier in respect of the same, the landlord's property-tax only excepted: And also will, during the said term, at his or their own costs and charges, well and sufficiently repair, uphold, support, cleanse, amend, and keep the premises, with all fixtures thereon and additions thereto, in, by, and with all manner of necessary reparations and amendments, when, where, and as often as the same shall be requisite: And the premises, being so well and sufficiently repaired, amended and kept, at the expiration or determination of the said term will quietly yield up, with all and singular the fixtures and articles contained in the inventory hereunder written, in as good condition as the same now are, reasonable use and wear thereof, and damage by fire and tempest in the meantime, only excepted: And further, that it shall be lawful for the lessor, [and also for the original landlord of the premises hereby demised] and his agents

Covenant by lessee to pay rent;

to pay sewers rate and all taxes and rates whatsoever;

to repair;

and at the end of term to leave same repaired, damage by fire excepted.

Agreement that lessor may enter to view the state thereof, and if necessary to give notice to repair.

(*s*) It has been held that as between landlord and tenant, the Apportionment Act, 1870 (33 & 34 Vict. c. 35), applies to rent under a lease assigned over by the trustee of a liquidating debtor: *Swansea Bank* v. *Thomas*, 4 Ex. D. 94: see *Re South Kensington Co-operative Stores*, 17 Ch. D. 161; and see *ante*, p. 159. The words in the text, therefore, may perhaps not be strictly necessary for the purpose of entitling the lessor to the proportion of rent in case of his determining the lease during a current quarter under the proviso for re-entry: it has, however, been thought well to retain them, at all events in leases, in accordance with the usual practice. A fuller form of apportionment clause will be found, *post*, p. 447.

[*or* their respective agents (*t*)], with or without workmen or others, once in every year, during the said term, at reasonable times in the day time, to enter upon the premises, in order to view and examine the condition thereof; and, if found necessary upon such view and examination, to give to the lessee, or leave on the said premises, notice in writing to the lessee, to repair and amend the same, within three calendar months then next following; within which period he, the lessee, will repair, amend, and make good all such repairs and amendments as shall be mentioned in such notice: AND the lessor hereby covenants with the lessee, that he paying the said yearly rent, in manner aforesaid, and observing and performing all and singular the covenants, conditions, and agreements on his part to be performed and observed shall and may peaceably and quietly hold and enjoy the premises during the said term, without any interruption or disturbance of or by the lessor, or any person or persons whomsoever claiming under or in trust for him. PROVIDED ALWAYS, that if the yearly rent hereby reserved, or any part thereof, shall remain unpaid for twenty-one days next after the same ought to be paid as aforesaid, whether any formal or legal demand thereof shall have been made or not: Or, if any of the covenants and agreements herein contained on the part of the lessee, shall not be by him observed, performed, and kept, Then, and in any such case, it shall be lawful for the lessor, into and upon the premises or any part thereof in the name of the whole, to re-enter, and the same to have again, and enjoy, as if this lease had never been made, but without prejudice to any right of action or remedy of the lessor in respect of any previous breach of any covenant on the part of the lessee herein contained: PROVIDED ALSO, that in case the said messuage, workshops, and premises, or any part thereof, shall be destroyed by fire or tempest, or other inevitable accident (*u*) during the said term, so that the same shall remain untenantable or unfit for use and occupation for more than —— calendar months by reason of such damage, then, and in such

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Covenant by lessee to repair accordingly.

Covenant by lessor for peaceable enjoyment.

Proviso for re-entry.

Proviso for suspension of rent in case premises are destroyed by fire.

(*t*) The words in brackets are applicable to an underlease.

(*u*) As to the meaning of the words "or other inevitable accident," see *Saner* v. *Bilton*, 7 Ch. D. 815; *Manchester Bonded Warehouse Co.* v. *Carr*, 5 C. P. D. 507.

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case, and so often as the same shall happen, the rent hereinbefore reserved, or a fair and just proportion thereof, according to the nature and extent of the injury sustained, shall cease and be suspended or abate, during so long after the first —— months as the premises, or any part thereof, shall remain uninhabitable or unfit for use, by reason of such destruction: And for the purpose of such cesser or abatement the rent shall, if necessary, be apportioned: PROVIDED LASTLY that if any dispute shall arise between the said parties, in regard to the amount of the abatement to be so made in the said rent, or the period for which the said rent, or any part thereof, shall cease and be suspended, the same shall be referred to the arbitrament of two indifferent persons, one to be named by each of the said parties, with power to choose an umpire; and if either of the said parties shall neglect to name an arbitrator on his part, after fourteen days' notice in writing from the other of the said parties, requiring him so to do, then the said dispute shall stand referred to the person who shall have been named by the party giving such notice; and, in either of the said cases, the determination of the said arbitrators or their umpire or of the said arbitrator shall be final and conclusive on both the said parties, in regard to the matters aforesaid, and the award of the said arbitrators or arbitrator shall or may be made a rule of the Queen's Bench Division [*or* any Division] of her Majesty's High Court of Justice.

Proviso for arbitration.

IN WITNESS, &c.

THE INVENTORY ABOVE REFERRED TO.

XXV. *LEASE to a* BUILDER'S NOMINEE *of a* HOUSE, *with common Clauses.—Covenants to* FINISH *the* HOUSE—*to contribute towards* REPAIRING PARTY-WALLS, *cleansing* DRAINS, *&c.—to leave* FIXTURES—*to* INSURE—*to give Notice of any* ASSIGNMENT—*not to* ASSIGN *after a certain Period—not to use Premises as a* SHOP.

THIS INDENTURE (*v*), made the —— day of ——, 18—, BETWEEN lessor, of, &c. (who and his heirs, &c., *ante*, p. 443),

Parties.

Stamp.

(*v*) Stamp *ad valorem* on yearly rent, *ante*, p 336.

XXV. Lease of Unfinished House to Builder's Nominee.

of the first part; [*builder*], of &c., builder, of the second part; and [*lessee*] of, &c. (who, and his executors, &c.), of the third part: WITNESSETH, that, in consideration of the expense incurred by the said [*builder*], in erecting and building the messuage hereby demised, and of the sum of £——, now paid by the lessee to the said [*builder*] (the receipt whereof is hereby acknowledged), and of the rent and covenants on the part of the lessee, and conditions hereinafter reserved and contained, the lessor at the request and by the direction of the said [*builder*] hereby demises unto the lessee, ALL THAT parcel of ground, situate on the south side of —— Street, in the parish of ——, in the county of ——, AND ALL THAT messuage or tenement erected thereon, being the fourth house westward from ——, exclusive of the corner house, which premises, with the dimensions and abuttals thereof, are particularly described in the ground plot thereof, drawn in the margin hereof and therein coloured ——; EXCEPT and reserved unto the lessor and his other lessees and tenants, the free passage, running of water and soil, from any other buildings and lands contiguous or near to the premises, in, and through the sewers drains and water-courses made, or to be made, in or under the premises: To HOLD the premises hereby demised unto the lessee, from the —— day of ——, 18—, for the term of —— years: YIELDING AND PAYING therefor yearly during the said term, the rent of £——, by equal quarterly payments, on the 24th day of June, the 29th day of September, the 25th day of December, and the 25th day of March in every year, without any deduction, except for landlord's property-tax, the first of such quarterly payments to be made on the —— day of —— next: AND ALSO YIELDING AND PAYING a proportional sum for the period, if any, which may happen to elapse between any one of the said quarterly days of payment, and the period of the determination of the said term, if the same should happen to be determined under the proviso in that behalf hereinafter contained; such proportional sum to be payable immediately on such determination (*x*): AND THE LESSEE HEREBY COVENANTS with the lessor, that he the lessee, will, during the said term, pay [*covenants to pay rent, rates, taxes, &c., ut ante*, p. 444]; AND ALSO, that he the lessee, will, at his own expense, under the inspection and to the satisfaction of the surveyor for the

Testatum.

Parcels.

Habendum.

Reddendum.

Apportionment clause.

Covenants by lessee to pay rent, taxes, &c.;

to finish house, &c.;

(*x*) See as to this clause, *ante*, p. 444, note (*x*).

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time being of the lessor, and in accordance with the plans, elevations, and specifications to be approved by him, before the 24th day of June next, complete and finish and make fit for habitation the said messuage or tenement, with the offices and outbuildings thereto belonging, and also well pave a footway in front of the said messuage or dwelling-house, with Yorkshire stone, four feet wide, with a granite kerb; and will produce such vouchers and other sufficient evidence as may be reasonably required by the said surveyor to satisfy him that the sum of £—— at the least has been expended in completing and finishing the said messuage and premises as aforesaid, and also will pay the fees and charges of the said surveyor: AND ALSO will, during the said term, contribute a rateable or reasonable proportion towards the expense of making, repairing, and cleansing all party and fence walls, sewers, drains, watercourses, roads, pavements, ways, paths, and other easements or conveniences, used or to be used in common, by the occupiers of the premises, and the occupiers of other premises belonging to the lessor adjoining or near thereto: AND ALSO will, as occasion shall require, during the said term, well and sufficiently repair, maintain, pave, empty, cleanse, amend, and keep the premises with the appurtenances, in good and substantial repair: And the premises, being in all things repaired, maintained, paved, emptied, cleansed, amended, and kept as aforesaid, at the end or other sooner determination of the said term, will quietly yield up unto the lessor, together with all additions and improvements which shall meantime be made thereto, and all fixtures whatsoever which at any time during the last seven years of the said term, shall be affixed or fastened to the premises, and come within the denomination of fixtures (*y*): AND ALSO that it shall be lawful for the lessor, or his agents, at all seasonable times, during such last seven years, to enter the premises, and take a schedule of the same fixtures and things: AND ALSO, that the lessee will, in every fourth year of the said term, paint all the outside wood-work and iron-work belonging to the premises, and all additions thereto, with two coats of proper oil-colours, in a sufficient and workmanlike manner, and will also in like manner paint the inside wood-work and

to contribute towards party-walls, roads, sewers, &c.;

to repair,

and leave repaired, together with all fixtures, &c.;

that lessor may enter to inspect repairs;

to paint outside;

(*y*) *Vide ante*, p. 309.

iron-work as often as the same shall be required (*z*): AND ALSO will forthwith, at his own cost, insure the said messuage and all buildings, erections and fixtures which at any time during the said term may hereafter be erected, on or affixed to the premises, to the full value thereof, such value to be determined by the surveyor for the time being of the lessor [*or* in the sum of £—— at the least], in the —— Fire Insurance Office, or in some other well established office, to be approved in writing by the lessor, in the joint names of the lessor and the lessee, and keep the same continually so insured, during the said term, and will, upon the request of the lessor, or his agent, produce the policy for every such insurance and the receipt for the last premium paid for the same: AND ALSO will, if and whenever the said messuage and buildings or any part thereof, shall be destroyed or damaged by fire, forthwith apply the monies received in respect of such insurance in or towards reinstating the same, under the direction of the surveyor of the lessor, and in case such monies shall be insufficient for that purpose, will out of his own monies make good the deficiency: AND ALSO, that it shall be lawful for the lessor and his agents, at all seasonable times, during the said term, to enter the premises, to take plans, and examine the condition thereof: AND FURTHER, that all wants of reparation which, upon such views, shall be found, and for the amendment of which, notice in writing shall be left at the premises, the lessee, will, within three calendar months next after every such notice, well and sufficiently repair and make good accordingly: AND ALSO that the lessee will not make any addition to the said messuage and buildings except in accordance with the said plans, elevations, and specifications, nor cut, maim, alter, or injure any of the principal timbers, roofs, or walls of the same premises: AND will not use the premises nor any part thereof, otherwise than as a private dwelling-house, without the consent in writing of the lessor (*a*), nor by building or otherwise stop or obstruct any light belonging to any building on the ground adjoining or contiguous, or suffer to be done anything which may tend to the annoyance or damage of the

to insure;

to rebuild in case of fire;

to permit lessor to enter and view;

to repair according to notice;

not to cut or alter walls, &c.;

nor use premises as a shop;

nor obstruct the light belonging to adjoining buildings;

(*z*) For a further form of covenant to paint outside and inside, see next Precedent, *post*, p. 452.

(*a*) For a fuller form of covenant not to use the demised premises for the purposes of any trade or business, see next Precedent, *post*, p. 453.

XXV. **Lease of Unfinished House to Builder's Nominee.**

lessor, or any of his tenants: AND ALSO that the lessee, will not assign, or underlet, or part with the premises, or any part thereof, for the whole or any part of the term hereby granted, without giving notice in writing within fourteen days then next to the lessor: AND will not, during the last seven years of the said term, assign, underlet, or part with the premises, or any part thereof, for all or any part of the residue of the said term, without the consent in writing of the lessor: AND that, if, at any time hereafter, any dispute shall arise between the lessee, and any other of the tenants of the lessor, touching the premises to them respectively demised, or the walls, lights, privileges, or appurtenances, belonging thereto, or any annoyance arising therefrom, the lessee will from time to time refer every such dispute to be determined by the lessor, and, in case of the infancy of the owner for the time being of the premises by the guardians of the infant, whose determination respectively the lessee, will abide by and perform. [*Covenant by lessor for quiet enjoyment, ante*, p. 445. *Proviso for re-entry by lessor on non-payment of rent, or breach of lessee's covenants, ante*, p. 445.] PROVIDED ALSO, that if at any time before the expiration of —— years from the date of these presents, the lessee shall be desirous of purchasing the fee simple of the premises hereby demised at the price of £——, and of such desire shall give notice to the lessor, or forward to, or leave at his last known place of residence in England, not less than six calendar months' notice in writing, then, upon the expiration of such notice and on payment of the said sum of £——, together with interest at the rate of —— per cent. from the expiration of such notice until completion of the purchase, and of all rent then accrued due up to such completion, the lessor, and all other necessary parties (if any), will at the cost in all respects of the lessee, well and effectually convey the premises in fee simple, free from incumbrances, unto the lessee, or to such person or persons, and in such manner as he shall direct: PROVIDED ALWAYS, that if the lessee shall exercise the option of purchase hereinbefore given to him, he shall be deemed to have accepted

to give notice of assignment; not to assign during the last seven years; to refer disputes to landlord.

Option for lessee to purchase the fee (*b*).

Purchase of reversion by tenant for life.

(*b*) The rule that a renewal of a lease by a tenant for life enures for the benefit of the remainderman (see *ante*, p. 219) applies also to the purchase of the freehold reversion: *Phillips* v. *Phillips*, 29 Ch. D. 673.

the title of the lessor up to the date of these presents, and no earlier title shall be called for or required. In witness, &c.

XXV. **Lease of Unfinished House to Builder's Nominee.**

XXVI. *UNDER-LEASE of a* House *in London, for twenty-one years, with Stable and Coach-house—* Ordinary Covenants, *&c.*—Special Clauses *as to maintenance of* Square-garden—Proviso *for* Determination *of the Lease at the end of seven or fourteen years.*

THIS INDENTURE (*a*) made the —— day of ——, 18—, Between [*lessor*], of &c. (who, and his executors, administrators, and assigns, are hereinafter, unless the contrary appears, referred to as the lessor) of the one part; and [*lessee*], of &c. (who, and his executors, administrators, and assigns, are hereinafter, unless the contrary appears, referred to as the lessee), of the other part: WITNESSETH that in consideration of the rents and covenants on the part of the lessee, and conditions hereinafter reserved and contained, the lessor hereby demises unto the lessee, All that messuage or dwelling-house, situate and known as No. ——, in —— Street [*or* Square], in the parish of ——, in the county of Middlesex; Together with the stables and coach-house in rear of the same messuage, and situate and known as No. ——, in —— Mews, in the same parish, except and reserved [*use of drains, &c., ante*, p. 447]: To Hold the premises hereby demised, except as aforesaid, unto the lessee, from the —— day of ——, 18—, for the term of twenty-one years, determinable, nevertheless, as is hereinafter provided: Yielding and paying therefor yearly during the said term, and so in proportion for any less period than a year, the rent of £——, by equal quarterly payments on the usual quarter days, without any deduction whatsoever, except for landlord's property tax; the first payment to be made on the —— day of ——, 18—, and the last payment in advance —— calendar months before the expiration of the said term: And also yielding and paying, during the said term, by way of further rent, such sum or sums as shall be equal to the

Parties and interpretation clause.

Demise.

Parcels.

Habendum.

Reddendum.

(*a*) Stamp *ad valorem* in respect of yearly rent reserved, *ante*, p. 336. Stamp.

XXVI. **Underlease of Town House with usual Covenants.**

sum or sums which shall from time to time be paid by the lessor in effecting or maintaining the insurance of the said premises hereby demised against destruction or damage by fire, such further rent to be paid on the quarter day next following the payment by the lessor of any such sum or sums: AND THE LESSEE HEREBY COVENANTS with the lessor [*to pay* the said yearly rent, and also the said further or insurance rent *and rates and taxes, ante*, p. 444: *to contribute to maintenance of party walls, roads, sewers, &c., ante*, p. 448]: [AND WILL also contribute and pay to the lessor, or such person or persons as he shall from time to time direct, a proportionate part, in common with the owners and occupiers of other messuages in —— Square aforesaid, such proportionate part to be assessed from time to time [*state mode of assessment*, e.g., "by the surveyor of the superior landlord," *or* "by a committee of management to be from time to time appointed by the tenants or occupiers of the houses in —— Square aforesaid]; of the expense of planting, mowing, rolling, gravelling, watering, and otherwise maintaining the garden or ornamental pleasure ground in the centre of the said square in good condition, and of repairing and painting the iron railings enclosing the same to the satisfaction in all respects of the lessor and the superior landlord and their respective surveyors]: AND WILL ALSO, during the said term, keep the premises and all fixtures and additions thereto in good and substantial repair and condition: AND ALSO will once in every three years, and also during the last year thereof, paint in two coats of good oil and lead paint all the outside woodwork and ironwork and plaster work of the premises, and such stone work and other parts thereof as are now or usually painted, in a sufficient and workmanlike manner, and of a proper colour to be approved by the lessor: AND will at all times make good and amend and keep in repair the stucco and cement work: AND once in every seven years, at the least, of the said term clean and re-point the outside stone and brick work belonging to the premises: AND ALSO will once in every

Further rent for insurance against fire(*b*).

Lessee's covenants:

to pay rent, &c.;

to contribute to maintenance of square-garden;

to repair;

to paint outside every three years;

to paint inside once in every seven years;

Insurance rent.

(*b*) In the case of an underlease granted by a lessor who is himself bound by a covenant in the ground lease to insure the premises against destruction or damage by fire, it will be often convenient that such insurance should be effected by him, and not by the underlessee, and that the premiums should be repaid to him by way of additional rent.

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seven years of the said term, in like manner, rub down and paint all the inside wood, iron, and plaster work, and other parts of the premises as are now or usually painted with two coats of proper oil and lead paint, and also wash, stop, whiten, or colour such parts of the premises as are now plastered, and grain and varnish such parts thereof as are now grained or varnished: And that it shall be lawful [*covenant to permit lessor to enter and view premises and to repair upon notice, ante, p.* 449]: And also that the lessee will not do or suffer anything upon the premises, or any part thereof, which might be a nuisance or annoyance to the owners or occupiers of adjoining houses, or amount to a breach of the ground-lease under which the lessor holds the same premises; and particularly that the lessee will not, without the previous consent in writing of the lessor, use or suffer to be used the premises, or any part thereof, as a shop, warehouse, or other place for carrying on any trade, business, or manufacture whatsoever; nor as a hospital, asylum, or charitable or public institution; nor for the purposes of a school, or of teaching music, or as a boarding or furnished lodging-house, nor otherwise howsoever than as a private dwelling-house; and will not, without the like consent, exhibit or affix on or about the premises any bill or notice that any part of the premises (less than the whole) is to be let furnished or unfurnished, nor any other bill, notice, door-plate, or inscription whatsoever; nor cause or allow any sale by auction, bazaar, exhibition or public meeting to be held upon the premises: And will not, without the like consent, assign or under-let the premises or any part thereof (otherwise than by sub-letting the whole of the premises from year to year, or for any less term): Provided always, and it is hereby expressly agreed (*c*), that such consent as last aforesaid shall not be withheld without some

to permit lessor to inspect premises;

to use premises as a private dwelling-house;

not to assign or underlet without consent;

(*c*) These words are inserted in order to constitute a contract on the part of the lessor: where a lease contained a covenant by the lessee that he would not assign, &c., without the previous consent of the lessor, "but such consent not being arbitrarily withheld," it was held that there was no covenant by the lessor, either express or implied, not to refuse his consent arbitrarily, but that an arbitrary refusal would leave the lessee at liberty to assign without licence: *Treloar* v. *Bigge*, L. R. 9 Ex. 151. So, in a similar case, it was held that such words do not constitute a covenant of which specific performance can be granted at the suit of the lessee, or for the non-performance of which he can claim damages: *Lear* v. *House Property, &c., Society*, 16 Ch. D. 387.

XXVI. **Underlease of Town House with usual Covenants.**

reasonable objection to the respectability or responsibility of the proposed assignee or sub-lessee, and that no pecuniary consideration shall be required therefor: And further that during the —— months immediately preceding the expiration or sooner determination of the said term, he the lessee will permit the lessor and his agent at any time to enter upon the premises, and to affix and maintain upon some convenient and conspicuous part thereof a notice for the letting of the same, or for the sale of the lessor's interest therein, and will also permit all persons who may be desirous of taking or purchasing the premises, and who shall produce a written order of the lessor or his agent to view the same at seasonable hours in the day time: And further that the lessee will, at the expiration or other sooner determination of the said term, peaceably surrender and yield up unto the lessor the premises with the appurtenances, together with all buildings, erections, and fixtures now or hereafter to be built or erected thereon, in good and substantial repair and condition in all respects: [*Covenant by lessor for quiet enjoyment, ante*, p. 445]: And also that he the lessor will, during the said term, pay the ground-rent payable in respect of the premises under the lease to him of the same premises dated the —— day of ——, 18—: And will, at the request and cost of the lessee, at all times during the said term (unless prevented by fire or other inevitable accident) produce to him the said last mentioned lease: And also will at all times during the said term keep the premises insured against loss or damage by fire in the sum of £—— at the least, pursuant to the covenant in that behalf contained in the same lease; And upon the request of the lessee produce to him the policy of such insurance and the receipt for the last premium paid in respect thereof; And also will if and whenever the said messuage and premises, or any part thereof, shall be destroyed or damaged by fire, cause all monies which shall be received in respect of such insurance as aforesaid to be forthwith laid out in reinstating the premises so destroyed or damaged; [*Proviso for re-entry, ante*, p. 445: *Proviso for suspension of rent in case premises are destroyed by fire, and for arbitration, ante*, p. 445]: Provided always that if the lessee shall be desirous of putting an end to this present demise at the expiration of the first seven years or fourteen years of the term of twenty-one years hereby granted, and shall, for that

to permit lessor to affix notice for reletting, &c.;

to deliver up premises at end of term.

Lessor's covenants: for quiet enjoyment;

to pay ground rent;

to produce ground-lease;

to insure.

Proviso that lessee may determine lease at the end of seven or fourteen years.

purpose, deliver to the lessor, or leave at his usual place of abode, six calendar months' previous notice in writing of such his desire, and shall pay all arrears of rent, and perform all and every the covenants hereinbefore contained, and on his part to be performed; then and in such case (*d*), immediately after the expiration of the said term of seven or fourteen years, this present lease, and everything herein contained, shall cease and be absolutely void to all intents and purposes whatsoever. IN WITNESS, &c.

XXVI. **Underlease of Town House with usual Covenants.**

XXVII. *LEASE of a* HOUSE *by a* TENANT FOR LIFE *under his* STATUTORY POWERS *in consideration of a* FINE: *the* TRUSTEES OF THE SETTLEMENT *join to* ACKNOWLEDGE *the* RECEIPT *of the* FINE.

THIS INDENTURE (*e*), made the —— day of ——, 18—, BETWEEN [*tenant for life*], of, &c. (who and his successors in title and the person or persons for the time being entitled to the reversion of the hereditaments hereby demised are hereinafter, unless the contrary appears, referred to as the lessor), of the first part; [*trustee*], of, &c., and [*trustee*], of, &c. (who are hereinafter referred to as the trustees), of the second part; and [*lessee*], of, &c. (who and his executors, administrators, and assigns are hereinafter, unless the contrary appears, referred to as the lessee) of the third part: WHEREAS [*testator*], late of, &c., deceased, by his will dated the —— day of ——,

Parties and interpretation clause.

Recital of lessor's title:

(*d*) If the power of determining the lease is to be mutual, add—"Or, if the lessor shall be desirous of determining the term hereby granted at the end of the said seven or fourteen years, and of such his or their desire shall give unto the lessee such previous notice as is hereinbefore provided to be given by the lessee for such purpose; then and in either of the said cases immediately," &c.

Proviso for determination of lease by either party.

Where a lessee is authorized, in the terms of the clause in the text, to determine the lease on payment of the rent and performance of the covenants, this has been held to be a condition precedent to the power of determining the lease by notice: *Friar* v. *Grey*, 4 H. L. C. 565; *Jervis* v. *Tomkinson*, 1 H. & N. 195.

(*e*) Stamp *ad valorem* on rent reserved (see *ante*, p. 336), and also on amount of premium, as on a conveyance by way of sale.

Stamp.

XXVII. Lease by Tenant for Life in consideration of Fine.

18—, devised (amongst other hereditaments) the hereditaments hereby demised to the use of the said [*tenant for life*] with remainders over, and the said testator by his said will also gave to the trustees, with such consent as is therein mentioned, a power of sale and exchange of the lands thereby settled: AND WHEREAS the lessor has agreed to demise unto the lessee the premises hereinafter described in consideration of the sum of £——, by way of fine or premium, at the yearly rent of £——, and subject to the covenants and conditions hereinafter contained: AND, upon the treaty for the said lease, it has been arranged that the said sum of £—— shall be paid into the hands of the trustees, and that the receipt thereof shall be acknowledged in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £——, now paid by the lessee to the trustees by the direction of the lessor, by way of fine or premium (the receipt of which sum of £—— the trustees hereby acknowledge), and in consideration of the yearly rent, and covenants hereinafter reserved and contained, on the part of the lessee, to be respectively paid and performed, the lessor hereby demises unto the lessee ALL THAT, &c. [*describe premises*]; ALL which premises are more particularly delineated in the plan or ground-plot thereof in the margin of these presents, and are numbered ——, on a general plan of the estates at ——, late of the said testator, annexed to an indenture dated the —— day of ——, 17—, and made between, &c.: EXCEPT out of this demise the free passage and running of water and soil from the other houses, late of the said testator, and now of the lessor, or his tenants, by and through the channels and drains belonging to the premises: TO HOLD the premises hereby demised, unto the lessee, from the twenty-fifth day of March, 18—, for the term of twenty-one years: YIELDING AND PAYING therefor, yearly, during the said term, unto the lessor, the rent of £——, by equal half-yearly payments, upon the days following: that is to say, the twenty-fourth day of June and the twenty-fifth day of December, in every year, without any deduction; and the first of the said half-yearly payments to be made on the twenty-fourth day of June, 18—: AND the lessee hereby covenants with the lessor in manner following: that is to say, that the lessee will [*covenant to pay rent and taxes, &c., ante*, p. 444; *to contribute towards party walls, roads, sewers, &c., ante*, p. 448]: AND ALSO will,

of agreement for lease.

Demise.

Parcels.

Exception of free passage for water and soil.

Habendum.

Reddendum.

Covenant by lessee to contribute proportionally towards cleansing drains, &c.

XXVII. Lease by Tenant for Life in consideration of Fine.

before the end of the first year from the commencement of this demise, put the premises into good and substantial repair; and lay out and expend in such repairs, or in substantial improvements to the premises, exclusive of internal painting and papering, the sum of £—— at the least: And will, within six calendar months next after the premises shall be so repaired or improved, render to the said lessor, or to his surveyor or agent, the several bills, documents, and other evidence, requisite to prove to their satisfaction, that the aforesaid sum, at the least, hath been so expended and laid out; and thereupon the lessee shall be entitled to a certificate, that the same sum hath been duly expended as aforesaid [*covenants to repair and paint, ante*, pp. 448 *and* 452; *to permit lessor to view premises and to repair on notice, ante*, p. 449: *to deliver possession at end of term, ante*, p. 454]: And also, that the lessee will not use, exercise, or carry on, or permit or suffer to be used, exercised, or carried on, in or upon the premises, or any part thereof, any of the trades, manufactures, or businesses mentioned in the schedule hereunder written, or any other noisy or offensive trade whatsoever (*a*); or erect any building in the yard or garden of the premises, higher than twelve feet above the parlour floor thereof, without having first obtained the license and consent in writing of the lessor: And also, that the lessor and his tenants, shall have free liberty of watercourse in and through the premises, to carry off the water and soil from the near or adjoining tenements: And that it shall be lawful for the workmen of the lessor at all seasonable times, in the daytime, to enter upon the premises, or any part thereof, for the purpose of repairing such near or adjoining premises, or emptying or cleansing the drains, necessaries, gutters, or cess-pools thereto belonging: And also, that it shall be lawful for him, the lessor, or his agent or agents, at all times, during the last six calendar months of the term hereby granted, to place a notice, in writing, on the door, or on any

In first year of term to expend in repairs and improvements, £—;

and within six months render bills, &c., to prove expenditure.

lessee to have certificate that that sum has been expended.

That lessee shall not carry on or permit, to be carried on, any noisy or offensive trades;

or erect any building in the yard higher than twelve feet without license.

That lessor shall have liberty of watercourse.

That their workmen may enter to repair adjoining premises, or empty drains, &c.

That lessors may, during last six months of term, place notice signify-

(*a*) Clauses of this nature frequently give rise to the question, as to what are offensive trades. It is in general better, therefore, if an enumeration is attempted, to specify as many as possible, especially any to which it may be intended that the clause shall extend, but which are not clearly of this description.

For a clause prohibiting the exercise of *any* trade upon the demised premises: vide *ante*, p. 453.

XXVII. Lease by Tenant for Life in consideration of Fine.

ing that premises are to be let.

window or other conspicuous place of the said premises, signifying that the same are to be let: AND, during the said six months, to enter and come, at seasonable times in the daytime, upon the premises, to show and treat for the same [*covenants by lessee to insure and produce policies, &c., and reinstate premises if destroyed or damaged by fire, ante*, p. 449: *covenant by lessor for quiet enjoyment, ante*, p. 445, *ending*] without interruption or disturbance by the lessor or any person claiming under or in trust for him or under the trusts or limitations of the said will: [*Proviso for re-entry, ante*, p. 445]. IN WITNESS, &c.

THE SCHEDULE HEREINBEFORE REFERRED TO.

XXVIII. *LEASE of* MESSUAGE *and* WAREHOUSE *for fourteen Years* DETERMINABLE *by* NOTICE *as to the* MESSUAGE, *at the End of any Year of the Term, and as to the* WAREHOUSE, *at the End of Seven Years, with Special* Reddendum, *and Covenant to pay Rent, adapted to the case of such* PARTIAL DETERMINATION. LESSEE *to* REPAIR *the* INSIDE, *and* LESSOR *the* OUTSIDE, *of the demised Premises.*

Parties.

THIS INDENTURE (*a*), made &c., BETWEEN [*lessor*], of &c. (who and his, &c.) of the one part; and [*lessee*], of &c. (who and his, &c.) of the other part: WITNESSETH, that, in consideration of the yearly rent hereby reserved, and the covenants hereinafter contained, and on the part of the lessee to be respectively paid, observed, and performed, the lessor

Parcels.

hereby demises unto the lessee: FIRST, ALL THAT messuage or dwelling-house, situate and being on the north side of and fronting to a certain street, called ——, in the parish of ——, in the county of ——, and more particularly distinguished as No. ——: AND SECONDLY, ALL THAT brick building, now used as a warehouse, situate and being at the back of the same messuage or dwelling-house, with the way and passage leading

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Stamp.

(*a*) Stamp *ad valorem* on aggregate rent for the entire premises, *ante*, p. 339.

XXVIII. **Lease determinable by Notice as to Part at one Period and as to other Part at another Period.**

to the same: To HOLD the messuage or dwelling-house, warehouse, and premises hereby demised unto the lessee, for the term of fourteen years, from the —— day of ——, 18—, subject, nevertheless, to a proviso hereinafter contained for determining the said term by notice, at the end of the first or any succeeding year of the said term as to the said messuage or dwelling-house, and at the end of the first seven years of the said term as to the said warehouse [*or* (determinable nevertheless as hereinafter provided)]: YIELDING AND PAYING therefor, yearly, unto the lessor during the term hereby granted, and so in proportion for any less period than a year, as to the whole of the premises, the yearly rent of £——, to be paid by equal payments half-yearly, on the —— day of ——, and the —— day of ——, in every year, clear of all deductions, except for landlord's property tax, the first of the said half-yearly payments to be made on the —— day of ——, 18—: But in case the term hereby granted shall be determined by notice, under or by virtue of the proviso for that purpose hereinafter contained, either as to the said messuage or dwelling-house, or the said warehouse only, YIELDING AND PAYING thenceforth, during the residue which shall be then unexpired of the said term, if the said term shall be so determined as to the said messuage only, the yearly rent of £——, or a proportionate part thereof, for or in respect of the said warehouse; or if the said term shall be so determined as to the said warehouse only, then the yearly rent of £——, for or in respect of the said messuage or dwelling-house, with the appurtenances; the said yearly rent of £—— or £—— (as the case may be) to be paid by equal payments half-yearly, on the days and in manner hereinbefore appointed for payment of the said yearly rent of £——, or a proportionate part thereof, and the first of such half-yearly payments to be made on such of the said days as shall happen next after the said term shall be so determined by notice as aforesaid: And the lessee hereby covenants with the lessor that he, the lessee, will, during the said term, as to the whole or part of the premises, duly pay such of the yearly rents hereby reserved as shall, for the time being, be payable, by virtue of the reservations hereinbefore contained, at the times and in manner hereinbefore appointed for payment thereof: AND ALSO will, during the said term, pay and discharge all existing and future rates, taxes, duties, assess-

Habendum.

Reddendum as to the entire premises.

Reddendum in case lease should be determined as to the warehouse or messuage only.

Covenant by lessee to pay rent;

to pay taxes, &c.;

XXVIII. **Lease determinable by Notice as to Part at one Period and as to other Part at another Period.**

ments, and outgoings whatsoever which shall be imposed upon or payable by the landlord or tenant in respect of the whole of the premises or such part thereof as to which the said term shall not have been determined by notice as hereinafter provided, landlord's property tax only excepted: And also that the lessee will, at all times during the said term, well and sufficiently repair, maintain, and amend, in a workmanlike manner, and with good materials, all and singular the glass and other windows, shutters, doors, locks, fastenings, partitions, ceilings, floors, chimney-pieces, shelves, pavements, privies, sinks, drains, cisterns, pipes, water-courses, and all other the inside of the premises; and also will, at the expiration or other sooner determination of the said term, yield and deliver up the said messuage or dwelling-house and warehouse, or the part thereof, in respect of which the said term shall be determined as hereinafter mentioned, in good and tenantable repair, unto the lessor: And also [*power of entry to examine repairs, ut ante*, p. 449]: And the lessor hereby covenants with the lessee, in manner following (that is to say) [*for quiet enjoyment, ante*, p. 445]: And further that he the lessor will, at all times during the said term, well and sufficiently repair, maintain, and amend the walls, roof, and outside of the premises; and also will, once in every four years during the said term, paint in good and proper oil-colour the doors, window-frames, rails, and other the outside wood and iron work of the same premises (*b*): Provided always, that if the rent, which shall be payable by virtue of these presents in respect of the whole or part of the premises, or

to repair the inside of the premises.

Covenant by lessor to repair outside.

Proviso for re-entry as to part or the

(*b*) Sometimes a clause to this effect is added:—

Lessee authorized to make repairs, &c., and deduct monies so expended out of the rent.

"And that if the lessor shall neglect, after notice in writing from the lessee to repair or paint the premises, or any part thereof, in pursuance of the covenant hereinbefore contained, then, so often as the same shall happen, it shall be lawful for the lessee to make the said repairs, or paint the part or parts of the premises in respect of which such default shall be made, at his own costs and charges, and deduct and retain the sum or sums of money expended therein, out of the rent that may then be or shall thereafter become due, the lessee showing and producing unto the lessor, the vouchers or receipts for the said monies so expended by him as aforesaid."

XXVIII. Lease determinable by Notice as to Part at one Period and as to other Part at another Period.

any part of such rent, shall be unpaid for fifteen days after any of the days on which the same ought to have been paid (although no formal or legal demand shall have been made thereof), or in case of the breach or non-performance of any of the covenants and agreements herein contained on the part of the lessee, then and in any of such cases it shall be lawful for the lessor, at any time thereafter, into and upon the whole of the premises hereby described, or, at his option, into and upon either the premises firstly hereinbefore described, or the premises secondly hereinbefore described (being the premises in respect of which such non-payment or breach of covenant shall happen or be made), or into any part thereof respectively in the name of the whole or of such part, to re-enter, and the same to have again, re-possess, and enjoy as in his or their former estate: PROVIDED ALSO, and it is hereby declared and agreed, that it shall be lawful for the lessor, or for the lessee, to determine and put an end to this present demise and the term hereby granted, in respect of the messuage or dwelling-house and premises firstly hereinbefore described, at the end of the first or any succeeding year of the said term, upon delivering to the other of them six calendar months' previous notice in writing, or leaving the same at his or their usual place or places of abode; And also to determine and put an end to this present demise, and the term hereby granted in respect of the warehouse and premises secondly hereinbefore described, at the end of the seventh year of the term hereby granted, upon giving six calendar months' previous notice as aforesaid; And that in either of the said cases this present indenture, and every clause, matter, and thing herein contained, so far as respects that part of the premises in respect of which such notice shall have been given as aforesaid, shall, upon the expiration of the said notice and performance of the covenants hereinbefore contained relative thereto, cease, determine, and be void. IN WITNESS, &c.

whole of the premises on non-payment of rent, &c.

Proviso for determining lease as to the several parts of the premises at different periods.

XXIX. *LEASE of a* RESIDENTIAL FLAT, *or* SET OF CHAMBERS.

Parties. THIS INDENTURE (*a*) made the —— day of ——, 18—, BETWEEN A. B., of &c. (hereinafter called the lessor), of the one part; and C. D., of &c. (hereinafter called the lessee), Demise. of the other part: WITNESSETH that the lessor hereby Parcels. demises unto the lessee ALL THAT suite of apartments consisting of —— rooms, known or intended to be known as the —— suite of apartments, on the —— floor of the messuage or mansion known as No. —— Street [*or* Mansions], in the Reservation of right to build on adjoining land. parish of ——, in the county of ——: RESERVING to the lessor and to the superior lessor or lessors for the time being, full right to erect any buildings upon any adjacent property, notwithstanding that such buildings when erected may impair or injuriously affect the free access of light and air *Habendum.* through any windows of the premises: TO HOLD unto the lessee, for the term of —— years, from the —— day of *Reddendum.* ——, 18—, YIELDING for it during the said term the yearly rent of £——, and so in proportion for any less period than a year, by equal quarterly payments on the usual quarter days in every year, the first of such payments to be Lessee's covenants: to pay rent and gas rate; made on the —— day of ——, 18—: AND THE LESSEE HEREBY COVENANTS with the lessor that he, the lessee, will pay the said rent at the times and in manner aforesaid, and will pay to the —— Gas Company their charges for gas consumed on the premises, according to the meter placed or to be placed by the said —— Gas Company in the not to use premises for improper purposes or cause annoyance; meter-house of the said mansion: AND ALSO will not use or permit the premises to be used for any illegal or improper purpose, nor exhibit any placard or any part thereof, nor hang, or allow to be hung, any clothes, or other articles, on the outside of the premises, nor make, or permit to be made, any disturbance, noise, or annoyance whatsoever, detrimental to the premises, or to the comfort of the other inhabitants of the said messuage, nor do, or permit to be done, any act or thing which may be, or grow, to the annoyance, damage, or disturbance of the lessor, or the superior lessor or lessors for the time being, or their tenants, or the occupiers of any adjoining premises, nor convert the premises, or any part

(*a*) Stamp, see *ante*, p. 336.

XXIX. **Lease of Residential Chambers.**

thereof, into nor use the same as a shop or warehouse, or suffer any trade to be carried on therein, but will use the same as a private residence only: AND WILL not use the same for any purpose or in any manner so as to cause scandal or annoyance to the other inhabitants of the said mansion, or to the neighbours or neighbourhood: AND WILL not waste, or permit to be wasted, any water on the premises: AND WILL not allow any person or persons or children under his control to loiter or play in the passages, landings, or stairs of the said mansion, nor soil the same by the carrying of coals or other articles, and shall not use the same in any way except for the purposes of ingress or egress: AND WILL not assign or under-let the premises, or any part thereof, without the consent in writing of the lessor, such consent not to be unreasonably withheld (*b*): AND WILL keep the interior of the premises, and also the doors and windows thereof, and the fixtures therein, and all interior walls, pipes, and other appurtenances, in good substantial and tenantable repair, and in clean condition (damage by fire excepted): AND particularly will in the seventh year of the said term, calculated from the —— day of ——, 18—, whitewash the ceilings and cornices, paper the walls of the premises with suitable paper, and paint in a proper manner with two coats of good oil and whitelead paint of suitable colours, and grain and varnish all the internal wood, iron, and other work previously painted, grained, or varnished: AND ALSO will permit the lessor, or his agents, and the superior lessor or lessors for the time being, and their respective architects, agents, surveyors, and workmen, twice in every year or oftener during the said term, at all reasonable hours, to enter into the premises, to view the condition thereof, and to give or leave notice in writing upon the premises for the lessee of all defects and wants of repair there found: AND ALSO will within three calendar months after every such notice well and sufficiently repair and make good such defects and wants of repair, whereof notice shall have been so given or left: AND ALSO WILL permit the lessors and their agents or workmen to do all such repairs as they may be liable to do upon the premises, or in or upon premises adjoining the same: AND ALSO will not during the said term cut or maim

not to waste water;

not to soil passages;

not to assign, &c., without consent of lessor;

to repair internally;

and paint, &c. in seventh year of the tenancy;

to permit to inspect premises;

to repair on notice;

(*b*) See as to this *ante*, p. 453, note (*c*).

XXIX. **Lease of Residential Chambers.**

any of the principal timbers or walls of the premises, or any part thereof, or make, or permit to be made, any addition to the premises, or any alteration in the architectural decoration thereof, without the licence in writing of the lessor: AND WILL at the end of the said term peaceably and quietly deliver up possession of the premises unto the lessor in good state and condition (damage by fire excepted) together with the venetian blinds and landlord's fixtures now or at any time during the said term to be fixed or fastened to the premises, or any part thereof, and all improvements and additions thereto: AND THE LESSOR hereby covenants with the lessee that the lessee, performing and observing all the covenants by the lessee herein contained, may quietly hold and enjoy the premises during the said term without any interruption by the lessor or any person claiming through him: AND FURTHER that he the lessor will pay all rates and taxes, parliamentary, parochial, or otherwise, that now are, or that hereafter may be imposed upon the premises, including water rate but excluding gas rate, and that he will keep the exterior of the premises in good and substantial repair: AND ALSO will, at his own proper costs, within three months from the date hereof, completely finish the premises fit for habitation in a good and substantial and workmanlike manner, and with good and proper materials of their respective kinds: PROVIDED ALWAYS that on any breach of any of the covenants by the lessee herein contained the lessor may re-enter upon the premises, and immediately thereupon the said term shall absolutely determine: PROVIDED ALSO that if the premises, or any part thereof, shall at any time during the said term be destroyed or rendered uninhabitable by fire (except through the wilful neglect of the lessee), then and in such case the payment of the rent hereby reserved, or a proportionate part thereof, according to the extent of the damage incurred, shall be suspended until the premises shall have been reinstated and again rendered fit for habitation: PROVIDED LASTLY that the lessor and the lessee, and the executors, administrators, and assigns, of the

not to injure the premises; to deliver possession at end of term.

Lessor's covenants: for quiet enjoyment;

to pay taxes, &c.

Proviso for re-entry.

Proviso for suspension of rent in case of destruction of premises by fire.

Interpretation clause (*b*).

(*b*) The interpretation clause in this Precedent is inserted at the end of the instrument, and this course may be adopted, if desired, in framing a lease or agreement for lease from any of the forms here furnished. The insertion of words of interpretation, or of a

lessor and of the lessee shall be respectively bound by and be entitled to the benefit of these presents, and to the covenants, conditions, and agreements therein contained in like manner as if the words "executors, administrators, and assigns" were inserted next after the words "lessor" and "lessee" throughout, so far as the nature of the case will admit, and unless the context may require a different construction. XXIX. Lease of Residential Chambers.

IN WITNESS, &c.

XXX. *UNDER LEASE of* PART OF A HOUSE, *as Business* OFFICES, *for twenty-one Years.—Covenant by Lessees to occupy as Business Offices, and not to bring combustible Materials upon the Premises, so as to invalidate Fire Insurance.—By the* LESSOR TO PAY *all* TAXES, *&c., and to* INDEMNIFY *the* LESSEES *therefrom.*

THIS INDENTURE (*c*), made the —— day of ——, 18—, BETWEEN [*lessor*], of &c. (who and his executors, administrators, and assigns, unless the contrary appears, are hereinafter called the lessor), of the one part; and [*lessees*], of &c., trading as —— in partnership under the style or firm of —— & Co. (who and their executors, administrators, and assigns, unless the contrary appears, are hereinafter called the lessees), of the other part: WITNESSETH, that, in consideration of the rent and covenants hereinafter respectively reserved and contained and on the part of the lessees to be paid and performed, the lessor hereby demises unto the lessees, ALL those offices or rooms, &c. (*describe rooms*), being part of a messuage, &c., situate, &c., together with full and free liberty of passing and repassing at all times, to and from the said offices and premises hereby demised, [on all days throughout the year, except Sundays, Christmas Day, Good Friday, and Bank Holidays, between the hours of —— in the forenoon, and

Parties. *Testatum.* Parcels: dining-room, parlour, &c.

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distinct interpretation clause at the commencement of the instrument appears to be the most convenient, as it is in practice the most usual course.

(*c*) Stamp, *ad valorem* on yearly rent, see *ante*, p. 336. Stamp.

XXX. **Lease of Part of House as Business Offices.**

—— in the afternoon]: To HOLD the premises unto the lessees, as joint tenants and as part of their partnership property, from the —— day of ——, 18—, for the term of twenty-one years, determinable nevertheless as hereinafter mentioned: YIELDING AND PAYING therefor, yearly during the said term, and so in proportion for any less period than a year, the clear rent of £——, on the four following days of payment, that is to say, the twenty-fifth day of March, the twenty-fourth day of June, the twenty-ninth day of September, and the twenty-fifth day of December in every year, by equal portions, the first payment thereof to be made on the twenty-fifth day of March, 18—: AND THE LESSEES HEREBY do jointly, and as a separate covenant each of them doth severally, covenant with the lessor, that they the lessees, or one of them, will pay the said rent at the times, and in manner aforesaid: AND ALSO, [*covenant to make internal repairs, and to permit the lessor to enter and view, and to repair on notice, ante*, p. 463]; AND ALSO, that they the lessees will not, during the continuance of this demise, use, or permit to be used, the premises, or any part thereof, otherwise than as business offices, nor for any purpose or in any manner which may be a nuisance or annoyance to the owners or occupiers of adjoining houses, or of other offices or rooms in the messuage aforesaid, nor will bring, or permit to be brought to or lodged in or upon the premises, or any part thereof, any goods of a sort or quality, nor to do or suffer any act or thing which may in any way affect or invalidate any insurance or insurances from fire, made, or hereafter to be made, by the lessor of the premises, or of any goods and merchandizes in the part thereof occupied by him or his undertenants [*covenant not to assign or underlet without the lessor's consent, ante*, p. 463], AND THE LESSOR HEREBY COVENANTS with the lessees, that they the lessees paying the rent or sum of £——, hereinbefore reserved and made payable, and observing, fulfilling, and keeping all and singular the covenants, articles, clauses, and agreements herein contained and on their part to be observed and performed, shall, peaceably and quietly, hold and enjoy the premises during the said term, without any disturbance, or interruption whatsoever by the lessor, or any other person claiming under him; freed and discharged of and from the payment of land-tax, and all other taxes, assessments, and

Habendum.

Reddendum quarterly.

Covenant by lessees not to use or permit noisy or offensive trades;

not to bring combustible materials on the premises so as to invalidate any fire insurance.

Covenant by lessor for lessees' quiet enjoyment;

free from all taxes, payments for water, &c.

payments for water, or otherwise whatsoever, and of what nature or kind soever, now payable or hereafter to become payable in respect of the premises, or any part thereof, by authority of Parliament, or otherwise howsoever: AND which taxes, assessments, and payments, the lessor hereby covenants with the said lessees to pay and satisfy: and also to indemnify the said lessees from all payments in respect thereof: and also to keep the exterior of the premises in good and substantial repair: [*Proviso for re-entry, ante*, p. 445 *or* 464. *Proviso for determination of the lease at the end of* 7 *or* 14 *years, ante*, p. 454.]

XXX. Lease of Part of House as Business Offices.

Covenant by lessor to pay all taxes, &c.

IN WITNESS, &c.

XXXI. *LEASE of a* PUBLIC-HOUSE *of* COPYHOLD *Tenure* (*d*), *for One Year, and thenceforth from Year to Year, for Six Years and a Half, if the Custom or Lord of the Manor will permit the Premises to be so demised; with a* POWER OF RE-ENTRY, (inter alia), *on Lessee's* ASSIGNING *or* UNDER-LETTING *without Consent; or becoming* BANKRUPT *or* INSOLVENT, *or* EXECUTION *being levied on his* GOODS, *&c.*

THIS INDENTURE (*e*), made the —— day of ——, 18—, BETWEEN [*lessor*], of &c. (who, &c.), of the one part; and [*lessee*], of &c., ale-house-keeper (who, &c.), of the other part: WITNESSETH, that, in consideration of the rent hereinafter reserved, and of the covenants by the lessee hereinafter contained, The lessor hereby demises unto the lessee, ALL THAT messuage and public-house, situate in —— aforesaid, and called "The Falcon," with the out-buildings, yards, garden, bowling-green, and appurtenances thereto belonging, as the same are now in the occupation of the lessee; EXCEPT, and reserved unto the lessor, and his workmen and agents,

Testatum.

Demise.

Parcels.

Except right of entry to view condition, to do repairs, &c.

(*d*) As to leases of copyholds, see *ante*, p. 85.

(*e*) Stamp, *ad valorem* on yearly rent, *ante*, p. 336. Stamp.

XXXI. **Lease of Copyhold Public-house.**

free liberty of ingress, egress, and regress, into, out of, and from the premises, to view and see the state and condition thereof; and to do repairs thereto, and bring materials thereon for such repairs, and on all other reasonable occasions: To HOLD the premises, (being copyhold), unto the lessee, from the —— day of ——, 18—, for the term of one year, and (if the custom or lord for the time being of the manor, whereof the premises are holden, will permit or suffer the same to be so demised, but not otherwise) thenceforth from year to year, for and during, and until the expiration of, the further term of six years and one half of another year; YIELDING AND PAYING therefor, the rent of £——, on the eleventh day of October next, and thenceforth yearly, and so in proportion for any less period than a year, during the term of seven years thence next ensuing, the rent of £——, by two equal portions, on the sixth day of April, and the eleventh day of October, in every year, except only during such part, hereinafter specified, of any period, during which the premises may remain uninhabitable, by reason of destruction by fire, tempest, or other inevitable accident: AND THE LESSEE HEREBY COVENANTS with the lessor, as follows: that is to say, that he the lessee will pay the said rents of £——, and said rent of £—— respectively, at the days and in the manner hereinbefore appointed for the payment thereof respectively: AND ALSO will during the said term pay and discharge all existing and future taxes, rates, assessments, duties, and outgoings whatsoever, payable either by the landlord or tenant, in respect of the premises (quit rent, heriots, and landlord's property tax only excepted); AND ALSO the lessee will, during the said term, keep and, at the termination thereof, leave in repair the glass and lead of all the windows of the buildings hereby demised (damage by fire or other inevitable accident only excepted); AND will keep and leave in a proper state and condition the aforesaid garden and bowling-green; AND will, with all convenient speed, repair, and make good again, all such injuries, breaches, and damages as shall happen or be done to the premises, by the negligence or fault of the lessee, or his inmates, servants, guests, or customers; AND that the lessor, and his agents, surveyors, and workmen, may twice in every year, at seasonable times, enter upon and inspect the state and condition of the premises, and take account of the fixtures and fittings thereon; AND FURTHER,

Habendum for one year, and thenceforth, if the custom or lord of the manor will permit, from year to year, for six and half years.

Reddendum.

Covenant by lessee to pay the rent;

to keep and leave in repair all the glass windows;

to keep and leave in proper condition garden and bowling-green;

to repair damage;

not to convert house into a private house;

XXXI. Lease of Copyhold Public-house.

that the lessee will not, at any time during the continuance of this demise, convert the said messuage into a private house, or use the same, or suffer it to be used, for any other purpose than as an inn, tavern, or public-house; AND will conduct and manage the same in a proper and orderly manner, so as to afford no ground or pretence for discontinuing the licences thereof; AND will at all times during the said term personally reside in the said messuage, and use and keep open the same as an inn, tavern, or public-house; AND will use his best endeavours to increase and extend the custom and business thereof; AND will not assign or underlet or part with the possession of the premises or any part thereof without the consent in writing of the lessor previously obtained for that purpose; AND will at the expiration or sooner determination of the said term peaceably deliver up the premises to the reversioner for the time being, uninjured except by reasonable use and wear, or accident by fire or tempest: AND THE LESSOR HEREBY COVENANTS with the lessee that he, the lessor, will, during the continuance of this demise, keep the premises in good and tenantable repair, except such parts thereof as the lessee is bound to repair or keep in repair in pursuance of the covenants on his part herein contained: AND that he, the lessor, will, at the end of the term of one year, for which the premises are hereinbefore demised, if this demise shall not have been determined under the proviso for re-entry hereinafter contained, at the request and costs of the lessee, make and execute to the lessee, if the license of the lord or lady of the said manor can be obtained, a new lease of the premises for a term expiring on the —— day of ——, 18— [*i.e., at the end of six and a half years*], but if such license cannot be obtained, then if and so far as the custom of the said manor will admit, a new lease of the premises for one year more, and so on, at the end of every year until the —— day of ——, 18—, aforesaid, if this demise shall not then have been determined as aforesaid: AND the lessor hereby also covenants with the lessee that the lessee, performing the covenants hereinbefore contained, shall quietly enjoy the premises during the said term, without any disturbance by the lessor, or any person claiming by, from, through, under, or in trust for him; PROVIDED ALWAYS that if the said several rents, or any part thereof respectively, shall be unpaid by the

to so manage the house as not to lose the licence;

not to assign, &c., without leave;

to deliver possession at end of term.

Lessor's covenants: to repair;

to renew lease from year to year;

for quiet enjoyment.

Proviso for re-entry;

XXXI. **Lease of Copyhold Public-house.**

space of twenty-one days next after the same shall have become payable (being first lawfully demanded upon or at any time after the said twenty-one days, and not paid when demanded); or if the lessee shall assign, let, or under-let, or in any manner part with the possession of the premises, or any part thereof, to any person or persons whomsoever, for the whole or any part of the term for which they are hereby demised, or covenanted to be demised, without the license or consent of the lessor in writing, first obtained for so doing; or if the lessee shall become bankrupt, or shall assign his estate or effects, or any part thereof, in trust for his creditors, or shall compound or enter into any scheme for arrangement for the payment of his debts; or if any execution shall be levied upon his goods or chattels; or if he shall be convicted of any offence against any law for the time being affecting publicans or licensed victuallers; or if he shall not perform the covenants herein contained, which by him ought to be performed; then, and in any of the said cases, it shall be lawful for the lessor, into the premises, or any part thereof in the name of the whole, to re-enter, and the same to have again, repossess, and enjoy, as in his first or former estate: PROVIDED ALSO, that, if the said messuage shall remain untenantable for more than six calendar months by reason of damage from fire, tempest, or other inevitable accident, the rent hereby reserved shall not be payable in respect of the time beyond the first six calendar months, during which the said messuage shall so remain uninhabitable; And for that purpose (if necessary) the rent shall be apportioned. IN WITNESS, &c.

or, on assigning or underletting premises without consent;

or on lessee becoming bankrupt, &c.;

or on non-performance of covenants.

Rent to be suspended in case of fire, &c.

XXXII. *LEASE of a* PUBLIC-HOUSE *by a Firm of* BREWERS.—COVENANT *by* LESSEE *to* DEAL EXCLUSIVELY *with* LESSORS; *and other* SPECIAL COVENANTS.

Parties and interpretation clause.

THIS INDENTURE (*g*), made the —— day of ——, 18—, BETWEEN [*lessor*], of, &c., and [*lessor*], of, &c., carry-

Stamp.

(*g*) Stamp, *ad valorem* on rent (see *ante*, p. 336), and also on amount of premium as on a conveyance by way of sale.

XXXII. Lease of Public-house by Firm of Brewers.

ing on the trade or business of brewers at ——, in the county of ——, in partnership, under the style or firm of —— & Co. (who and their heirs and assigns are hereinafter, unless the contrary appears, called the lessors), of the one part; and [*lessee*], of, &c., licensed victualler (who and his executors, administrators, and assigns are hereinafter, unless the contrary appears, called the lessee), of the other part: WITNESSETH that, in consideration of the sum of £——, upon the execution of these presents paid by the lessee to the lessors (the receipt whereof is hereby acknowledged), and also in consideration of the rents hereinafter reserved, and of the covenants and agreements on the lessee's part hereinafter contained, the lessors do, and each of them doth hereby, demise unto the lessee ALL THAT [*describe parcels, ante*, p. 467], Together with the fixtures and fittings particularly mentioned in the schedule hereunder written: TO HOLD the premises unto the lessee from the —— day of ——, 18—, for the term of —— years next ensuing: YIELDING AND PAYING therefor yearly during the said term and so in proportion for any less period than a year, the rent of £——, to be paid without any deduction (except for landlord's property tax) by equal quarterly payments, on the —— day of ——, 18—, &c., the first of such payments to be made on the —— day of ——, 18—, and the last payment to be made in advance —— calendar months before the expiration of the said term, or immediately upon the sooner determination thereof under or by virtue of the proviso for re-entry hereinafter contained: AND ALSO YIELDING AND PAYING, yearly during the said term, by way of further rent, the sum or sums of money which the lessors shall from time to time expend in pursuance of the covenant on their part hereinafter contained, in insuring and keeping insured the said messuage and the offices and outbuildings thereof, and the fixtures or fittings specified in the schedule hereunder written, and any fixtures or fittings which may during the continuance of this demise be added thereto or substituted therefor against loss or damage by fire, and in insuring the plate glass windows and mirrors against damage by accident, as hereinafter mentioned; such further rent to be paid on demand on the quarterly day of payment of the said yearly rent of £—— next ensuing after the said sum or sums shall have been expended: AND ALSO YIELDING AND PAYING, by way of further rent, the sum of £—— in any and

Testatum.

Demise.

Parcels.

Habendum.

Reddendum of yearly rent.

Reddendum of monies paid for insurance.

Reddendum of penal rent for selling liquors

XXXII. Lease of Public-house by Firm of Brewers.

every year during the said term in which the lessee shall buy, consume, sell, or dispose of, either directly or indirectly, or permit to be bought, consumed, sold, or disposed of, either directly or indirectly, in, upon, out of, or about the messuage or tenement, and premises hereby demised, or any part thereof, any wine, brandy, rum, hollands, gin, shrub, beer, ale, porter, stout, perry, cider, or any other spirit or liquor whatsoever, other than such as shall have been *bonâ fide* purchased of the lessors, provided they shall at such time deal in such liquors as aforesaid, and shall be willing to supply the same to the lessee at the fair current market price thereof: Such last-mentioned further rent to be paid on the quarterly day of payment of the said yearly rent of £—— next ensuing after such purchase, consumption, sale, or disposal as aforesaid, and to be paid quarterly thereafter during the residue of the then current year: And all the rents aforesaid to be paid without any deduction whatsoever except for landlord's property tax:

not supplied by lessors.

Covenants by lessee to pay rents;

And the lessee hereby covenants with the lessors that he the lessee will, from time to time during the term hereby granted, duly pay the said yearly rent or sum of £——, and the said further rents or sums, if and whenever the same shall become payable respectively, at the times and in the manner hereinbefore appointed for payment thereof respectively, without any deduction or abatement, except as hereinafter mentioned; And also will, during the said term, pay and discharge all existing and future taxes, rates, assessments, duties, and outgoings which may be payable by or imposed upon the landlord or the tenant in respect of the premises (landlord's property tax only excepted);

to repair;

And also, that he the lessee will, from time to time during the said term, at his own costs, sufficiently repair, amend, scour, cleanse, paint, glaze, pave, and maintain the premises, and all erections and buildings whatsoever, which during the same term shall be erected or built thereon, or on any part thereof; and the same premises, erections, and buildings so being in all things well and sufficiently repaired, amended, scoured, cleansed, painted, glazed, paved, and maintained, will, at the expiration or other sooner determination of the same term, peaceably and quietly yield up unto the person or persons who shall then be entitled to the same; Together with all the fixtures and fittings specified in the schedule hereunder written, and all other fixtures or fittings which now are, or at any time during the term

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hereby granted shall be fixed, fastened, or put up, in or about the premises, or any part or parts thereof, including all sign-boards and placards relating to the businesses of the lessee and the lessors respectively (damage by fire or tempest only excepted); And will from time to time replace and make good any of the said fixtures and fittings, including all such sign-boards and placards as aforesaid as shall become or be worn out, destroyed, damaged, or lost, by other articles of similar quality; Provided always, that nothing herein contained shall render the lessee liable to replace any plate-glass windows or mirrors which the lessors shall be liable to insure against damage by accident under the covenant on their part hereinafter contained; And further, that it shall be lawful for the lessors, or either of them, and for their or his servants, agents, or workmen, twice or oftener in every year during the term hereby granted (giving to the lessee three days' previous notice of his or their intention so to do), to enter and come at seasonable hours in the daytime into and upon the premises, and every or any part thereof, with the appurtenances (including all such fixtures, fittings, signboards, placards, and things as aforesaid), to search and inspect the condition of the repairs thereof; And to give or leave notice in writing at or upon the premises, or any part thereof, for the lessee to repair and amend all defects, decays, or wants of reparation which shall be so found; And that he the lessee will, within three calendar months after every such notice shall have been so given or left as aforesaid, well and sufficiently repair, amend, and make good all the defects, decays, and wants of reparation expressed in such notice (except damage by fire or tempest); And further, that he the lessee will, during all the term hereby granted, use and occupy, or cause to be used and occupied, the said messuage or tenement as or for an inn or public-house; and will not permit any gaming or riotous or disorderly practices to be carried on therein, or commit any offence against the laws for the time being in force with respect to publicans or licensed victuallers, but will keep and conduct the same premises in a proper and orderly manner, so as to afford no just or reasonable ground for the withdrawing or withholding of all or any of the licences for the sale of beer and ale and wine and spirituous liquors therein, as heretofore used and accustomed; and will from time to time apply for and do or cause to be done what shall

to permit lessor to enter and inspect premises.

to repair on notice;

to use premises as a public-house;

not to lose licences;

XXXII. **Lease of Public-house by Firm of Brewers.**

be requisite for obtaining the renewal of such licence or licences; And will not do or permit to be done any act or thing on the premises which may invalidate any policy for the insurance of the premises against loss or damage by fire, or which may render any increased or extra premium payable in respect of any such policy: And further that he the lessee will not buy, consume, sell, or dispose of, either directly or indirectly, or permit to be bought, consumed, sold, or disposed of, either directly or indirectly, in, upon, out of, or about the messuage or tenement and premises hereby demised, or any part thereof, any wine, brandy, rum, hollands, gin, shrub, beer, ale, porter, stout, perry, cider, or any other spirit or liquor whatsoever, other than such as shall have been *bonâ fide* purchased of the lessors, provided they shall at such time deal in such liquors as aforesaid, and shall be willing to supply the same to the lessee at the fair current market price thereof; And also [*covenant not to assign or underlet without lessor's consent, ante*, p. 470]; And also that he the lessee will, at the expiration or sooner determination of the said term, do all necessary acts for assigning and transferring to the lessors, or to any other persons or person whom they shall nominate in that behalf, all the then existing licences and certificates affecting the premises, on being paid a fair proportion for any unexpired term thereof, and for obtaining such renewals thereof as the lessors, or such other persons or person as aforesaid, may require, at the cost of the person or persons requiring the same; And the lessors hereby covenant with the lessee [*for quiet enjoyment, ante*, p. 469]; And further, that the lessors will at their own cost insure and keep insured the said messuages and buildings, and all other insurable fixtures and things, insured to their full value from damage by fire in some respectable office or offices; And also will insure and keep insured all plate-glass windows and mirrors in the said messuage to their full value from damage by accident in some respectable office or offices; And will, when required, produce to the lessee the policy or policies of such insurance, and the receipt for the last premium on every such insurance; And shall apply the money received on any such insurance in rebuilding, repairing, or reinstating the premises which shall have been damaged or destroyed by fire or accident as aforesaid. [*Proviso for re-entry, ante*, p. 469: *Proviso*

or insurance;

to sell only liquor supplied by lessors;

not to assign, &c., without leave;

to transfer licences at end of term.

Lessors' covenants: for quiet enjoyment; to insure.

for suspension of rent in case of destruction by fire, p. 470.]

In witness, &c.

XXXII. Lease of Public-house by Firm of Brewers.

The Schedule hereinbefore referred to.

XXXIII. *LEASE of a* Mansion-house, Furniture, Garden, *and* Pleasure grounds, Reddendum *on breach of certain* Covenants, *Special* Covenants *for the* Preservation *of the* Furniture. Management *of the* Garden, Fruit Trees, Pleasure grounds, &c.—*Covenant by* Lessor *to* pay Taxes, *or allow the* Lessee *to* deduct *them out of the* Rent.

THIS INDENTURE (*h*), made &c., Between [*lessor*], of &c. (who, &c.), of the one part; [*lessee*], of &c. (who, &c.), of the other part: WITNESSETH that, in consideration of the rents hereby reserved, and of the covenants hereinafter contained and by the lessee to be respectively paid, observed, and performed; the lessor hereby demises unto the lessee, All that messuage and dwelling-house, situate in the parish of ——, in the county of ——, and commonly called or known by the name of —— Lodge, with the out-buildings, gardens, shrubberies, and pleasure grounds thereunto belonging; And also all the fixtures and articles of furniture in and belonging to the said messuage or tenement, and mentioned in the schedule or inventory hereunder written; And also all that close, or parcel of meadow or pasture land, situate in front of the said messuage or dwelling-house, and partly surrounding the same, containing by estimation twelve acres or thereabouts; And also all that other close, or parcel of meadow land, situate behind the said dwelling-house, and containing by estimation six acres or thereabouts; And also all that wood, or parcel of wood ground, situate near unto

Parties. *Testatum.* Parcels. Dwelling-house; wood and shrubbery.

(*h*) Stamp, *ad valorem* on the aggregate amount of both rents, *ante*, p. 340. No additional stamp is required in respect of the penal rents. Stamp.

XXXIII. Lease of Mansion-house, Furniture, and Garden, &c.

the said messuage or dwelling-house, with the shrubbery and gravel walk through the same, containing by estimation ten acres or thereabouts; and which messuage or dwelling-house, closes, pieces, or parcels of land, wood, and premises, are now in the occupation of the lessor, and the same are more particularly delineated and described in the plan or ground plot thereof, drawn in the margin of these presents: To HOLD the said messuage or dwelling-house, furniture, and all and singular other the premises hereby demised, with their appurtenances, unto the lessee, henceforth during the term of —— years: YIELDING AND PAYING THEREFOR the yearly rent of £——, in even portions, half-yearly, on &c.; the first payment to be made on the —— day of —— next; And also YIELDING AND PAYING on the days aforesaid (above the yearly rent of £—— hereinbefore reserved), for every acre of meadow or pasture ground which the lessee shall plough, break up, or convert into tillage, contrary to the covenant hereinafter contained, the yearly rent of £100 during the then residue of the said term; the first payment of the said additional rent to be made on such of the days hereinbefore appointed for payment of rent as shall happen next after such ploughing, breaking up, or conversion into tillage as aforesaid; AND in case the lessee shall be guilty of any breach or non-performance of any of the several covenants or agreements hereinafter contained on the part of the lessee to repair the premises, and to preserve the said furniture, and to preserve the timber trees and other trees on the premises, and not to assign, under-let, or otherwise dispose of or part with the possession of the premises as is hereinafter more fully expressed: Then also, and on every such breach or non-performance, YIELDING AND PAYING the further additional yearly rent of £200, during the said term, on the days and in manner aforesaid; the first payment of the rent lastly hereinbefore reserved to be made on such of the aforesaid days of payment as shall happen next after any and every such breach or non-performance as aforesaid (*k*): AND THE LESSEE HEREBY COVENANTS with

Habendum.

Reddendum.

Reddendum of £100 an acre for ploughing meadow.

Reddendum of additional rent for breach of covenant.

Covenants by lessee

Separate rents for house and furniture;

(*k*) If it be desired to provide against the contingency of a severance of ownership of the house, &c., and furniture, the following proviso may be here inserted:—

"Provided always, that in case at any time during the continuance of the said term it shall so happen that the pre-

XXXIII. Lease of Mansion-house, Furniture, and Garden, &c.

the lessor, that he the lessee will pay the yearly rents hereby reserved at the times and in manner hereinbefore appointed for payment thereof respectively; And also, that the lessee will, at all times during the continuance of the term hereby created, as often as occasion shall require, at his own expense, sufficiently repair, maintain, paint, and preserve the said messuage or dwelling-house, with the stables, out-buildings, and appurtenances thereunto belonging, and all other the erections and buildings standing or being on the premises, or any part thereof; and will keep the premises, with all the walls, rails, fences, drains, sinks, sewers, and appurtenances thereunto belonging, in good and tenantable repair and condition (accidents by fire only excepted); And

to pay rents and to repair.

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mises hereby demised, other than the fixtures and articles mentioned in the said schedule, shall devolve on and become the property of a person or persons other than the person or persons who shall then be entitled to the same fixtures and articles, then the said yearly rent of £—— shall be deemed to be apportioned, so that the yearly sum of £—— or part thereof shall be deemed to be and thenceforth become and be the yearly rent payable in respect of the premises except the said fixtures and articles, and the yearly sum of £——, the remainder thereof, shall be deemed and thenceforth become and be the yearly rent or sum payable in respect of the said excepted fixtures and articles: Provided also, that in case after such severance of ownership as aforesaid the said yearly rent or sum of £—— thenceforth payable in respect of the said fixtures and articles shall be in arrear for —— days, whether legally demanded or not, it shall be lawful for the person or persons entitled to the receipt of such yearly rent or sum into or upon the said messuage and premises or any part thereof to enter and distrain, and the distress then and there found to dispose of in due course of law, to the intent that all arrears of such rent or sum, and all costs and expenses incurred by non-payment thereof and by distraining, may be thereby paid and satisfied."

See as to reserving separate rents for a house and furniture, and as to the insertion of an express power of distress for the furniture rent, *ante*, p. 430, note (*u*).

Distress on furnished house.

A furnished house, it is obvious, affords to a landlord less security for his rent than an unfurnished house, where, in general, he has the lessee's furniture to distrain; in such a case, therefore,

XXXIII. **Lease of Mansion-house, Furniture, and Garden, &c.**

will not remove, from out of the said messuage or dwelling-house and premises, any of the articles of furniture in or about the same, and which are hereby demised therewith; but will at all times, during the continuance of this present demise, carefully preserve the same furniture from being lost, or in any manner damaged or injured (reasonable use and wear thereof and accidents by fire only excepted); AND ALSO that the lessee will, from time to time during the continuance of the present demise, keep the gardens and garden ground belonging to the said messuage or dwelling-house well cropped and manured, and manage the same according to approved methods of gardening; AND that he will not cut down or destroy any of the fruit-trees or any other trees now growing, or which shall, at any time or times during the term hereby created, grow in the said gardens (except such trees as shall be decayed or shall cease to be productive of fruit), but will carefully preserve the same trees, except as aforesaid, and cause the said fruit-trees to be properly pruned at seasonable times of the year: AND that he will plant, in the place or stead of every fruit-tree which shall be decayed or become unproductive during the said term, and which shall be cut down by him or them, a thriving tree of proper growth, of the same sort of fruit: AND ALSO that the lessee will not, at any time during the continuance of this present demise, fell, cut down, lop, top, or carry away any of the timber or other trees now growing or being, and which shall at any time or times during the said term grow or be, upon the other parts of the premises, but will preserve the last-mentioned trees, and all the shrubberies, hedges, and underwood belonging to the premises from damage or injury by cattle or otherwise; AND ALSO will keep the said pleasure grounds and ornamental plot of the premises in good order, as the same have been usually kept by the lessor, and will not use the same for any other purposes than those of pleasure and ornament; nor commit, or suffer to be committed, on the premises, or any part thereof, any waste, spoil, or destruction whatsoever; AND

Not to remove furniture;

to keep the gardens in order;

to preserve the fruit-trees;

to plant fresh trees in the room of decayed trees;

not to cut timber trees;

to keep pleasure grounds in order;

not to convert land to tillage;

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it may sometimes be prudent for the lessor to require the junction of a surety for its payment. The landlord of a furnished house has a right of distress over any distrainable property of the tenant he may find upon the premises: *Newman* v. *Anderton*, 2 Bos. & P. N. R. 224, but under such circumstances it is likely to be inconsiderable.

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ALSO that the lessee will not, at any time during this present demise, plough, break up, or convert into tillage, all or any of the meadow or pasture ground hereby demised, without first obtaining the licence or consent in writing of the lessor for that purpose; AND ALSO that the lessee will, in every year during the said term, cause all the dung, manure, and compost to arise from the premises, or any part thereof, to be spread or bestowed in a husband-like manner, upon the land or ground hereby demised, on such part thereof as shall stand in most need of manure; AND that he will not in anywise impoverish or deteriorate the land or ground hereby demised, or any part thereof; but will, at all times during the said term, use, manage, and cultivate the same in a husband-like manner; AND ALSO that the lessee will not, at any time or times during the term hereby created, assign, demise, or otherwise dispose of or in any wise part with the possession of the premises, or any part thereof, to any person or persons whomsoever, for the whole or any part of the said term, without the licence of the lessor in writing first obtained for the purpose; AND ALSO that the lessee will, at the expiration or other sooner determination of the term hereby granted, peaceably and quietly yield up unto the lessor the hereby demised messuage or dwelling-house, closes, pieces, or parcels of land, wood, and premises, in good and tenantable repair and condition, together with all the fixtures, furniture, and articles specified in the schedule or inventory hereunder written; AND ALSO that the lessor shall be at liberty, either with or without workmen or others, twice in every year during the term hereby granted, at all convenient times in the day, to enter into and upon the premises, in order to view the same and examine the state and condition thereof; And in case the lessor shall find any want of repairs, and shall deliver to the lessee, or leave upon the premises, a notice in writing, enjoining him to repair the premises, then the lessee shall, within the space of two calendar months after the delivery of such notice, repair the same accordingly; AND FURTHER, that the lessee will not, during the term hereby granted, use or employ the premises, or any part thereof, or permit or suffer the same to be used or employed, for the purposes of any trade or business whatsoever; AND THE LESSOR HEREBY COVENANTS with the lessee that the lessor will discharge and pay all taxes, assessments,

to spread upon the lands the manure that shall arise therefrom;

not to assign, demise, or otherwise part with the possession;

to leave premises at the end of term;

to permit lessor to inspect repairs;

not to use premises for purposes of trade.

Covenant by lessor to pay taxes;

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and other impositions whatsoever, which now are, or shall at any time or times hereafter during the term hereby created be, taxed, charged, or imposed upon the premises, or any part thereof, or upon the landlord or tenant in respect thereof, or will from time to time allow the lessee to deduct and retain the amount of such taxes, assessments, and impositions, out of the rent which shall have become payable by him or them in respect of the same premises, by virtue of these presents, whether such taxes, assessments, and impositions shall have accrued and become payable for or in respect of and within the same period as the rent out of which the same shall be deducted or not (*l*); And also that the lessee, he paying the said yearly rents hereby reserved respectively, and observing, &c. [*continue ut ante*, p. 469]; Provided always, that if the yearly rents, or any of them, hereby reserved, or any part thereof respectively, shall be in arrear for the space of thirty days next after either of the days hereinbefore appointed for payment thereof, whether the same shall have been lawfully demanded or not; or in case default shall be made in the observance or performance of any of the covenants hereinbefore contained and on the part of the lessee to be observed and performed, then, in either of the said cases, it shall be lawful for the lessor to re-enter into the premises, or any part thereof in the name of the whole, and to re-possess and enjoy the same as in his former estate; and upon such entry the term hereby granted shall cease, determine, and be absolutely void. In witness, &c.

or allow the tenant to deduct them out of the rent;

for quiet enjoyment.

Proviso for re-entry.

The Schedule above referred to.

XXXIV. *AGREEMENT for the* Letting *of a* Brickfield *from year to year.*

AN AGREEMENT (*m*), made the —— day of ——, 18—, Between [*lessor*], of &c., of the one part; and [*lessee*], of &c., of the other part.

Parties.

(*l*) The necessity for this clause is suggested by the cases stated, *ante*, p. 246 *et seq.*

Stamp. (*m*) Stamp, *ad valorem* on yearly rent, *ante*, p. 336.

XXXIV. **Agreement for Letting a Brickfield.**

1. [*Lessor*] agrees to let, and [*lessee*] agrees to take, All that piece or parcel of ground, situate, &c., Together with full liberty to [*lessee*], his executors, administrators, and assigns to dig, work, and get clay, brick-earth, and sand therefrom; and to make, manufacture, and burn the same into bricks, pipes, and tiles; and for that purpose to erect and construct on the same piece or parcel of land such machinery, kilns, sheds, or other buildings and works as may be necessary.

Parcels.

Liberty to dig clay, and make bricks, &c.

2. The tenancy shall be for one year, commencing from the —— day of —— next, and shall continue thereafter from year to year, but shall be determinable on the —— day of ——, or the —— day of —— in any year, by either party giving to the other six months' previous notice in writing.

Term.

3. [*Lessee*] shall, during the continuance of the tenancy, pay the several rents and royalties following, that is to say: a fixed rent of £—— per annum to be paid by equal half-yearly payments on the —— day of ——, and the —— day of —— in every year without any deduction, except for landlord's property tax; and also a royalty of —— for every 1000 bricks, to be paid on the days aforesaid, on all bricks manufactured on the said piece or parcel of land during the half-year preceding each such payment.

Rent and royalties.

4. [*Lessee*] shall pay all existing and future taxes, rates, outgoings, and assessments which now are, or at any time during the continuance of this demise, shall be imposed upon or payable by either the landlord or tenant in respect of the said piece or parcel of land.

Rates and taxes.

5. [*Lessee*] will at all times during the continuance of the tenancy, unless prevented by unavoidable accident, effectually and vigorously carry on the manufacture of bricks, pipes, and tiles on the said piece or parcel of land, and not discontinue the same, unless prevented as aforesaid, for the space of more than —— weeks in any one year.

Covenants by tenant to carry on manufacture;

6. [*Lessee*] will, at his own expense, within three calendar months after any clay, brick-earth, or sand shall have been taken, to the extent of —— acres, level the ground from which the same respectively shall have been taken, and replace the whole of the surface soil removed thereupon, so as to render the surface fit for agricultural purposes.

to restore surface.

7. [*Here insert any special stipulation*].

8. Provided always, that if the rent and royalty hereinbefore reserved, or any part thereof respectively, shall be

Power of re-entry.

XXXIV. **Agreement for Letting a Brickfield.**

unpaid by the space of —— days after the same shall respectively have become payable (whether the same shall have been legally or formally demanded or not), or in case of breach by [*lessee*] of any of the foregoing stipulations or agreements on his part to be performed or observed, [*lessor*] may re-enter upon the said piece or parcel of land, or any part thereof, in the name of the whole, and thereupon this agreement shall determine and become void, but without prejudice to any remedy of [*lessor*] in respect of any breach of the said stipulations or agreements.

As witness, &c.

XXXV. *AGREEMENT for the* Lease *of a* Coal Mine.

Parties.

AN AGREEMENT (*n*), made the —— day of ——, 18—, Between [*lessor*], of, &c. (hereinafter called the lessor), of the one part; and [*lessee*], of, &c. (hereinafter called the lessee), of the other part: Whereby it is agreed and declared as follows:—

Agreement to grant and take lease.

1. The lessor will grant, and the lessee will accept, a lease (*o*), and execute a counterpart thereof of all the mines, delfs, beds, and veins of coal and cannel opened and unopened within and under the lands situate in the townships of —— and ——, in the county of ——, containing —— acres or thereabouts, and particularly described in the schedule hereunder written and delineated in the map hereunto annexed, and therein coloured —— and ——.

Liberty for lessee to enter and work mines;

2. The lessee and his agents, servants, colliers, and workmen shall have liberty to enter upon the lands aforesaid, and to dig, search for, get, win, work, make marketable, carry away, sell, and dispose of, the coal and cannel within and from and out of the same.

to sink pits, &c.;

3. The lessee shall have liberty for the purposes mentioned in clause 2 hereof to sink pits and shafts, and to erect and set

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(*n*) Stamp, *ad valorem* on *minimum* footage rent, see *ante*, p. 336.

(*o*) A form of lease framed generally in accordance with this agreement will be found, *post*, Precedent XLI., p. 559.

up engines and machinery, to divert and use mining water, and to make reservoirs, soughs, tunnels, drains, trenches, watercourses, roads, ways, docks, wharves, and other communications and conveniences in or upon the lands aforesaid: Provided always that no diversion or user of water under this clause shall infringe or affect the rights of third parties.

to erect cottages;

4. The lessee shall also have liberty to erect and build cottages or dwelling-houses for the accommodation of his colliers and workmen.

to get stone, brick clay, &c.;

5. The lessee shall have liberty, for the purposes of any of the works and operations hereby authorized, but not for the purpose of sale, to get and take stone, sand, gravel, and clay on or out of the lands aforesaid, and to erect brick-kilns and works and manufacture clay into bricks and tiles thereon.

to deposit minerals and rubbish.

6. The lessee shall have liberty to deposit at a convenient place or places upon the lands aforesaid coal and cannel gotten from the said mines, and spoil and rubbish produced in working the same, and materials used for the purposes of the works and operations hereby authorized.

Restriction on lessee's liberties.

7. No pit or shaft shall be sunk, and no engine, machinery, cottage, or other building or thing shall be erected or set up, and no stone, sand, gravel, or clay shall be gotten, and no minerals, spoil, rubbish, or materials shall be deposited, and no other work or operation affecting the surface of the lands aforesaid shall be executed or done upon any part of the same lands other than the part coloured —— in the said map without the previous consent in writing of the lessor.

Right of way for lessee to and from mines.

8. The lessee shall also have liberty for himself, his agents, servants, workmen, and customers, to pass and repass to and from the said mines and works over and along the lands aforesaid, along the road or way delineated on the said map between the points marked A and B thereon, for the purpose of carrying away the coal and cannel from the said mines and works, and of conveying materials thereto, and for any other purposes incident to any of the works and operations hereby authorized.

Liberty for lessee to remove machinery, &c, at end of term.

9. The lessee shall also have liberty at any time during, or within six months after the expiration, but not after any sooner determination of the said term, to take down, remove, and dispose of all railed roads, engines, machinery, and utensils erected or brought upon the said mines and works:

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Provided always that the lessor shall have the option of purchasing the same at a sum to be agreed upon between the parties, or, in case of disagreement, at a valuation to be made by two referees or their umpire, to be appointed in the usual manner.

Term.

10. The term shall be for —— years from the —— day of ——, 18—.

Footage rent.

11. The lessee shall during the said term, on the —— day of —— and the —— day of —— in every year, pay a footage-rent after the rate of £—— per acre for all coal and cannel which shall have been gotten and raised during the preceding half-year, including and reckoning therein all pillars, walls, and supports which the lessee may think proper to leave; but in case the footage-rent shall not in any half-year during the said term amount to the sum of £——, then the lessee shall pay such a sum as will, together with the actual footage rent amount to the clear minimum rent of £——.

Minimum rent.

Royalty on coal got by outstroke.

12. The lessee shall also pay on each of the rent days aforesaid a royalty after the rate of —— per ton for all coal, cannel, or other minerals brought to surface during the preceding half-year through the pits belonging to the said mines and works from any other mine or mines.

Average clause.

13. The lessee having paid the minimum rent under clause 11 for any half-year, shall not be liable to pay any further rent for such half-year by reason of any increased quantity of coal and cannel got by him in any subsequent half-year; but no excess of footage-rent paid for any half-year shall be allowed to make good the deficiency in any subsequent half-year.

Contents of lease: lessee's covenants.

14. The lease shall contain the following covenants by the lessee, that is to say: to pay the rents and royalties reserved thereby; to pay all taxes, rates, assessments, and outgoings, except landlord's property tax; to deliver up to the lessor peaceable possession of the mines and premises at the expiration or sooner determination of the term; to work the mines in a fair and workmanlike manner, and to have proper pillars, walls, and supports; to deliver to the lessor, within twenty days after request in writing so to do, true and exact measurements of the quantity of each mine or bed gotten since the last such admeasurement; to permit the lessor and persons authorized by him to descend into the mines and view the state and condition thereof; to make and maintain such

fences and gates as the lessor shall reasonably require on and about the mines and premises; to pay compensation for all damage sustained by the mines and works to the lessor or his lessees or tenants, such compensation (if not agreed upon) to be settled by two arbitrators or their umpire in the usual manner; to fill up and level from time to time all disused pits and roads, and at the expiration or sooner determination of the term to fill up and level all pits and holes, and as far as possible restore the surface to its present condition, unless the lessor shall otherwise direct in writing; and to permit the lessor from time to time to inspect and take copies or extracts of or from all plans and accounts relating to the mines and premises and the working and conduct thereof.

Lessor's covenant for quiet enjoyment.

15. The lease shall also contain the usual covenant by the lessor for quiet enjoyment.

Powers and provisoes.

16. The lease shall also contain the several provisoes following, that is to say: a power for the lessor, in case of default in the payment of any of the rents or royalties thereby reserved by the space of —— days after the same shall have become payable, to enter upon the mines and premises and distrain all minerals, engines, machinery, implements, utensils, and effects whatsoever, in or upon the same, and to dispose of such distress or distresses in due course of law; and a proviso for re-entry by the lessor and determination of the lease upon any such default as aforesaid, or upon breach of any of the lessee's covenants, or upon the commission by the lessee of any improper waste, or upon his becoming bankrupt or making or entering into any composition or arrangement for the benefit of his creditors.

Other clauses.

17. The lease shall also contain the usual arbitration clause and such other clauses as are usual in leases of coal mines in the county [*or* district] of ——, provided such clauses shall not be repugnant to or inconsistent with the stipulations herein contained; and the terms of all covenants, powers, and provisoes contained in the lease shall be in substance similar to such as are usually inserted in such leases of coal mines as aforesaid.

Preparation, &c., of lease.

18. The lease and counterpart shall be prepared by the lessor's solicitors, and the expenses of preparation, stamping, and execution of the same respectively, as also all expenses of and incident to this agreement, shall be borne by the

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lessee. [The lessor's title shall not be required or investigated (*p*).]

Operation of agreement.

19. These presents are intended to operate as an agreement only, and not as an actual demise of the mines and premises, nor to give to the lessee any legal interest therein until the lease shall have been created.

Disputes to be referred to arbitration.

20. All questions, disputes, or differences (if any) which shall arise between the parties hereto touching any matter or thing relating to this agreement, shall be settled by two arbitrators or their umpire, to be appointed in the usual manner.

As WITNESS, &c.

THE SCHEDULE HEREINBEFORE REFERRED TO.

XXXVI. *LEASE by way of* LICENCE *to work* COPPER, TIN, *and* LEAD MINES, *within certain Limits, during Twenty-one Years, yielding a* ROYALTY *of* ONE-FIFTEENTH *of the* PRODUCE *in* KIND *or* MONEY. *Usual Authorities to Lessees to make Shafts, Adits, &c.; use Water-courses, &c. Power for Lessor to make and use Adits, &c.; to inspect and survey Works; to* DETERMINE LICENCE *by Notice as to* ANY SETS *that may not be* DULY WORKED. COVENANTS *by* LESSEES (inter alia), *to render Royalties, pay Taxes, work Mines; to drive a certain Adit constantly; to deliver* PLANS *of* WORKS *and* ACCOUNTS. POWER *of* RE-ENTRY, ARBITRATION *Clause.*

Parties.

THIS INDENTURE (*q*), made, &c., BETWEEN [*lessor*], of, &c. (who and his heirs and assigns, unless the contrary appears, are hereinafter called the lessor), of the one part,

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(*p*) The words in brackets are necessary only in the case of an underlease, see *ante*, p. 394, note (*x*).

(*q*) This not being a lease, either in a consideration of a premium, or of a money-rent, would require a stamp of 10*s.*, as a lease not otherwise charged in the schedule to the Stamp Act: *ante*, p. 336. If a fixed money-rent were reserved as a mine-rent or surface-rent, the lease would require an *ad valorem* stamp on that rent, and it would not be safe to dispense with the stamp of 10*s.* in addition: see *Coster* v. *Cowling*, 7 Bing. 456.

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Testatum.

and [*lessees*], of &c. (who and their executors, administrators, and assigns, are hereinafter called the lessees), of the other part, WITNESSETH that, in consideration of the royalties, payments, covenants, and stipulations hereinafter reserved and contained and on the part of the lessees to be paid, observed, and performed respectively, THE lessor hereby grants unto the lessees, FULL, sole, and exclusive liberty and power to dig, work, mine, and search for copper, copper-ore, tin, tin-ore, lead, lead-ore, and all other metals, ores, and metallic minerals whatsoever (except royal metal (*r*)), within and under such parts of the farms of —— and ——, and other lands of the lessor, extending —— feet east, and —— feet west of the present —— street, in the borough of ——, and —— fathoms north, and —— fathoms south of ——; the boundaries of which are more particularly set forth in the plan delineated in the first skin hereof, and therein coloured red (*s*); doing thereby as little damage or injury as may be

Grant of license to work mines.

Reference to map.

(*r*) Vide *infra*, p. 497.

(*s*) The following is a concise form of a demise of lead and copper mines :—

"The lessor hereby demises unto the lessee all lead or copper mines, and veins, beds, nests, and bunches of lead and copper-ore, and all other mines and minerals whatsoever, lying within or under ALL (*describe the lands*) ; With liberty and power to the lessee, and his agents, servants and workmen to enter upon the said lands, or any parts or part thereof, and there to break the surface, and search for, work, win, and obtain the said ores and minerals, and for that purpose to dig, sink, drive, and make pits, shafts, drifts, headways, levels, adits, soughs, trenches, buddles, fences, and sluices, and to build and make engines, furnaces, smelting-houses, stamping-mills, ore and store houses, hovels and stables, and other erections; and to do all other things necessary or convenient, as well for working the said mines as for refining the metals and minerals, and carrying off and removing all the water, slag, rubbish, and other annoyances and troubles from the works, and for the accommodation of the persons employed therein ; With allowance also of sufficient heap-room and ground-room for laying, placing, ordering and dressing the ores, minerals, and metals, and that upon the most convenient parts of the premises ; And also

Demise of lead and copper mines.

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to the tenants or occupiers of the premises hereinbefore described, or of any part thereof; And all metals, ores, and metallic minerals (except as aforesaid, and except tin and tin ores), there found, to raise and bring to grass, and there to spall, dress, cleanse, and make fit for sale, and all tin and tin ores there found to render fit for stamping, and stamp and render fit for the smelting-house, and (subject to the reservations and covenants hereinafter contained) to carry away and convert the same to their own use; And, within the limits aforesaid, to dig, make, and drive such adits, shafts, pits, winzes, drifts, leats, or watercourses (*t*), and to make such

To dispose of all metals and ores;

to make adits, &c.

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liberty to make and set up, if judged necessary, water-engines, and to turn, change, or alter the course of water and rivulets within the limits aforesaid; And also liberty of access, ingress, egress, and regress, and passage at all times to the said *lessee*, and his servants and workmen, with or without horses or other animals, and carriages and materials of all kinds; And liberty of digging and cutting turf or peats, and of cutting and using brush or common wood for building or repairing any houses, hovels, and other offices belonging to or necessary for the said works; And all other necessary or convenient powers, authorities, privileges, and advantages: To hold and enjoy the premises, unto the lessee, for the term of twenty-one years, from the —— day of ——, 18—; Yielding, (*ut supra*)."

Explanation of some mining terms.

(*t*) A drift is a passage driven horizontally upon the vein of ore from a shaft or from some other drift: a drift leading to a vein is a cross-cut; when it traverses the plane of the vein it is usually called a level. An adit is a drift slightly inclined, and opening upon the side of a hill, and serving for the drainage of the superior parts of the mine. A single adit often serves for the drainage of a large mining district, of which the "Nant Force Level" in Alston Moor, and the "Great Adit" in the district of Gwennap, in Cornwall, are well-known examples. A winze is a perpendicular pit, joining two levels, for the windage or ventilation of both. A leat or lead is any artificial watercourse, used for turning mills, and other purposes. See, as to the construction of mining terms, *Clayton* v. *Gregson*, 5 A. & E. 302; and see *Houghton* v. *Gilbert*, 7 Car. & P. 701; *Hutchinson* v. *Bowker*, 5 M. & W. 535.

The levels or water-gates used for the purpose of draining mines are called soughs in Derbyshire, adit appearing to be a term properly confined to Cornwall and Devon. They are frequently the subject of distinct undertakings and ownerships, being projected by companies of adventurers, who carry them through

erections and buildings thereon (other than warehouses, dwelling-houses, dwelling-places, or tenements), as shall from

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extensive districts of mines, receiving remuneration from the owners of the mines "within the title" of the sough (*i. e.* drained by it) in the shape of a share (often as much as a fourth) of the ore raised from the mines, which share is called "composition ore." The right to make these soughs through the lands of the various owners appears, in some cases, to exist by custom (but see *Bastard* v. *Smith*, 2 M. & Rob. 129); in others a licence is obtained from the owners.

Prescriptive rights in flow of water through soughs and adits.

In *Arkwright* v. *Gell*, 5 M. & W. 203, it was decided, that the user by a mill-owner for more than twenty years of water issuing from a particular sough, did not give him any right to prevent the owners of the mines within the title of that sough, or adventurers undertaking the work by agreement with those owners, from diverting the drainage of the mines from the former sough into a new one, at a lower level. The decision was put by the Court on the ground, partly that the watercourse was artificial, and partly that, being created for particular purposes which were continuing purposes, any right of user of it by third persons must be subservient to the proper fulfilment of those purposes; and consequently that no rights had been acquired under the stat. 2 & 3 Will. 4, c. 71, s. 2. In a more recent case, the action was brought by a brewer, who had used for thirty-six years, without intermission, the pure water issuing from an adit, the origin of which was unknown, and which belonged to an abandoned mine, against a neighbouring mine-owner, who had opened a new mine and turned the foul water issuing from it into the adit in question. Evidence was given at the trial, of a custom in the mining districts in Cornwall, that although an adit had not been used for twenty years, the mine-owners were at liberty to resume it. *Patteson*, J., directed the jury to consider whether there was any such custom, and whether those who used the water flowing from the adit, used it subject to such custom; and that, in the absence of any custom, if an artificial stream was carried through the land of A., and A. used it for twenty years, he acquired the same right as he would in the case of a natural stream. A verdict was given for the plaintiffs, and a rule obtained to set aside the verdict, on the ground of misdirection, was subsequently discharged: *Magor* v. *Chadwick*, 11 A. & E. 571. In the course of the argument, *Patteson*, J., observed, that "*Arkwright* v. *Gell* must be taken with all its circumstances. If a branch had been made from this adit, and had lowered the stream, that case would have applied, and would raise a difficulty; but this is an action for fouling the stream." See, however, on this point, *Sutcliffe* v. *Booth*, 32 L. J., Q. B. 136; *Wood* v. *Waud*, 3 Ex. 776; *Simpson* v. *Hoddinott*, 26 L. J., C. P. 148; *Greatrex* v. *Hayward*, 3 Ex. 291.

The peculiar nature of mining property does not seem to have been sufficiently adverted to in the case of *Magor* v. *Chadwick*; and particularly the well-established rule, that a right of mining is not lost by non-user for an indefinite period, appears to have been forgotten. There can be no doubt, however, that there is no

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time to time be necessary and proper for more effectually working the lodes and mines to be worked within the limits aforesaid, and for preparing and making fit for sale, and for rendering fit for stamping, and for stamping and rendering fit for the smelting-house respectively, in manner aforesaid, the metals, ores, and metallic minerals, to be raised within the limits aforesaid, together also with the use (for the purposes of this grant only) of all such water and watercourses arising in or running through the limits aforesaid, as are not in grant, or let, or under any agreement for granting or letting to any other person or persons, at the time of the sealing and delivery of these presents: with liberty, by and with the previous consent of the lessor, or his agent or toller for the time being, in writing, to divert such water and watercourses, and to cut leats and drains for the conveying or carrying off the same, in, through, or over any part of the lands lying within the limits aforesaid; Together also with the use, for the purposes of this grant only, of such portion of the surplus waters of the —— canal and collateral cut, as in the opinion of the agent or toller for the time being of the lessor shall be proper: so, nevertheless, as not in any manner to prejudice or interfere with the property, right, and interest of the lessor in the said water of the said canal and collateral cut respectively, or in any streams, brooks, or other water belonging to the lessor, which are or shall be necessary for the supply of the navigation thereof: But always reserved out of these presents unto the lessor and his stewards, agents, tollers, tenants, servants, and others to be employed or authorized by him, full liberty at any time or times to make and drive any new adit or drift, from any adit, drift or shaft, driven or sunk, or hereafter to be driven or sunk within the limits aforesaid, and to sink any shaft whatsoever therein, and keep open, repair, and use the same adits,

Liberty to use existing watercourses not otherwise granted or leased.

Liberty to divert watercourses with consent;

and to cut drains.

Use of surplus waters of the —— canal.

Reservation of right to drive adits, &c., and to use new adits.

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essential distinction between a natural and an artificial watercourse with respect to the acquisition of rights by user: the question will depend upon the peculiar circumstances of the particular case, and the customs, if any, by which it may be affected. Thus, in the cases of the user for twenty years of water raised by a steam-engine, or flowing from the eaves of a row of houses, it is clear that no right will be acquired to insist on the continuance of the working of the engine, or to prevent an alteration of the construction of the roofs of the houses: see *Arkwright* v. *Gell*, 5 M. & W. at p. 232.

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drifts, and shafts, at his and their own will and pleasure; with power to turn the water, which shall arise within such new adit, drift, or shaft, into all or any of the adits, drifts, or shafts, now made, or which hereafter may be made under or by virtue of these presents; and to enter into and drive any such new adit in or through the lands or grounds within the limits aforesaid, or any part thereof, and to sink any shaft therein, and to convey any water or watercourse into and over the said lands or grounds, or any part thereof, in such manner as he or they shall think proper; and to make any leat whatsoever for that purpose; and to erect and support any building, flat-rod, or other machinery whatever upon or within any of the said lands for the driving of any such adit into any other lands of the lessor, or into the lands of any other person or persons whomsoever, or for any other purpose whatsoever, at his will and pleasure, doing thereby no wilful damage or injury; And also reserved power for the lessor, and his stewards, agents, tollers, tenants, and workmen, and others to be authorized by him or them, from time to time and at all times during the continuance of the powers and privileges hereby given, to go into, inspect, examine, measure, level, and dial all or any part of the adits, shafts, drifts, and other workings within the lands or grounds aforesaid, and for such purposes to make use of all or any ladders, ribbals, ropes, tackle, whims (*u*), and other things therein and thereupon, without prejudice or hindrance to the working of the said lodes and mines (*x*); And also reserved to the lessor, upon his or his agent, giving three months' previous notice of the intended exercise of the power next

Reservation to lessor of power to inspect mines.

Power for lessor to determine licence as to particular

(*u*) A whim is a kind of capstan, worked by horses, called in the north of England a whimsey or gin. Ribbals, or kibbles, are large iron buckets, worked by the whim. Mining terms.

(*x*) It is sometimes the practice to except and reserve the royalty of one-fifteenth of all the ores brought to the surface in a dressed and merchantable form; but this form of reservation, though usual in leases granted in Cornwall and Devonshire, is obviously erroneous and inconsistent, inasmuch as the lessees would not be at liberty to win and bring to the surface anything excepted from the licence. The exception is also incompatible with the subsequent *reddendum* of the same fifteenth, or its value in money. The cases in which royalties were held to be rateable as exceptions out of the demise (*infra*, p. 495 n.), do not, it is conceived, bear upon this question. Mode of reserving royalties.

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hereinafter mentioned, to the lessees, in manner hereinafter provided, or affixing such notice in some conspicuous place within the limits aforesaid, power to annul and make void the powers and privileges hereby granted, as to such of the hereinbefore mentioned mines or sets as shall not have been duly and effectually pursued and wrought, and continued to be pursued and wrought, by the lessees, according to the covenants and provisoes herein contained (*y*): To HOLD

sets, by notice, in case they are not duly worked.

Nature of the interest conferred by a mining licence.

(*y*) The grant in the above precedent does not, of itself, confer any estate in the mines or subsoil, but is merely "a grant of a licence to search and get (irrevocable, indeed, on account of its carrying an interest); with a grant of such of the ore as should be found or got; the grantor parting with no estate or interest in the mines, metals, and minerals:" *Doe* d. *Handley* v. *Wood*, 2 B. & Al. 724: see *Norway* v. *Rowe*, 19 Ves. 158; *R.* v. *Baptist Mills Co.*, 1 Mau. & S. 612; *R.* v. *St. Austell*, 5 B. & Al. 693.

Licensee has not necessarily an exclusive right.

It follows that, unless the grant is in terms of an exclusive right, the grantor may himself dig or grant licences to others to dig within the same bounds, the right conferred by such a licence being analogous to a right of common *sans nombre*. Thus, in *Lord Mountjoy's case*, 4 Leon. 147, it is stated, that, notwithstanding such a reservation in a grant of land, the grantees of the land might dig there: see also *Chetham* v. *Williamson*, 4 East, 468; *Carr* v. *Benson*, L. R. 3 Ch. A. 524.

Whether it be a grant or a reservation, the intention must govern the construction: see *Doe* d. *Handley* v. *Wood*, 2 B. & Al. 724; *Earl of Cardigan* v. *Armitage*, 2 B. & C. 197.

Licence is assignable.

Such a grant or reservation to a man, his heirs and assigns, confers an interest which is an hereditament (*Jones* v. *Reynolds*, 7 Car. & P. 335), and is assignable by deed: *Lord Mountjoy's case*, 4 Leon. 147; *Harker* v. *Birkbeck*, 3 Burr. 1556; *Muskett* v. *Hill*, 5 Bing. N. C. 694; see *Doe* d. *Earl of Falmouth* v. *Alderson*, 1 M. & W. 211, n. (*b*); and *Stoughton* v. *Leigh*, 1 Taun. 410. Where the reservation was to A. and his heirs, during the time that he and his heirs should continue owners of the demesne lands of F., it was held, that the right passed to an alienee of the demesne lands of F.: *Earl of Cardigan* v. *Armitage*, 2 B. & C. 197.

Whether covenants run with the land.

Covenants can be annexed to a licence so as to run with the land: *Norval* v. *Pascoe*, 34 L. J. Ch. 82. And it seems that the rule applies equally to freehold as to leasehold interests: see *The Earl of Portmore* v. *Bunn*, 1 B. & C. 694; *Aspden* v. *Sedden*, 1 Ex. D. 496. By the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sect. 2 (xi.), a mining lease includes a grant or *licence* for mining purposes, and by sects. 10 and 11 of that Act, the benefit of lessee's covenants and the obligation of lessor's covenants run with the reversion, where the lease was made after the 31st of December, 1880; see *ante*, p. 233.

What amounts to occupation under a licence

If the lessee or licensee of mines under a down, merely digs holes in the down, to ascertain the nature of the property, and fills them up immediately, this is not a taking of possession which

AND ENJOY all and singular the licences, powers, and privileges hereby granted (subject as aforesaid) unto the

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Habendum.

will make him liable for use and occupation: *Jones* v. *Reynolds*, 7 Car. & P. 335.

When licence becomes possession.

The precise point at which the mere licence, which has been mentioned, becomes converted into an actual possession of, or estate in, the mine, is not always of easy determination. *Primâ facie*, the possession of an unopened mine follows the possession of the surface; and a copyholder, although the property of the mines is in the lord, and by opening a mine the tenant commits waste, may maintain trespass against the owner of an adjoining mine for entering the subsoil from his own land, notwithstanding that no trespass is committed on the surface: *Lewis* v. *Branthwaite*, 2 B. & Ad. 437; and a copyholder may restrain the lord or his lessees from conveying minerals from adjoining non-manorial mines under the copyhold lands: *Eardley* v. *Earl Granville*, 3 Ch. D. 826. As to stealing ore and malicious injuries to mines, see the stat. 24 & 25 Vict. c. 96, ss. 38, 39; and 24 & 25 Vict. c. 97, ss. 11, 12, 27, 29.

When licensee could sue in trespass.

In *Harker* v. *Birkbeck*, 3 Burr. 1556, it was held, that a licensee of the exclusive right of mining within a certain district might sue an intruder in trespass, for by entry the licensee acquired possession of the mine. See further, as to the distinction between grants and licences, *post*, tit. LICENCES. The personal representatives of a party who has intruded into a mine, and dug and sold coal, are liable for the value in an action for money had and received; and the right to bring such an action is not affected by previously bringing an action of trespass against them: *Powell* v. *Rees*, 7 A. & E. 426.

The damages in trespass for entering from a neighbouring mine, and raising the ore, are estimated according to the value of the ore, without deducting the expense of raising it: *Martin* v. *Porter*, 5 M. & W. 352.

When court interferes in case of mines.

Where the owner of coal-mines is unable to ascertain, by observations upon his own land, whether or not any trespass has been committed from a neighbouring mine, he may, upon showing to the Court good ground of suspicion, obtain an order to inspect the adjoining workings; and if the defendant has caused any obstruction to the inspection, as, by destroying the air courses, or blocking up the passages, he will be ordered to remove such obstructions: *Earl of Lonsdale* v. *Curwen*, 3 Bli. 168 n.; see also *Bennett* v. *Whitehouse*, 28 Beav. 119. Sometimes the Court will order a mutual inspection: *Walker* v. *Fletcher*, 3 Bli. 172, n. The Court will, it seems, enforce the order by process of contempt, and will not direct a forcible entry: *East India Co.* v. *Kynaston*, 3 Swan. 248.

In *Doe* d. *Handley* v. *Wood* (2 B. & Al. 724), *Abbott*, C. J., said, "If the deed operated as a licence only, then, admitting that a party claiming under such a deed, and who should have actually opened and worked, and should be in the actual possession of a mine, might, if ousted of such possession, maintain an ejectment, yet such a right would not sustain the present action, inasmuch as the defendant was not shown to be in possession of any mine worked

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lessees from the —— day of ——, 18—, for the term of twenty-one years from thence next ensuing; YIELDING

under the deed in question, but only of other mines and parts of the metals and minerals lying at a distance from the workings of the grantor, and which workings had even been long abandoned by him. It is our opinion that this deed operates as a licence only." In *Muskett* v. *Hill*, 5 Bing. N. C. 694, there was a licence similar to that in *Doe* v. *Wood*, with a power of re-entry after notice for breach of condition, and the grantor having given a notice which was void, and, in pursuance of such notice, expelled the grantee's workmen from the mine, and afterwards refused to allow the grantee access, it was held, that that refusal was not such a continued trespass, as to make it necessary for the grantee to sue in trespass, and not in case, but that he might sue in either form at his election. Again, where ejectment was brought for land and mines, a consent-rule entered into by the defendant to defend for "a certain tin bound in the parish of, &c." (setting out the abuttals), "containing a certain mine, &c.," was held insufficient, on the ground that ejectment would not lie for a tin bound; the defence should have been for the mine actually worked within the bound: *Doe* d. *Earl of Falmouth* v. *Alderson*, 1 M. & W. 210.

Tin bound.

A tin bound is an exclusive liberty of mining within certain limits, which is called in Cumberland a "square lease," as distinguished from a licence to work a particular vein, and so many fathoms on each side of it. As to the laws regulating the acquisition of rights of mining within certain bounds, and the privileges of the free miners there, see 3 Bl. Com.; *Rowe* v. *Brenton*, 3 M. & Ry. 133, 214, n.; 8 B. & C. 737; and the stat. 32 & 33 Vict. c. 19, for enlarging the jurisdiction of, and amending the proceedings in, the Stannary Courts. With regard to Devon, the Stannary customs appear to retain some of their ancient rudeness: see *Bastard* v. *Smith*, 2 M. & Rob. 129, which was a decision against a claim on the part of the miners of Devon, of a prescriptive right to divert streams into their mines, and for that purpose to dig trenches over other persons' lands: see *R.* v. *Harris*, 4 Jur. 459.

Stannaries, &c.

Royalties in mining leases; use and occupation.

The annual payment which is reserved upon a licence to dig for minerals, &c., is of the nature of a rent, and will pass with the land: see *Ex parte Hankey*, 1 Mont. & M. 247. After the licence has been actually exercised, an action for use and occupation may be brought: *Jones* v. *Reynolds*, 7 Car. & P. 335.

Interest in mines:—free miners.

Where it was a custom (in the Forest of Dean) for certain persons, called free miners, to have the right of applying to the gaveller of the hundred to allot to them a spot for a coal pit, and when the spot was agreed upon the gaveller cut a turf, and cut so many notches in a stick as there were to be partners in the intended work, and also one for the king, and one for the gaveller, and the stick was then fastened down with pegs on the spot where the turf had been pared, and the turf replaced, after which the spot was considered as appropriated; and it was proved that reputation was, that this was freehold property, and generally on the death of the first adventurer went to his eldest son; and that formerly the only mode of transfer was delivery of possession of the wind-

AND PAYING therefor one fifteenth part (the whole into fifteen equal parts to be divided) of all such copper and

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lass; but of late years feoffments, &c., had been used; it was held, that the interest was of the same kind as the right which exists among the miners in the Peak of Derbyshire, and freehold property: *Doe* d. *Thompson* v. *Pearce*, Peake Add. Ca. 242. By the stat. 1 & 2 Vict. c. 43, provision is made for the regulation of the future opening and working of mines in the *Forest of Dean* and Hundred of *St. Briavels*, by commissioners appointed by that Act; after the making of whose award the customs are to cease. See also the amending statutes, 24 & 25 Vict. c. 40; 34 & 35 Vict. c. 85; and see *Elway* v. *Davis*, L. R. 16 Eq. 294; *James* v. *The Queen*, L. R. 5 Ch. A. 153; *Re Brain*, L. R. 18 Eq. 389; *Rose* v. *Rugge Price*, 1 Ex. D. 269.

Dower of mines.

In the case of *Stoughton* v. *Leigh*, 1 Taun. 410, it was held that a widow was dowable of all the deceased's mines, as well those which were in his own landed estates, as the mines and strata in the lands of other persons, which had in fact been opened and wrought before his death, and wherein he had an estate of inheritance during the coverture; but that she was not dowable of any of the mines or strata which had not been opened at all, whether in lease or not.

Tithes of mines.

Mines, being the substance and not the increase of the earth, are not titheable, except in particular places by special custom, or by local Act: Co. Lit. 651, 664; *Stoutfield's case*, 1 E. & Y. 480. Such tithes cannot be made the subject of compulsory commutation under the stat. 6 & 7 Will. 4, c. 71, s. 90, but there is a special provision for a voluntary commutation in respect of them, in the amending statute of the 2 & 3 Vict. c. 62, s. 9.

Rateability of mines.

A reservation, in a licence to mine, of a share of the ore raised, or an equivalent in money, is an exception out of the demise, which makes the lessor rateable as an occupier of land: *R.* v. *St. Austell*, 5 B. & Al. 693; see *R.* v. *Tremayne*, 4 B. & Ad. 170. As to the rateability of mines, see also *Rowls* v. *Gells*, Cowp. 453; *R.* v. *Lord Granville*, 9 B. & C. 188; *R.* v. *Bilston*, 5 B. & C. 851; *R.* v. *Bedworth*, 8 East, 387; *R.* v. *Foleshill*, 2 A. & E. 593; *R.* v. *Earl Pomfret*, 5 Mau. & S. 139; *Morgan* v. *Crawshay*, L. R. 5 H. L. 304; and stat. 37 & 38 Vict. c. 54: see also *Van Mining Co.* v. *Llanidloes (Overseers)*, 1 Ex. D. 310; *Duke of Devonshire* v. *Barrow; Hematite Steel Co.*, 2 Q. B. D. 286.

Mine under railway.

It has been held that an owner of land which had been taken by a railway company, is not entitled to further compensation on discovering that a mine (excepted from the conveyance by the Act) could not be worked without damage to the railway: *R.* v. *Leeds and Selby Rail. Co.*, 3 A. & E. 683.

Disclosure of mines or mining rights in contracts for sale of land.

A purchaser who is acquainted with the existence of a mine in the land he is purchasing, is not bound to give information of it to the vendor: *Fox* v. *Macreth*, 2 Bro. C. C. 420; *Turner* v. *Harvey*, Jac. 178; and see *ante*, Vol. II. p. 598. The undisclosed existence of a right to dig for mines is a ground for setting the contract aside: *Seaman* v. *Vawdrey*, 16 Ves. 390. The case of *Lydall* v. *Weston*, 2 Atk. 19, where such a right on the part of the Crown,

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copper-ore as shall at any time or times be dug, broken, raised, or gotten within the limits aforesaid, on the grass, at

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was held to be no objection to a title, on the ground of there having been no search made for a century, seems scarcely reconcilable without authority: see *Seaman* v. *Vawdrey*, 16 Ves. 390.

Presumptions as to right of mining.

A right of mining will not be barred by non-user for a long period; and a grant of such a right will be presumed from uninterrupted user for a sufficient time: see *Rowe* v. *Grenfell*, Ry. & M. 396; *Curtis* v. *Daniel*, 10 East, 273; *Rowe* v. *Brenton*, 8 B. & C. 737. A grant of mines will not be presumed against an express reservation, although the party entitled to the benefit of the reservation stands by during the expenditure of the persons in possession: *Adair* v. *Shaftoe*, cit. 19 Ves. 156. Though a right of mining will not be lost by laches, the Court will not assist a person who has stood by while another has expended his capital in making the mine profitable, either by appointing a receiver, or by injunction, or perhaps even by decree: *Senhouse* v. *Christian*, 1 T. R. 560, cit. *Norway* v. *Rowe*, 19 Ves. 158; *Field* v. *Beaumont*, 1 Swan. 208; *Parrot* v. *Palmer*, 3 Myl. & K. 640.

Effect of inclosure.

An inclosure act, which directed that the allotment of each commoner should be deemed to be within the township wherein the lands lay, was held to affect the surface only, and not mines under it, belonging to other persons: *R.* v. *Pitt*, 5 B. & Ad. 565.

Rights conferred by a licence to mine.

A grant or reservation of a right of mining implies what is necessary for the convenient working of the mine—a right of entering and breaking the surface (unless it be a right of continuing mines already opened into other land)—a right of way for carrying away the ore, &c.; *Simpson* v. *Telwright*, 2 Lutw. 1247; *ante*, p. 133; but it implies no more. "It would allow no use of the surface; no deposit upon it to a greater extent, or for a longer duration, than should be necessary; no attendance upon the land of unnecessary persons. It would be questionable, at least, whether it would authorize a deposit upon the land for the purposes of sale, and whether it would justify the introduction of purchasers to view the coals:" *Earl of Cardigan* v. *Armitage*, 2 B. & C. 211. Any special powers given for the purpose of working the mine will enlarge simply, and not control this implied power: *Ib.*; *Hodgson* v. *Field*, 7 East, 613. The right of way which the lessee has, either by implication or express contract, is for the purpose of working the mine in respect of which it is granted; and therefore cannot, it seems, be properly let to the owner of a neighbouring mine: or at least such letting would be determinable by either party, at any time: but where the owner of a mine then in lease made a grant of the use of the waggonways for a term of years, and afterwards acquired the possession from the lessees, who had also granted the same liberty to the same parties, he was restrained from removing the materials and destroying the way; although, it was said, his lessees, during their term, might have done so: *Newmarch* v. *Brandling*, 3 Swan. 99. As to whether the blocks, sleepers, &c., of a road are removable by a tenant, see *Lowther* v. *Cavendish*, 1 Ed. 118.

Implied powers not controlled by express powers.

Right of way.

Injuries by mining.

The mines must be so worked as to leave a reasonable support for

the stamps, or at the scales, when made merchantable, either on the mine or at the place where the same shall be carried

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the surface; and any damage consequent upon negligent working in this respect will not come within a proviso for compensation for damage done to the surface in working the mines: *Harris* v. *Ryding*, 5 M. & W. 66. See further as to damage by working a mine, *Hodgson* v. *Field*, 7 East, 613; *Wyrley and Essington Canal Co.* v. *Bradley*, 7 East, 368; *R.* v. *Birmingham Canal Co.*, 2 B. & Ad. 570; *Bowler* v. *Wolley*, 15 East, 444; *Dudley Canal Co.* v. *Grazebrook*, 1 B. & Ad. 59; *R.* v. *Leeds and Selby Rail. Co.*, 3 A. & E. 683; *Raine* v. *Alderson*, 4 Bing. N. C. 702; and *ante*, p. 493. As to the construction of clauses restraining the exercise of a right of mining within a certain distance from a mansion-house, &c., see *Bowler* v. *Wolley*, 15 East, 444.

Royal mines and metals.

As an appendage to the prerogative of coining, the Crown is entitled to all mines of gold and silver, which, by the common law, included mines of copper, tin and lead, containing gold or silver: Plowd. 339. The law is now regulated by the statutes 1 W. & M. c. 20, s. 4, and 5 & 6 W. & M. c. 6, s. 2, which enact, that mines of copper, tin, iron, or lead, may be worked by the proprietors, notwithstanding they may be claimed as royal mines; provided that their Majesties, and all claiming royal mines under them, may have the ore of such mines (other than the tin ore in the counties of Devon and Cornwall), paying to the proprietors certain specified rates; as to which see also 55 Geo. 3, c. 134. The king's grant of mines will not carry royal mines unless they are named: Plowd. 336. As a necessary consequence of the reasoning on which is founded a right to the mine, it follows that the Crown has a right to dig for and open mines on a subject's land, or to grant licence to another to do so, as well as to work mines already opened: *Case of Mines*, Plowd. 313. *Lyddal* v. *Weston*, 9 Atk. 12, *contrà*, seems to be erroneous: see *Seaman* v. *Vawdrey*, 16 Ves. 393.

Construction of Crown grants of mines.

Who entitled to mines

Subject to the above-mentioned prerogative, the property of all mines is *primâ facie* in the owner of the soil: Co. Litt. 4 a; see *Rowe* v. *Brenton*, 8 B. & C. 737; *Rowe* v. *Grenfell*, Ry. & M. 396. To open new mines is waste (Co. Litt. 52 a; *Campbell* v. *Leach*, Amb. 740; *Whitfield* v. *Bewitt*, 2 P. Wms. 242), although mines are mentioned in the general words; but a tenant for life (impeachable of waste) may work mines, quarries, or clay pits, already opened, and do all necessary acts, as sinking shafts, &c., for that purpose: *Clavering* v. *Clavering*, 2 P. Wms. 388. And it is said, that a tenant for years may take as much coal, iron, and stone as are necessary for his own use: Bac. Abr. 816; and may dig for gravel and clay for repairs on the estate, although no pits are open: Co. Litt. 53 b. In a later case the question arose, whether a tenant for life could re-open or work old abandoned pits and mines, or open pits or mines, for the working of which the author of the gift for life had only made preparations. An injunction was granted, until further inquiry should be made as to the state of the pit at the time of the death of the author of the gift: *Viner* v. *Vaughan*, 2 Beav. 466.

tenant for life. Distinction between opened and unopened mines.

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for the sampling and sale thereof, free and clear of all costs, charges, and expenses whatsoever; AND ALSO YIELDING AND

Even when a tenant for life was unimpeachable of waste, he was restrained from digging up pasture land for brick-earth: *Bishop of London* v. *Webb*, 1 P. Wms. 527. There may be a distinction between clay and gravel pits, where there is an extensive disruption of the surface for a temporary benefit, and mines, where the damage to the surface is comparatively trifling. A tenant for life, who has granted a lease of mines amounting to forfeiture, cannot have an injunction against his lessee by joining the remainderman, any more than if he had sold timber; and it is collusive if they join: *Wentworth* v. *Turner*, 3 Ves. 3.

What mines included in a lease of mines.

A lease of land, and all mines therein, confers no right to open mines, unless there are no mines open at the time of the lease; and a lessee of the lands may work open mines although they are not named: *Saunders's case*, 5 Rep. 12; *Astry* v. *Ballard*, 2 Lev. 185. So, a power to lease lands has been held to be confined to opened mines, unless it expressly includes unopened mines: *Campbell* v. *Leach*, Amb. 740; but now a tenant for life may grant leases of unopened as well as opened mines by virtue of his statutory power under the Settled Land Act, 1882, see *ante*, p. 33. The tenant cannot take timber to use in the mines which he is entitled to work: *Daveye's case*, Hutt. 19; Hob. n. 298.

Power to lease mines.

Right of re-entry.

As to rights of re-entry under leases, &c., of mines, see *Doe* v. *Wood*, 2 B. & Al. 724; *Roberts* v. *Davey*, 4 B. & Ad. 665.

Mortgagee of mines.

A mortgagee in possession of mines open and worked must carry them on, but is not bound to expend more than a prudent owner; any speculation will be at his own risk, and he will not be liable for letting pass an opportunity of making a great probable gain by a large expenditure: *Rowe* v. *Wood*, 2 J. & W. 555; see also *Marriott* v. *Anchor Reversionary Co.*, 3 Giff. 304. The same rule applies to a tenant for life: *Rowe* v. *Wood*, 2 J. & W. 553. A mortgagee opening or working mines, which were not open or worked when he took possession, does so at his own risk, and he is not entitled to do so at all unless he can show that his security is deficient: *Millett* v. *Davey*, 31 Beav. 470; see also *Hughes* v. *Williams*, 12 Ves. 493; *Thorneycroft* v. *Crockett*, 2 H. L. C. 239.

Mines belonging to lunatics and infants.

As to the management of mines belonging to a lunatic, see *Ex parte Tabbart*, 6 Ves. 428; and as to leases of mines belonging to infants, *vide ante*, p. 64.

Mines in copyhold lands.

The property of mines in copyhold lands is in the lord of the manor, but the possession is in the tenant, who may maintain trespass against the owner of an adjoining mine for breaking and entering the sub-soil, although he commits no trespass on the surface: *Lewis* v. *Branthwaite*, 2 B. & Ad. 437. The lord, therefore, cannot, without a special custom to do so, enter upon the land of the tenants and dig for minerals without their licence; and, on the other hand, without a special custom or licence, it is waste if the copyholder opens new mines, although he may work mines already opened: *Saunders's case*, 5 Rep. 12; Co. Litt. 54 b; *Bishop of Winchester* v. *Knight*, 1 P. Wms. 406; *Grey* v. *Duke of*

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PAYING and delivering therefor one-fifteenth part (the whole into fifteen equal parts to be divided) of all such tin and tin-

Northumberland, 13 Ves. 236; *Richards* v. *Noble*, 17 Ves. 281; *Bourne* v. *Taylor*, 10 East, 189; see *Whitechurch* v. *Holworthy*, 19 Ves. 213; *Rowe* v. *Brenton*, 8 B. & C. 737. There may be a custom for the lord to have mines of one metal, and for the tenant to have mines of another: *Curtis* v. *Daniel*, 10 East, 277. Where large masses of stone had fallen upon a copyhold field, from time to time, from some cliffs above, and there was no evidence to show the time when any particular portion of them fell, it was held, that they belonged to the lord, and the value of them was recoverable by him, in trover, from the copyholder, who had removed them for his own profit: *Dearden* v. *Evans*, 5 M. & W. 11. It seems he might have removed them for the improvement of the close: *Ib.* A copyholder may dig marl, &c., for manure: see *Paxton's case*, 1 Bac. Ab. 267, pl. 1; Co. Litt. 53 b.

Injunction against working mines.

The Court will not generally interpose by injunction to suspend the working of a mine already opened, on account of the mischief that ensues to the work from such suspension; *Anon.* Amb. 209; *Clavering* v. *Clavering*, 2 P. Wms. 388; but it will restrain the opening of a new mine by a person not entitled: *Grey* v. *Duke of Northumberland*, 13 Ves. 237; see *Richards* v. *Noble*, 3 Mer. 656. But even in such a case there must be no delay in going to trial at law, for the value of the opportunity of opening a mine may depend upon temporary circumstances: *Richards* v. *Noble*, 17 Ves. 281; *Field* v. *Beaumont*, 1 Swan. 208; and the right to an injunction may be lost by laches: *Birmingham Canal Co.* v. *Lloyd*, 18 Ves. 515; *Field* v. *Beaumont*, 1 Swan. 208. So, on account of the irreparable mischief that might be committed before any trial could be had, an injunction will go to restrain trespass by working from adjoining land: and where a tenant had taken coal out of the close demised to him, and also out of an adjoining close belonging to the landlord, an injunction was granted to restrain both the waste and the trespass: *Flaming's case*, cit. 7 Ves. 307; *Mitchell* v. *Dors*, 6 Ves. 147; *Field* v. *Beaumont*, 1 Swan. 208. And where one had a right to take stone from a quarry for building on a certain farm, an injunction was granted against a trespass by taking stone for other purposes: *Thomas* v. *Oakley*, 18 Ves. 184.

Account in respect of mines.

It has been held that mines constitute a kind of trading concern, as to which there may be an account, even where no injunction would lie: *Bishop of Winchester* v. *Knight*, 1 P. Wms. 406; *Sayer* v. *Pierce*, 1 Ves. sen. 232; *Pulteney* v. *Warren*, 6 Ves. 89; *Lansdowne* v. *Lansdowne*, 1 Madd. 116; *Williams* v. *Attenborough*, Turn. & R. 73; *Rose* v. *Nixon*, 1 J. & W. 302; *Rowe* v. *Wood*, 2 J. & W. 553; *Parrott* v. *Palmer*, 3 My. & K. 640. The right to an account, as well as to an injunction, may of course be lost by laches: *Birmingham Canal Co.* v. *Lloyd*, 18 Ves. 515.

Partnership in mines.

The ownership and working of mines by several persons is not generally a mere interest in common in land, of which partition can be made, but, for some purposes at least, a partnership—in the trade of manufacturing and bringing to market the produce of the land as

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ore as shall at any time or times be dug, broken, raised, or gotten within the limits aforesaid, in such form as the said

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one common fund to be sold for the common benefit—under which a sale of the mines may be had : *Crawshay* v. *Maule*, 1 Swan. 518. Accordingly, as has been seen, an account of profits may be had ; but where part owners cannot agree upon the management, a receiver and manager will not be appointed, except where a dissolution of a partnership is sought : see *Jefferys* v. *Smith*, 1 J. & W. 298 ; *Roberts* v. *Eberhardt*, Kay, 148. Again, the purchaser of a mine is not entitled, as in other cases of sales of real estate, to the profits from the last quarter-day, but from the commencement of the month or week in which the sale took place, according to the usual course of taking the accounts : *Wren* v. *Kirton*, 8 Ves. 502 ; *Williams* v. *Attenborough*, T. & R. 70. See further as to the relations of co-owners of mines to each other and to strangers, *post*, tit. "PARTNERSHIP," &c.

Destination of real property held for partnership purposes.

"The general principle is, that all property acquired for the purpose of a trading concern, whether it be of a personal or real nature, is to be considered as partnership property, and is to be first applied accordingly in satisfaction of the demands of the partnership. It is true, a mining concern differs in some particulars from a common partnership—the shares are assignable, and the death or bankruptcy of the holder of shares does not operate as a dissolution ; but it has been repeatedly held to be in the nature of a trading concern. In *Crawshay* v. *Maule*, Lord *Eldon* expressed a doubt, whether, if persons previously entitled as tenants in common to mines were to form a mining concern, the general principles of a partnership would apply to such a case ; and I am not aware that the particular point has ever been decided ; but the distinction here is, that the interest in the mines was expressly acquired for the purpose of a partnership, and the general principle is therefore to be applied to it." *Per* Sir *J. Leach*, M. R., *Fereday* v. *Wightwick*, 1 Russ. & M. 49. Generally, the devoting of real estate already acquired to partnership purposes is not sufficient to make it part of the partnership stock, so as to effect its absolute conversion (as between the real and personal representatives of each partner), the rule is otherwise if it has been acquired by purchase or otherwise for the purposes of the partnership fund ; but such conversion may, in any case, be made by express stipulation, or by proof of intention. Upon this subject see *Phillips* v. *Phillips*, 1 My. & K. 649 ; *Townshend* v. *Devaynes*, cit. 1 My. & K. 665 ; *Broom* v. *Broom*, 3 My. & K. 443 ; *Morris* v. *Kersley*, 2 Y. & C. 139 ; *Bligh* v. *Brent*, 2 Y. & C. 268 ; *Darby* v. *Darby*, 3 Drew. 495 ; *Essex* v. *Essex*, 20 Beav. 442 ; *Waterer* v. *Waterer*, L. R. 15 Eq. 402 ; *Steward* v. *Blakeway*, L. R. 4 Ch. A. 603 : and see *post*, tit. "PARTNERSHIP," &c.

Liability of shareholders for supplies.

One of the rules of ordinary partnership, which is applicable to mining concerns, is a liability of a shareholder, or a person who has held himself out to the world as a shareholder, for supplies furnished to the concern. As to what is sufficient at law to establish an interest in a mine for this purpose, see *Vice* v. *Lady Anson*, 7 B. & C. 409 ; *Vice* v. *Fleming*, 1 Y. & J. 229 ; *Dickinson*

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lessees shall sell or dispose of such tin and tin-ore, whether stuff or stamped, or in white tin at the smelting-house, free and clear of all expenses, costs, and charges whatsoever; AND ALSO YIELDING AND PAYING and delivering therefor one-fifteenth part (the whole into fifteen equal parts to be divided) of all such lead and lead-ore, and other metals, ores, and metallic minerals as shall at any time or times be dug, broken, raised, or gotten within the limits aforesaid, to be taken in and from such ores, metals, and minerals, on the mines when made merchantable, at the scales immediately after the weighing thereof, free from all costs, charges, and expenses (*g*); Or (if the lessor shall, at any time or times during the term hereby granted, desire to have the value of the hereinbefore reserved part or parts respectively of the said metals, ores, and metallic minerals, or any of them in money, and of such desire shall, from time to time, give or leave notice in manner hereinafter provided; THEN and in every such case, from and after the expiration of two calendar months after notice given or left as aforesaid, and until two calendar months next after the same shall have been revoked or countermanded by the lessor, by notice to be so given or left as aforesaid; YIELDING AND PAYING, in

Or an equivalent in money at the lessor's option to be signified by leaving a written notice.

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v. *Valpy*, 10 B. & C. 128; see also *Dawson* v. *Rishworth*, 1 B. & Ad. 574; *Jefferys* v. *Smith*, 1 J. & W. 298. Shareholders in a mining concern have no power to bind each other by drawing and accepting bills, such power not being generally required in such a business: *Dickinson* v. *Valpy*, 10 B. & C. 128; *Ducany* v. *Gill*, 4 Car. & P. 120; see *Edmunds* v. *Bushell*, L. R. 1 Q. B. 97.

Drawing and accepting bills.

A mining company differs, as has been observed, from an ordinary partnership in this respect also, that each shareholder may dispose of his interest without the consent of his copartners. As to the specific performance of contracts for the sale of shares in mines, see *Stevens* v. *Guppy*, 3 Russ. 171. And see, as to a proviso for pre-emption of any partner's share, *Ex parte Broadbent*, 1 Mont. & A. 635.

Transfer of mining shares.

See further on the subject of mining partnerships, Bainbridge on Mines, p. 540 *et seq.*; and Lindley on Partnership, 61 *et seq.*

(*g*) A reservation of a proportion of the produce of a mine as royalty is a good reservation, under a power to lease at the best rent: *Campbell* v. *Leach*, Amb. 740, 748. What is a proper proportion depends, of course, upon the circumstances:—In Cornwall the expense of working seldom allows a render of more than one-fifteenth of the produce, sometimes not more than half of that; in the north of England, where the mines lie in beds, which are shallow and easily worked, a seventh or an eighth is often paid to the proprietor.

Reservation in a mining lease under a power.

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lieu of the hereinbefore reserved part or parts respectively of the said metals, ores, and metallic minerals, or such of them in respect of which such notice to pay the value thereof in money shall be given or left as aforesaid, such sum or sums of money as shall be equal to the full value of the hereinbefore reserved part or parts respectively, free from all costs, charges, and expenses whatsoever, except a proportionate part of the carriage to quay, quay dues, sampling expenses, and samplers' fees: The several and respective parts, shares, dues, royalties, or sums of money hereinbefore respectively reserved, to be payable on the 31st day of December, the 31st day of March, the 30th day of June, and the 30th day of September, during the said term of twenty-one years, or oftener if and as often as any such ores, metals, or minerals as aforesaid shall be on the mine or place of sale, and made merchantable; AND the lessees do hereby severally covenant with the lessor, in manner following: that is to say, That they the lessees will, during the continuance of the said term, pay and deliver unto the lessor, or his agent or toller for the time being, the full parts, shares, dues, and royalties, hereinbefore respectively reserved, in manner aforesaid; or, at the election of the lessor, will pay the hereinbefore respectively reserved parts, shares, dues, and royalties, in money, at such best price as the same can from time to time be sold for, at the respective times hereinbefore mentioned for the payment of the same, or within two months after such copper, tin, lead, and other metals, ores, and metallic minerals, shall be returned and sold as aforesaid; AND ALSO that they the lessees will give four days' notice in writing to the lessor, or his agent or toller, of the time of the weighing or division of the copper, copper-ore, tin, tin-ore, lead, lead-ore, and other metals, ores, and metallic minerals to be raised and gotten by virtue of these presents; AND ALSO that they the lessees will pay and discharge all rates, taxes, and assessments, parliamentary or parochial, which now are or which at any time during the said term shall be taxed, charged, assessed, or imposed upon the said ores, metals, and minerals, or the money which shall arise from the sale thereof, or the dues hereby reserved, or upon the lessor for or in respect of the same; AND ALSO that they the lessees will, at all times during the said term, well and effectually, and without intermission, work all lodes or mines now being worked within the limits

Covenants by lessees:

to render royalties;

to give to lessor notice of times of weighing and dividing the ores;

to pay taxes charged in respect of the ores;

to work all mines within the limits during the term;

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aforesaid, and all and singular other the lodes or mines which may hereafter be discovered therein, at all usual working times, with a sufficient number of able working miners, and also by all other ways and means in approved use, according to the rules and practice of good miners, so that the whole of the lands within the limits aforesaid, hereby granted, may be fully and effectually explored, tried, and worked (*b*); AND ALSO, that they the lessees, will, from time to time and at all times during the said term, well and sufficiently repair all houses and other buildings already erected for the use of the said mines, or which shall be erected by them, being built with stone and lime, and covered with slate, within the limits aforesaid; and well and sufficiently bind, secure, repair, keep open, and support with timber, and fixed stemples and props, and by all other good and effectual and durable means, all adits, shafts, and other workings which are, or shall or may be cleared, driven, sunk, or made within the limits aforesaid; AND ALSO the low slovan or tail of any adit already driven within the limits aforesaid; AND the same houses and other buildings, together with the roofs, coverings, and fixtures thereunto belonging, and the same adits, shafts, and other workings, in good repair, and firmly bound, secured, kept open, and supported as aforesaid, and also the whole of the mines intended to be worked under or by virtue of these presents, in a regular course of working, according to the most approved practice of good miners, and in good order for the future prosecution thereof, will, at the expiration or sooner determination of the said term, peaceably yield up unto the lessor; AND ALSO, that they the lessees, will, during the continuance of the said term, constantly, as well by night as by day, drive the deep adit, leading into the said several mines or sets, by four men at the least, until the same shall be wrought or driven through, and to the extent of, the ground comprised within the limits aforesaid; AND ALSO will, within three calendar months after the expiration or other determination of the said term, well and effectually, and in a miner-like manner, at the expense of them the lessees, sollar all such shafts as ought to be kept open in pursuance of the covenants herein in that behalf contained, to the depth of at

to repair buildings, shafts, &c.;

to deliver up in good repair and order;

to drive a certain adit constantly during the term;

to clear shafts;

(*b*) See *Hanson* v. *Boothman*, 13 East, 22, as to the effect of this covenant.

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least twelve feet below the level of the then deepest adits communicating therewith; And will not cover with ores or rubbish, or otherwise waste any meat-earth, mould, or soil within the said lands, but will preserve and lay aside the same in heaps, on some convenient part of the said lands, for the use of the occupier or occupiers for the time being thereof;

not to throw rubbish on soil;

to fence shafts and tenant's lands;

And will, at all times during the said term, at their own expense, make sufficient fences for the protection of man and beast, round every shaft or open part of any adit already or hereafter to be sunk or dug within the limits aforesaid, during the said term, and erect and keep proper gates and fences for protecting the tenants and occupiers of the said lands for the time being from any trespass which might otherwise happen, by reason or means, or in consequence of any act, matter, or thing done by the lessees, or any of them, or under the authority of them, or any of them, And make and keep in repair proper bridges and passes for the safe and convenient passage of the cattle and carriages of the occupiers for the time being of the said lands, or any part thereof, over any leat or open part of any adit or adits, and over or under any flat-rod or flat-rods now existing or which shall be made or erected during the said term, within the limits aforesaid; And also will, upon reasonable notice in that behalf, make full compensation to the respective tenants or occupiers for the time being of the said lands, for all unnecessary damage, arising from any act or neglect of the lessees, or any of them, or any of their respective agents, servants, or workmen, in the exercise of any of the licences, powers, and authorities by these presents granted; such compensation to be ascertained and declared in the manner hereinafter mentioned; And also will, once in every year during the continuance of the said term, within one calendar month after notice in writing, to or for them the lessees, or the purser, manager, or principal captain for the time being of the said mines, for that purpose given in manner hereafter provided, at their own expense, provide for and deliver to the lessor, a full and correct plan and section of all mines or works carried on and prosecuted for the time being within the limits aforesaid, and of all lodes or veins which shall have been discovered therein: And also, that they the lessees will, at all times, permit and suffer the lessor, and his stewards, agents, and tollers for the time being, or any other persons employed or authorised by him or them, to go down

to make bridges, &c.

to make compensation for damages to tenants;

to deliver plans and sections of works on demand;

to allow lessor, &c., to inspect works;

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into, inspect, examine, measure, level, and dial any and every adit, shaft, or work which is, or shall or may be dug, wrought, driven, sunk, or made within the limits aforesaid, and for that purpose to make use of the tackle, ropes, buckets, ribbals, and any other conveniences belonging to, and being within the same, when and so often as he or they shall think fit; AND ALSO, that they the lessees will, from time to time and at all times during the said term, keep at some place within the limits aforesaid, accurate and regular books of account, and therein shall from day to day make, or cause to be made true, plain, and perfect entries of all such ores, metals, and minerals as shall be raised and gotten within the limits aforesaid, and of the sales thereof, and of all such monies as shall be received or paid by the lessees, out of, from, or in respect of the several lodes or mines hereby authorised to be worked; AND ALSO will permit the lessor, or his steward or agent for the time being, at any time and from time to time during the said term, to inspect the said books of account, and to take extracts therefrom, or to make copies thereof; AND ALSO that they the lessees will, on the 31st day of March in every year during the said term, or within one calendar month after each such day (if required so to do), make or cause to be made a full, true, just, and fair account and rest in writing of all the ores, metals, and minerals raised or gotten from the lodes or mines hereby authorised to be worked, and of all the monies received and paid by the lessees on account thereof during the last preceding year, so that the affairs of the said mining concern, and the balance of profits and losses of the lessees made and contained in such preceding year may from time to time plainly appear; and, on demand, deliver the same unto the lessor or his steward or agent for the time being; AND ALSO will, from time to time and at all times during the said term, and at any time after the expiration or sooner determination thereof, while any of the covenants herein on the lessees' part contained shall remain unperformed, give to the lessor or his steward or agent for the time being, within twenty-one

to keep regular accounts;

and allow lessor, &c., to inspect the same and take copies (*c*);

to make an annual rest, and balance account of profit and loss;

to deliver account of all adventurers and their respective interests;

(*c*) The breach of a covenant in a mining lease to allow the lessor to inspect books, &c., is not within the provisions of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41) as to relief against forfeiture of leases: see sect. 14, sub-sect. 6 (ii.) of that Act.

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days after notice in writing in that behalf shall have been given in manner hereinafter provided, a true and perfect list in writing, under the hand or hands of the lessees, or of such purser as aforesaid, of all such persons as shall have been adventurers therein during any period or periods of the time between the commencement of the said term or the date of any previous like notice, as the case may be, and the day of the date of such current notice, which shall be specified therein, together with the then or last known places of abode and additions of such adventurers; AND ALSO the shares and interests held by them respectively in the said mines, during the same period or periods of time, as far as the lessees may be enabled by the cost books or account books of the said mines, or otherwise, to set forth the same; AND ALSO, that they the lessees will not, at any time or times during the said term, work or dig, or cause to be worked or dug, any ground beyond the limits aforesaid; AND will not, at any time or times during the said term, in the exercise of all or any of the liberties, licences, or powers hereby granted, do or commit any waste, damage, or injury to any messuage, tenement, house, or other erection or building, or any garden now existing, or do, or cause to be done, any act, matter, or thing whatsoever which may in anywise tend to the detriment, injury, or prejudice of the owner, tenant, or occupier of such messuage, tenement, house, erection, building, or garden: AND the lessor hereby covenants with the lessees that they, rendering and paying, laying out and delivering the said several and respective dues and royalties, and dishes, or the money so to be paid in lieu thereof as aforesaid, and observing and performing the several covenants, conditions, and agreements hereinbefore contained, and on the part of the lessees to be observed and performed, shall (subject and without prejudice to the several exceptions, reservations, provisoes, and agreements in favour or for the benefit of the lessor hereinbefore contained), peaceably and quietly have, hold, possess, and enjoy the powers and privileges hereby granted, and every of them, for and during the said term, without any interruption or disturbance from or by the lessor, or of any person or persons lawfully claiming under or in trust for him: PROVIDED ALWAYS, and it is hereby agreed and declared, that if the parts or shares hereby reserved of the metals, ores, and metallic minerals which shall be found within the limits aforesaid, or any part thereof respectively, or

not to work beyond limits of demise;

not to commit waste, &c.

Covenant by lessor for quiet enjoyment.

Proviso for lessor to revoke licence and re-enter on non-render of royalties,

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&c., on breach of covenant.

such sum or sums of money (if any) as shall from time to time be payable in respect of the same, or any part thereof respectively, shall be undelivered, behind, or unpaid by the space of twenty-one days next after any one of the several days whereon the same ought to have been delivered and paid as aforesaid, whether payment thereof respectively shall have been formally or legally demanded or not; or in case of breach or non-performance of all or any of the covenants, provisoes, and agreements hereinbefore contained; THEN and thenceforth for all or any of the causes aforesaid, and at any time thereafter, it shall be lawful for the lessor, by notice in writing to be given to the lessees in manner hereinafter provided, to revoke and determine the several liberties, licences, and powers hereby granted; AND immediately after any such notice shall have been so given, the liberties, licences, and powers hereby granted, and every article, clause, matter, and thing herein contained, shall absolutely cease and determine (*d*), save and except so far as concerns and for the purpose of enforcing any right of action which shall have accrued to either of the said parties hereto, by reason of any breach of all or any of the covenants and agreements herein contained (*e*): PROVIDED ALSO that all notices hereby required or authorised to be given shall be in writing, and shall be signed by the lessor or the lessees, as the case may be, or by their respective agent or solicitor for the time being: AND any notice hereby required or authorised to be given to the lessor shall be deemed to be duly and sufficiently given if delivered to the lessor personally, or if left for him at his last known place of abode in the United Kingdom, or if delivered to his agent or any of his agents for the time being, or to such other person and in

Proviso as to notices.

(*d*) The notice must be peremptory. Where there was a proviso somewhat similar to the above, a notice, that, unless the grantees did thenceforth keep six miners constantly at work, &c., the grantors would, at the end of a month, re-enter, was held not to be a sufficient notice to determine the licence, although the grantees did not observe the requisitions of the notice: *Muskett* v. *Hill*, 5 Bing. N. C. 694.

(*e*) A power of distress does not seem very appropriate to a grant of this kind; if, however, it be thought advisable to reserve such a power for the purpose of recovering any money equivalent for royalties that the grantor may have entitled himself to under the provision (*supra*, p. 501), the clause (*infra*, p. 556) may be adopted, *mutatis mutandis*.

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such manner as the lessor shall from time to time in writing direct: And any notice hereby required or authorised to be given to the lessees, shall be deemed to be duly given if given to the lessees or any of them either personally, or if left for them or any of them at their or his last known places or place of abode in the United Kingdom, or if given or left for the purser, manager, or principal captain for the time being of the said mines either personally, or at his dwelling-house or dwelling-houses, or at the office or counting-house of the said mines: Provided nevertheless that, in case and as often as any differences or dispute shall arise during the continuance of these presents, whether the said lode or mine now being worked within the limits aforesaid, or any other lodes or mines hereafter to be discovered within the said limits, or any of them, have been or are being properly and effectually worked, or otherwise, with reference to the construction and meaning of these presents, or any of the covenants, provisoes, and agreements herein contained, the same shall be referred to the arbitration of the mining agent for the time being of the [X.] mine; And in case the mining agent (*f*) for the time being of the said [X.] mine shall not, within ten days after the same shall be referred to him, consent to act as such arbitrator, then the same shall be referred to the arbitration of the mining agent for the time being of the [Y.] mine: And in case the mining agent for the time being of the said [Y.] mine shall not, within ten days after the same shall be referred to him, consent to act as such arbitrator, then the same shall be referred to the arbitration of such person as shall be named as arbitrator by the vice-warden of the Stannaries for the time being for the county of Cornwall; And also, that no action or suit shall be brought, commenced, or prosecuted by either of the parties in difference against the other of them touching the matters referred to either before or pending the reference: And such arbitrator shall, notwithstanding the death of either of the parties in difference, proceed to make his award, and the same shall be binding and conclusive on the parties in difference, and each of them, and the heirs, executors, and administrators of them and each of them, and all and every

Proviso for arbitration of disputes as to the working of the mines.

Arbitrator's powers to continue, notwithstanding the death of either party.

(*f*) Inasmuch as the owner of an adjoining mine may part with his estate before the expiration of the lease, it is better to name the agent for the time being acting in respect of a particular mine.

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other persons and person claiming by, through, or under them, or either of them; And the arbitrator shall have full power to require to be produced before him all books, documents, and writings which he shall deem necessary, and also to examine the parties to the said reference, or either of them, and such arbitrator shall, if he shall think proper, direct in his award, by which of the said parties in difference, or in what proportions by each of the said parties, the expenses of the said reference shall be paid; And in default of such direction the expenses of the said reference shall be paid by the parties to the said reference, and their respective executors or administrators, in equal moieties, and every such award shall be binding and conclusive on the said parties, notwithstanding the same may be informal, or there may be any technical error therein. In witness, &c.

Expenses of reference.

XXXVII. *LEASE by* Tenant for Life, *in exercise of* Power, *of a* Salt Mine, *with the Use of Surface Land: Reservation of Fixed Mine and Surface Rent, and Royalties for Salt carried away:* Penal Rent *for Salt got* beyond *the* Limits *of the Demise: Covenant for* Renewal: *Proviso for Re-entry in case of* Failure *of* Mine: *Proviso for* extending *the* Limits *of the Working in case the Mine is* exhausted *during the Term.*

THIS INDENTURE (*g*), made &c., Between [*lessor*], of &c. (who, and his assigns and the person or persons entitled in remainder or reversion after him, unless the contrary appears, are hereinafter referred to as the lessor), of the one part, and [*lessees*], of &c. (who, and their respective executors, administrators, and assigns, unless the contrary appears, are hereinafter referred to as the lessees), of the other part, WITNESSETH, that, in consideration of the rents and covenants herein reserved and contained, and on the part of the lessees to be paid, observed, and performed respectively, the lessor, by virtue of the power in that behalf given or reserved to

Parties.

Testatum.

(*g*) Stamp *ad valorem* on aggregate amount of fixed mine and surface rents: *ante*, p. 336.

XXXVII. **Lease of Salt Mines by Tenant for Life under a Power.**

him by an indenture, dated, &c. (being the settlement made on the marriage of the lessor with his present wife), and of all other powers enabling him thereunto, hereby appoints and demises unto the lessees, ALL that piece or parcel of land, part of the estate comprised in the said settlement, situate in ——, in the said county of ——, being part of a close of land called ——, containing by admeasurement two acres, as delineated and described in the plan annexed to these presents, and marked as Plan No. 1 : TOGETHER WITH liberty for the lessees by means of the now existing pits, shafts, or drifts, or by means of any other pits, shafts, or drifts, to be sunk and established within the piece of land hereby demised, during the term hereby granted (so as not to have more than two pits in the course of actual work or use at the same time), to get and take rock-salt from and out of the lower or second mine only, but not any other mine, as well under the lands hereby demised, as also under the other adjoining lands, part of the estates comprised in the said settlement, situate in —— aforesaid, not exceeding in the whole (including the piece of land hereby demised) thirteen acres of land, which adjoining land is also delineated on the said plan ; AND all such rock-salt as the lessees out of the said lower or second mine shall think fit to get, and the same, when gotten, to take away, manufacture, sell, and dispose of, or convert to such use or uses as they shall think fit ; AND ALSO liberty for the lessees, in or upon the piece of land hereby demised, or any part thereof, to erect and build any rock-salt house or houses, storehouse or storehouses, warehouse or warehouses, with a dwelling-house for a principal or agent, and a dwelling-house for an engineer, and a quay or wharf, or any other building or buildings, or other erections or engines for the raising, laying, storing, securing, preserving, keeping, shipping, or loading of such rock-salt or salt-rock, or manufactured salt, as shall be found, gotten, or made, on, in, or under the lands hereby demised, or for the lodging of any agents, servants, or other workmen to be employed in or about the working such rock-salt pit, or manufacture of salt ; AND ALSO liberty for the lessees, in or upon the piece of ground hereby demised, or any part thereof, to make, erect, and build such number of salt-pans, reservoirs, ponds, cisterns, pits, salterns, boilers, furnaces, pumps, pipes, troughs, steam and other engines, and such other works, erections, buildings, and

Parcels by reference to a plan.

Special liberty of mining.

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apparatus, as may be requisite and necessary for the refining, boiling, evaporating, or manufacturing of salt, whether found in the state of rock-salt or of natural brine; And for converting fossil salt into manufactured or white salt, and for working up the roof or cistern rock-salt, which may be found upon the land hereby demised (*a*), Together with liberty for

Liberty to get brick earth,

(*a*) If the right of mining is not to be limited to a particular bed, these words will follow the description of the lands :—

"Together also with all mines of rock-salt and springs of brine, within and under the land hereby demised; with liberty for the lessees, and their agents, servants, or workmen, within, upon, and under the land hereby demised, or any part thereof, to bore, search, dig, sink for, and get and take to and for their own use (subject as hereinafter mentioned), rock-salt or salt-rock and brine; And for that purpose in and upon the land hereby demised, or any part thereof, to make, erect, dig, or sink any number of rock-salt or brine pits, air or water pits or shafts, or any holes, ninnels, hollows, eyes, drifts, pipes, or cavities; And also to erect or set up any engines or other machinery for finding rock-salt, salt-rock, and brine, and for obtaining and manufacturing the same, on the land hereby demised, or any part thereof, as from time to time may be found most expedient; And also to raise, get, and take all such rock-salt or salt-rock as shall be there found or gotten, and from the brine springs there discovered to make and manufacture on the land hereby demised white salt, and the same to sell and dispose of, for their own use (subject as hereinafter mentioned); And also liberty in and upon the land hereby demised, or any part thereof, to make, erect, set up, and build, and to use, occupy, and enjoy, rock-salt or other salt houses, pan-houses, storehouses, warehouses, or other buildings, engines, and places for storing, securing, preserving, or keeping rock-salt, salt-rock, or manufactured salt, or for the making, laying up, storing or preserving of rock-salt, salt-rock, or white salt, and also any house or houses for the habitation of persons employed in or about the land hereby demised during the said term; Together also with the right reserved to the lessor by a certain indenture of lease, dated, &c., and made, &c., of a good and sufficient and convenient road, as therein mentioned, down the ——, through certain land or ground formerly

General liberty of mining.

Right of way reserved to lessor in a former lease.

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the lessees (but only for the purposes aforesaid) to dig for and get clay, and to make bricks upon any convenient and proper part of the land hereby demised, or upon other lands comprised in the said settlement, within the distance of two furlongs from some part of the land hereby demised, to be set out and appointed by the steward or agent for the time being of the lessor, the lessees paying and allowing a reasonable recompense and satisfaction from time to time during the said term, to the tenant or occupier thereof, for all damages and inconveniences that shall or may be sustained thereby, or arise therefrom; And not obstructing, contracting, diverting, or prejudicing any road or way; And from time to time filling up and levelling (as soon as the same can properly and effectually be done) all the pits or holes which shall be made in pursuance or on account of the liberty and powers aforesaid, and also leaving the surface of the ground well and sufficiently covered with soil, and in good order and condition; And also liberty for the lessees to make a rail-road or tram-road, or other roads or ways from the said rock-salt pit or pits and works, towards the navigable brook called —— Brook, as far as the lands comprised in the said settlement extend, and also to or towards the navigable cut or canal called the Grand Trunk Canal, in the direction marked and delineated on the said Plan No. 1, for the purpose of con-

&c., upon premises comprised in settlement;

paying compensation for damage to tenants.

Liberty to make rail-road, &c., to canal;

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called the —— meadow, to the river ——, from any other lands or grounds which the lessor is entitled to, subject to the restriction in the said indenture mentioned; Provided, that if, in carrying on the work so made or intended to be made, and projected as aforesaid, it shall be found necessary to erect a quay on land of the lessor, now in the occupation of [E. F.] as tenant thereof, and a quay shall be erected and formed accordingly, the lessees shall stand in the place of the lessor, and shall be bound to reimburse and indemnify the said [E. F.] for all damages sustained by the erecting such quay, or in the exercise of the right of way reserved to the lessor by the said lease thereof, granted to the said [E. F.] as aforesaid; And also liberty (so far as the lessor can grant the same) of erecting such quay, subject as aforesaid; Together with all requisite easements and appurtenances for the loading, unloading, or reloading of salt or any other goods or things for the purposes of this demise."

Liberty to construct quay.

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veying away all such rock-salt and manufactured salt as they shall get or make by virtue of these presents, or of conveying to the land hereby demised such coal or other materials as they shall need for the purpose of getting or manufacturing such salt; And also such liberty as the lessor can lawfully grant to the lessees to make quays and wharfs at —— Brook, at a place marked on the said Plan No. 1 with the letter X, for the purpose of loading rock-salt or manufactured salt, or for unloading coals and other things to be brought to the land hereby demised; And also liberty for the lessees to make quays or wharfs at the Grand Trunk Canal, at a place marked on the said Plan No. 1 with the letter Y, for the purpose of loading any rock-salt or manufactured salt, and of unloading coals or other things to be brought to the land hereby demised; They the lessees from time to time sufficiently fencing in such roads or ways, and making, at proper places, gates and proper places for the lessor, and his tenants, with horses, cattle, carts, and carriages, to cross the same; And also allowing the other tenants of the lessor to use such roads, quays, and wharfs for the same and like purposes as the lessees shall use the same for, on fair and reasonable terms and conditions, to be settled by two indifferent persons, to be nominated by the lessor; Except, and always reserved unto the lessor all timber and other trees now growing or being on the land hereby demised, with liberty for him and any other person or persons by his order to enter into the land hereby demised, and there, by digging saw-pits and by all usual ways and means, to fell, cut down, sell, dispose of, and carry away the same: Provided always, that, notwithstanding the extent of ground hereinbefore described or mentioned, and the powers of working the said salt-works hereinbefore given, the lessees shall not be at liberty to excavate the said land or work the said mines beyond the line extending from A. to B., nor beyond the line extending from C. to D., as drawn on the plan annexed to these presents, and marked Plan No. 2: To hold the piece of land and premises hereinbefore mentioned unto the lessees from the 1st day of April, 18—, for the term of —— years; Yielding and paying therefor yearly during the said term, and so in proportion for any less period than a year, the rent or sum of £——, by two equal half-yearly payments, on the first day of April and the first day of October in every year,

to make wharfs;

roads, &c., to be fenced in and gates made.

Lessees to allow lessor and servants to use roads, &c.

Exception of timber, &c.;

Right of entry, &c., to cut timber.

Limits within which works are to be carried on.

Habendum.

Reddendum.

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the first payment to be made on the first day of October, 18— ; AND ALSO YIELDING AND PAYING the clear yearly rent of £——, and so in proportion, &c., for every acre of land, and a proportionate sum for any less quantity that the lessees shall have, use, or occupy over and above the two acres of land hereinbefore described and hereby demised, for the purpose of making rail or other roads, or ways, and quays, or wharfs as aforesaid, by equal half-yearly payments on the days aforesaid, the first of such payments to begin and be made on such of those days as shall first happen after the land for such purposes shall be inclosed and taken possession of; AND ALSO YIELDING AND PAYING as aforesaid yearly, and so in proportion, &c., during the said term, the clear rents or sums hereinafter mentioned: (that is to say) for all salt, of what description soever, to be gotten and raised out of the said mine, or which is now or shall be manufactured upon and moved and carried away from the land hereby demised, the sum of $4\frac{1}{2}d.$ for every ton, and so in proportion for any less quantity than a ton thereof (the quantity and quantities of such rock-salt or manufactured salt that shall be so removed to be ascertained and stated to the lessor weekly, during the said term, and the amount of money payable for the same at the rate aforesaid, to become due and payable on such of the said rent days as shall next happen after the first removal and carrying away of such rock or manufactured salt as aforesaid, and thenceforth on every future rent-day which shall happen for the remainder of the said term); AND ALSO, in case in any year the lessees shall not remove and carry away from the land hereby demised the full annual quantity of —— tons at the least of rock-salt, THEN YIELDING AND PAYING, at the expiration of each and every such year, to the lessor the sum of $4\frac{1}{2}d.$ for every ton by which the quantity of salt removed and carried away in such year shall fall short of the full quantity of —— tons; AND ALSO YIELDING AND PAYING in manner aforesaid the further sum of £20 for every cubic yard of rock-salt that, by, or with or by the consent or permission of, the lessees, shall be gotten or taken out of or from under any of the lands comprised in the said settlement, or any part or parts thereof, or any mine or mines therein, other than the land and the part and parts thereof, and mine therein, in respect whereof the liberty hereinbefore mentioned is hereby granted as afore-

Rent for surface land occupied.

Royalty.

Reddendum for deficiency of salt obtained.

Penal rent for salt obtained contrary to the terms of the demise.

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said; such last-mentioned sum or sums respectively to be payable at or on the next of the aforesaid days of payment that shall happen after the commission of the act or acts in respect whereof the same shall become payable: And the lessees hereby severally covenant with the lessor in manner following; (that is to say), that they will, during the said term, pay the said clear yearly rent or sum of £——; And also the said further rent of $4\frac{1}{2}d.$ for every ton weight of rock-salt to be manufactured or removed and carried away as aforesaid from the land hereby demised, at the days and times and in manner hereinbefore appointed for payment thereof, without any deduction or abatement out of the same or any part thereof, on any account whatsoever; And will, in every year during the said term, remove and carry away from the land hereby demised —— tons weight at the least of rock-salt or manufactured salt; and in case of default thereof, then and in every such case will, at the expiration of every year in which they shall remove and carry away a less quantity of salt than —— tons, pay to the lessor the sum of $4\frac{1}{2}d.$ for every ton by which the quantity of salt carried away in such year shall be short of —— tons; And also will, at all times during the said term, pay and discharge all taxes, charges, assessments, and impositions whatsoever which shall be taxed, charged, assessed, or imposed upon the land hereby demised, and the pits or shafts, erections and buildings now made, erected, and built, or hereafter to be made, erected, and built thereon, or on any part thereof respectively, by them, or for or in respect of any other cause or thing relating thereto, or otherwise howsoever; And will at all times during the said term, well and sufficiently repair and maintain all and every the said erections, buildings, pits, shafts, rock-salt mine, and all other the premises hereby demised, in good and sufficient repair and condition; And will yield and deliver up the same in such repair and condition unto the lessor at the end or other determination of the said term; And will from time to time and at all times during the said term, by means of a proper pit or shaft, made or to be made for the purpose, well and effectually draw out the water or brine which shall come unto the same, so as to prevent any injury arising by any excess of water to the said rock-salt pits or shafts; And also, that it shall be lawful for the lessor and his agents, stewards, and others, by his and their appoint-

Covenants by lessees:

to pay rent;

to raise —— tons of salt annually, or pay a royalty proportional to the deficiency;

to pay taxes;

to repair premises and deliver up in repair;

to drain the mine;

that lessor, &c., may enter and view the premises;

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ment, at any time or times hereafter during the said term, to use the shaft, engine, windlass, ropes, buckets, and other implements of machinery and tackling belonging to the rock-salt pits or shafts, now sunk or hereafter to be sunk on the land hereby demised, or any part thereof, and by means thereof to enter into the said rock-salt pits, for the purpose of surveying, dialling, seeing, and examining into the state and condition of the same, and to measure, dial, and plan the cavity, or for any other lawful purpose that shall be thought necessary and proper by the lessor; AND, FURTHER, that (save and except as is hereinafter mentioned and expressed) the lessees will not, at any time or times during the said term, get or take any rock-salt, or any other mines or minerals, or cause, or permit, or suffer the same to be gotten or taken, within, out of, or under any land comprised in the said settlement, other than the land hereby demised in respect of the lower mine, wherein such liberty is hereby granted as aforesaid, without yielding and paying unto the lessor, as a further or increased rent, the sum of £20 for each and every cubic yard of rock-salt that the lessees shall get or take, or cause, procure, permit, or suffer to be gotten or manufactured, or taken out of or from under any lands comprised in the said settlement, other than and except the lands delineated and described on the said plans for that purpose annexed to these presents, and in proportion thereto for any less quantity than a cubic yard; AND FURTHER, will, on every first day of April and October, or within one calendar month after those days respectively, in each year during the said term, if thereunto required, deliver unto the lessor or his agent for the time being, a true and faithful account in writing, under their hands or under the hand of their clerk, of all the rock-salt which shall have been gotten or manufactured or taken away from the land hereby demised within the preceding half-year, and since the then preceding rent-day; AND FURTHER, will, during the said term, in working and getting the mine and rock-salt hereby demised, from time to time and at all times, work and make the cavity occasioned by getting the rock-salt at the least thirteen feet in height from the sole or bottom of the said cavity to the roof or top; AND ALSO will, in getting the said rock-salt from the said mine leave therein solid and firm upright pillars of rock-salt, extending from the bottom or sole of the said pit to the roof

to pay penal rent in respect of salt got beyond the bounds of the demise;

to deliver accounts;

to make the working cavity of a certain height;

to leave pillars of certain dimensions and at certain distances.

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thereof, distant from each other twenty-five yards, and not further; all and every of which pillars shall be five yards square: And the Lessor hereby covenants with the lessees in manner following, that is to say, that the lessees, performing all and every the covenants and stipulations hereinbefore contained, and on their part to be performed and observed, and subject as aforesaid, shall and may peaceably and quietly hold, occupy, possess, and enjoy, all and singular the lands hereby demised and the liberties aforesaid, during the said term, and receive and take the rents, issues, and profits thereof, to and for their own use and benefit, without any interruption, or disturbance of the lessor, in anywise; And further, that immediately upon the expiration of the first —— years of the said term, or at any time thereafter, at the request and at the costs and charges of the lessees, and on the surrender of this present lease, (such surrender to be at the like costs and charges), he, the lessor, in case he shall be then living, will duly make and execute unto the lessees, a new and further lease of all and singular the land and premises hereinbefore demised for the term of —— years, to be computed from the 10th day of October which will be in the year 18—, or for such period of time as shall be commensurate with and shall not exceed such term of —— years, to be so computed as aforesaid, at and under the same yearly rents, and with and subject to such and the same covenants and stipulations as are herein contained, except only this present covenant or agreement: Provided always, that if the said clear yearly rent or sum of £——, or the several tonnage rents hereinbefore reserved and appointed to be paid, or any part thereof respectively, shall be behind by the space of forty days next after any of the days hereinbefore appointed for payment thereof, and no sufficient distress or distresses shall be found upon the premises to satisfy the same, or if they the lessees, shall fail, neglect, or refuse to observe and perform all and every or any of the covenants, provisoes, and agreements herein contained and on their part to be observed and performed, then, and in any of the said cases, the said term and the liberty hereby granted shall cease and be void; and it shall be lawful for the lessor, into all and singular the land hereby demised or any part thereof in the name of the whole, to re-enter, and the same to have again, repossess, and enjoy, as in his or their former

For quiet enjoyment.

For renewal at the end of the first —— years.

Proviso for re-entry.

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estate, anything herein contained to the contrary in anywise notwithstanding: PROVIDED ALSO, that if the said rock-salt pits or shafts, so to be worked as aforesaid, shall, at any time during the said term, be in any danger of failing, by any inevitable accident, then, and in such case, they the lessees shall at their own expense use their utmost endeavours to prevent and hinder any such failure; BUT in case the rock-salt pits or shafts so to be worked as aforesaid shall, at any time during the said term, fail by any inevitable accident, (all due care and diligence having been used to prevent the same), or if the mine of rock-salt hereby demised shall be worked out and exhausted at any time during the said term, then, and in either of the said cases, this demise, and every matter, and thing dependent thereupon or consequent thereto, shall from and after such failure as aforesaid, (all rents and sums of money which may be then due for or on account of the premises being paid and satisfied, and all the covenants herein contained on the lessees' part having been fully paid, performed, and kept), cease and determine to all intents and purposes; AND it shall be lawful for the lessor, into the land hereby demised, or any part thereof in the name of the whole, to re-enter, and the same to have again and re-enjoy as in his former estate; AND then and in such case it shall be lawful for the lessees to remove and take away the steam-engines and other machines, implements and utensils of trade and manufacture belonging to them, and then being on the land hereby demised, or any part thereof: AND the lessor hereby covenants with the lessees that, in case the lessees shall, before the expiration of the said term, have worked the said mine thirteen feet in depth, and shall have gotten and carried away all the rock-salt, to the depth of thirteen feet, out of the said mine, under the piece or parcel of land or ground containing thirteen acres statute measure, and set forth and delineated on the said plans, then and in such case the lessees shall be at liberty to work the said mine beyond the said thirteen acres under the other adjoining lands comprised in the said settlement, in —— aforesaid, except on the sides only of the mine hereby demised, indicated by the lines A B, and C D, as drawn on the said Plan No. 2; they, the lessees, working and getting the said further mine to the depth of thirteen feet, and leaving pillars at the same distances as aforesaid, and working such mine in every respect in the same

Proviso for cesser on failure of mines;

in such cases lessees may remove machinery, &c.

In case mines demised are worked out before the expiration of the term, lessees may work beyond the limits aforesaid.

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manner as is hereinbefore directed and provided touching the said rock-salt under the said thirteen acres of land delineated on the said maps; but so that in such last-mentioned working no rock-salt shall be gotten or cavity made on the westerly side beyond the red line E F as drawn on the said Plan, No. 1; And that the lessees shall be liable to, and shall during the residue of the said term, after the rock-salt under the before-mentioned thirteen acres shall be exhausted, well and truly pay the like rent or sum of $4\frac{1}{2}d.$ for every ton of rock-salt that shall afterwards be so gotten as aforesaid, and shall so work the mine to the thickness of at least thirteen feet, and leave pillars as hereinbefore mentioned, and in every other respect pay, abide by, and perform all and singular such rents, covenants, conditions, and agreements as are hereinbefore reserved, mentioned, and contained respecting the rock-salt under the said thirteen acres of land, so that the lessees may have a sufficient quantity of rock-salt during the said term, if there is not sufficient under the said thirteen acres; Provided lastly, that if any question, dispute, or difference shall arise concerning the said mines hereby demised, or the working thereof, or concerning the construction and meaning of these presents or any of the covenants, provisoes, or agreements herein contained, or the rights or liabilities of the parties hereto respectively hereunder, then such question, dispute, or difference shall be referred to the determination and award of two arbitrators, one to be appointed by the lessor and the other by the lessees, or, in case of their disagreement, then to the determination and award of an umpire to be chosen by the said arbitrators before entering upon the reference: and the award of the said arbitrators or of their umpire as the case may be shall be final to determine such question, dispute, or difference, and also to determine by whom the costs of the arbitration and award shall be borne: And every such reference shall be deemed to be a submission to arbitration, within the Common Law Procedure Act, 1854, or any statutory enactment for the time being, in force with regard to arbitrations.

Arbitration clause.

In witness, &c.

XXXVIII. *UNDER-LEASE of* SALT MINE *and* WORKS *in Cheshire, held under a Lease by a* JOINT STOCK COMPANY.—*Reservation of* RENT, VARIABLE *with the* QUANTITY *of Salt got and the* MARKET PRICE *of Salt.—Usual Powers of Entry to inspect Works, &c.; Power of Distress and Re-entry.—Covenant by Lessors to* GRANT UNDER-LEASE *in case of their obtaining a* RENEWAL, *and other Clauses.*

Parties.

THIS INDENTURE (*a*) made &c., BETWEEN the —— Company, Limited (who, and their successors and assigns, are hereinafter, unless the contrary appears, called the Company), of the one part; and [*lessees*], of &c. (who, and their executors, administrators, and assigns, are hereinafter, unless the contrary appears, called the lessees), of the other part (*Recital of indenture of lease dated the 1st December, 18—, demising lands, &c., mines of salt, salt springs, with liberty of mining, &c., and way-leave over adjoining land (setting forth the parcels fully) from* [*A.*], *in execution of a power of appointment, to the Company, for sixty years at certain rents*): AND WHEREAS the Company have erected and established or extended various storehouses, machinery, salt-pans, and other conveniences in and upon the land and premises demised by the said lease: NOW THIS INDENTURE WITNESSETH that, in consideration of the several rents and royalties hereinafter reserved, and of the several covenants, conditions, and stipulations hereinafter contained, and on the part of the lessees, to be respectively paid, observed, and performed, the Company hereby demises and grants unto the lessees ALL THOSE the said several pieces or parcels of land, situate at —— in the county of ——, with the dwelling-houses, cottages, pan-houses, storehouses, warehouses, and other erections and buildings in or upon the same, and all those the mines of rock-salt and springs of brine within and under the said pieces or parcels of land, and all and singular the powers, liberties, licences, rights of road, and other privileges, easements, and authorities whatsoever, by the said indenture of lease demised, given, and granted to the lessees therein

Recitals.

That company have erected storehouses, machinery, &c.

Testatum, in consideration of rents, &c.

Demise.

Parcels by reference.

Stamp.

(*a*) Stamp, *ad valorem* on aggregate amount of fixed rents, see *ante*, p. 336.

XXXVIII. Underlease of Salt Mine and Works by a Company.

named, for the purpose of obtaining and manufacturing rock-salt or salt-rock and brine, and for other purposes connected therewith, or otherwise as is therein mentioned; And all and singular other the hereditaments, privileges, and premises comprised in and demised or granted by the same indenture of lease to the Company, but subject to the restrictions in the said indenture of lease contained; And also the use and enjoyment of all the pans, engines, fixtures, implements, and utensils which are now in and upon the premises, and the particulars whereof are specified in the schedule hereunto annexed (being the absolute property of the —— Company); And also all that the said messuage, garden, and piece or parcel of ground, commonly called ——, and all and singular other the premises comprised in the said indenture of lease, together with the appurtenances thereto belonging: To hold, exercise, and enjoy the said land and all and singular other the hereditaments, privileges, and premises comprised in and demised or granted by the said indenture of lease unto the lessees, from the —— day of ——, 18—, for the term of —— years (hereinafter referred to as the said term), being the whole residue of the term of forty years created by the said indenture of lease, except the last day thereof; subject to the payment of all and singular the several yearly surface and pit rents, and royalties and other rents, by the said indenture of lease reserved and made payable to the said [*A.*] or other the reversioner for the time being entitled to the premises (hereinafter referred to as the reversioner), as and when the same shall respectively become due and payable; Yielding and paying therefor yearly during the said term, and so in proportion for any less period than a year (over and above the several rents hereinbefore reserved as payable to the reversioner), unto the Company, the further rent or sum of £—— reducible as hereinafter mentioned, by two equal half-yearly payments, on the 1st day of January and the 1st day of July in every year, such several payments of rent, and every of them, to be made at the expiration of one calendar month from each of the said appointed days of payment in the manner hereinafter expressed (the first half-yearly payment whereof has been made); And also yielding and paying, in like manner, such contingent rent by way of addition to the said rent of £——, as is hereinafter particularly expressed: Provided always that, for the purpose of ascer-

Machinery and fixtures.

Other leasehold parcels.

Habendum.

Reddendum.

Proviso for re-

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taining whether any reduction from or addition to the said yearly rent of £—— shall take place, the gross price of common salt at Liverpool shall be ascertained weekly by the Liverpool prices current as usually reported and published, and when and so often as the average gross price of common salt at Liverpool, during any one quarter of a year, shall be at or under —*s.* a ton, a reduction of £150 shall be made from the portion of the said rent of £—— payable in respect of that quarter; and when and so often as such average price of common salt, during any one quarter of the year, shall exceed —*s.* a ton by 6*d.* or more, then and in every such case, and as often as the same shall happen, an additional rent, at the rate of £100 for every excess of 6*d.* or upwards, and under 1*s.* per ton, during that quarter, shall be paid for that quarter, and so in proportion for every further excess of an entire 6*d.*, but not in respect of any rise which, according to such average, shall not amount to 6*d.*; And the said progressive additional rent of £100 per quarter, in respect of each successive increase of an entire 6*d.* in the price of common salt, shall continue and be payable during such time as the annual quantity of salt sold and delivered from the lands hereby demised shall not exceed 40,000 tons; but if, and when, and so long as such annual quantity shall exceed 40,000 tons, then the said progressive additional rents shall be £125 instead of £100 per quarter, to be calculated upon the principle and in manner above expressed; And the quarters with reference to which the rise and fall in the price of common salt shall be ascertained, so as to determine whether any reduction from or addition to the said rent of £—— (so far as the same may be affected by the rise or fall in the price of common salt) shall take place, shall be computed from the 1st day of July, the 1st day of October, the 1st day of January, and the 1st day of April, in each year of the said term; and the quantity of salt sold and delivered in the preceding year shall, with reference to the increased rent in respect of the excess of manufacture beyond 40,000 tons annually, be ascertained at the end of each year of the said term, for the purpose of determining the annual rent, so far as the same may be affected by the quantity of salt sold and delivered: Provided also, that if there shall be a failure of the brine springs within the lands hereby demised, enduring for the space of ten days successively, the said yearly rent of £——, and all other the rents hereby

ducing or increasing rent by reference to the market price of salt, and the amount manufactured.

Proviso for reduction of rent on failure of brine.

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reserved, save and except the rents payable to the reversioner as aforesaid, shall during the continuance of such failure be reduced to an extent proportioned to the extent of the failure of brine; the amount of such reduction, in case of dispute, to be ascertained by arbitrators to be appointed in the manner hereinafter mentioned: And it is hereby further agreed and declared, that an account of the total rent to grow due from time to time by virtue of these presents, and the several reservations hereinbefore contained, shall be made up and adjusted within fourteen days after the termination of each half-year; And that the amount of such rent, when ascertained, shall be provided for and satisfied through the medium of some banking-house in London, or of the Branch Establishment of the Bank of England at Liverpool aforesaid, within one calendar month next after each half-yearly day of payment; and any additional rent which shall become payable, in consequence of the sale in any one year of more than 40,000 tons of salt, shall be provided for and paid in manner aforesaid, within one calendar month after the expiration of that year; And the lessees do hereby jointly and severally covenant with the Company, that they the lessees will, at all times hereafter during the said term, pay all and singular the yearly and other rents and sums of money hereinbefore respectively reserved and made payable, clear from all payments, taxes, charges, assessments, deductions, and outgoings whatsoever, upon the said several days of payment and in manner hereinbefore mentioned; And will at all times during the said term, at their own costs, keep all and singular the dwelling-houses, pan-houses, storehouses, warehouses, quays, reservoirs, railways, engines, pipes, works, and all and singular other the erections and buildings now standing and being upon the lands hereby demised, or any part thereof, or which shall at any time during the said term be erected, built, or made, in or upon the lands hereby demised or any part thereof, in good and substantial repair and condition; And will at the expiration or other determination of the said term, yield and deliver up all and singular the lands, hereditaments, and premises hereby demised, together with all and singular the dwelling-houses, pan-houses, storehouses, warehouses, reservoirs, quays, railways, engines, pipes, pits, works, shafts, and appurtenances thereunto belonging; And also together with all other the erections

Account of rent to be adjusted within fourteen days after expiration of each half year.

Rent to be paid through a bank within one month from time of becoming due.

Covenants by lessees to pay rents;

to repair premises;

yield up premises in repair;

and fixtures, except tenant's fixtures;

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and buildings erected and built or to be erected and built thereon, and together with the fixtures and things attached thereto, except such engines and machinery, not being landlord's fixtures, as shall or may hereafter belong to the lessees, and as shall or may be removable without injuring any of the premises, in such good and substantial repair and condition;

and machinery, &c., in schedule;

And will at the same time yield and deliver up the pans, engines, machinery, fixtures, implements, and utensils specified in the schedule hereto, in fair working condition, unto the Company;

to pay taxes;

And also will from time to time and at all times during the said term, pay and discharge all taxes (including land-tax), duties, charges, and assessments whatsoever, charged or to be charged by authority of Parliament or otherwise howsoever upon the lands and premises hereby demised, or any part thereof:

and rents, &c., payable under original lease.

And also will pay all and singular the several yearly surface and pit rents and royalties and other rents by the said indenture of lease reserved and made payable to the reversioner, as and when the same shall become due and payable, and will keep the Company indemnified therefrom:

Proviso to reimburse lessors any rents they may pay to the superior landlord.

And in case the Company shall be required to pay and shall actually pay to the reversioner the said several yearly surface and pit rents and royalties and other rents, or any part thereof respectively, will forthwith repay unto the Company the amount of what they shall have so paid to the reversioner as aforesaid;

Power of distress in default.

And that the Company shall be entitled, in default of such payment, to distrain or re-enter upon the lands hereby demised for the same, in like manner as they would be entitled to do in respect of any arrears of the rent hereby expressly reserved and payable to them;

To keep account of salt, and allow the same to be inspected;

And also, will during the said term, enter and keep from time to time in proper books, a just and accurate account of the quantities and qualities of salt that shall be made, manufactured, gotten, or sold, shipped or removed from the lands hereby demised by them by virtue of these presents;

And also, if required, will from time to time furnish to the Company similar accounts to those which may be kept and made out between the persons occupying or managing the said salt-works for the time being, and the owners and proprietors thereof, and produce the original accounts on some convenient part of the lands hereby demised, for the purpose of examination by the reversioner, or by the Company or their respective agents, when required so to do;

to deliver copies annually.

And will, when thereunto required,

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transmit to him or them respectively a copy of such account or accounts, on or before the 1st day of ——, and the 1st day of ——, in every year, attested as a true copy by some person who shall have examined the same with the original accounts or entries; And will, at any time or times when required for that purpose, produce such original account and accounts from time to time, or on or before such time or times as aforesaid, to the reversioner or the Company, or to any person or persons duly authorised by him or them respectively, or on his or their behalf, on some convenient part of the lands hereby demised, for the purpose of making copies of or extracts from the same; And, if required, by him or them, will verify and attest all such accounts by declaration, but so nevertheless that the lessees or their several or respective agents shall not be required to travel or journey from the lands hereby demised to produce such accounts as aforesaid; And further, will, within one calendar month next after the determination of the said term, pay to the Company such sum of money as three persons, one to be named by the Company, another to be named by the lessees, and the third by the two persons so first chosen, shall arbitrate and award, for such damage as shall have been done to the surface of the soil of the lands comprised in the said term, by means or in consequence of the exercise of the privileges hereinbefore demised or granted, or any of them; And also will, during the said term, use, manage, and cultivate such of the lands hereby demised as shall not be taken or used for the purpose of building or for the said works, in a proper and husbandlike manner, and not make, permit, or suffer any unnecessary damage or spoil therein; And also will not, at any time during the said term, carry off from the lands hereby demised in an unmanufactured state any of the brine that shall arise therefrom, but will manufacture all such brine on the lands hereby demised; And will not, during the said term bring or convey from any other lands than those hereby demised, upon the said works and premises, any brine or rock-salt without paying for such rock-salt and for the salt manufactured from the said brine, or from the said rock-salt so brought on the same, a royalty, as if the said brine and rock-salt were obtained or carried from the lands, pits, or works hereby demised; And moreover, in case any brine shall be so brought on to the lands hereby demised from any other

At the expiration of the term to pay for damage to the surface, to be ascertained by arbitration.

To cultivate surface not required for the works;

not to carry away brine unmanufactured;

to pay same royalties for brine, &c., brought from elsewhere and manufactured on the premises as for brine, &c., got from the premises; and also an additional rent;

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land whilst the same may be found or obtained in any pit or pits made or to be made on the lands hereby demised, will pay an additional yearly rent of £50 at the several half-yearly days appointed for payment of the said rents to the reversioner during the continuance of such bringing of brine as last aforesaid, in consideration of the same being allowed to be brought on the lands hereby demised, and also will pay the like further sum, or pit rent, of £50 per annum in such manner and at such times as is last mentioned, in case rock-salt shall be so brought on to the lands hereby demised when the same can be gotten thereon; And also, that the lessees will not erect, or cause to be erected, any chemical or other works for manufacturing soda, or any other preparation from salt, or for any purpose other than the manufacturing of salt according to the stipulations aforesaid, unless the Company shall, in writing signed by their secretary, specify their consent thereto; And further, that it shall be lawful for the person or persons for the time being entitled to the immediate freehold of the lands hereby demised, and also for the Company, and his and their respective agents, with engineers, manufacturers, surveyors, workmen, and others in his or their company or without, as often as he or they shall think proper, during the said term at all seasonable times in the day-time to enter and come into and upon the lands hereby demised or any part thereof, and into the houses, pan-houses, storehouses, warehouses, or any other of the buildings, works, and erections for the time being erected, and built thereon; And also into the salt and other pits and works, whether on the surface or subterraneous, and to examine and see the state and condition thereof respectively, and also the state and condition of the said works, and the nature, quality, and quantity of the rock and other salt and produce to be derived from the said works, and to leave or give notice in writing for or to the lessees, upon the lands hereby demised, to repair, amend, or correct, any defect and want of repair then found, or any matters or things made or done contrary to the provisions of these presents: And that within the space of three calendar months next after any such notice shall be given or left as aforesaid, they the lessees will repair, amend, make good, or correct the same accordingly; And that they the lessees will at all times during the said term, at their own costs and charges, keep insured against accidents by fire in the sum of

not to carry on manufactures of soda, &c.;

power for lessors to enter and inspect works;

to repair, &c., after notice;

to insure;

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£8000 at the least, the several messuages, cottages, pan-houses, store-houses, offices, warehouses, and other buildings for the time being erected and standing upon the lands hereby demised, in some public office or offices in London or Westminster for insuring buildings from fire; And also, that in case the lessees shall at any time during the said term refuse or neglect to keep the said insurance on foot as aforesaid, then and so often as it shall happen, it shall be lawful for the Company in like manner to insure the said buildings and premises to the like extent and for such time as they shall think proper; And that the premium or premiums and other costs and charges attending the making of such insurances as last aforesaid, shall stand charged upon all and singular the lands and premises hereby demised, and shall be recoverable as a further rent in the same manner as the several rents hereinbefore reserved and made payable: And the Company do hereby covenant with the lessees that they the lessees, paying the several rents and sums hereinbefore reserved and made payable, and observing and performing the several covenants, conditions, and stipulations hereinbefore contained on their part, shall peaceably and quietly hold and enjoy all and singular the lands and premises hereby demised, for and during the said term without any molestation or disturbance of or by the said Company, or any person or persons lawfully claiming or to claim, by, from, or under them respectively, or through or with the acts, means, default, privity, or procurement of them or any of them: Provided always, that, in case the yearly rents or sums hereby reserved and covenanted to be paid as aforesaid, or any of them, shall be behind or unpaid by the space of twenty-one days next after any of the days on which the same or any of them ought to be paid as aforesaid, and after the same shall have been ascertained according to the provisions of these presents, or in case the lessees shall neglect to keep, make out, and verify such accounts of salt made, manufactured, and gotten upon the lands hereby demised as aforesaid, or shall at any time during the said term neglect or cease for the space of three calendar months, to make white salt upon the lands hereby demised (except in the case of failure of brine or some unforeseen or unavoidable accident to prevent the same), or in case the lessees shall not perform and keep all and every the covenants and conditions herein contained on their part, then and in

on default lessors may insure and recover expenses by distress, &c.

Covenant by lessors for quiet enjoyment.

Proviso for re-entry.

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any of the said cases it shall be lawful for the Company into or upon the lands hereby demised, or any of them, or any part thereof in the name of the whole, to re-enter and the same to have, possess, and enjoy, as in his or their former estate: PROVIDED ALSO, that it shall be lawful for the lessees, to use the name or names of the Company, or of the directors or secretary for the time being thereof, for the purpose of obtaining, during the whole of the remainder of the said term which shall be then unexpired, the use of the present roads and ways over the lands and hereditaments called [B.], they indemnifying the Company or the directors or secretary thereof in respect thereof.

Lessees may use lessors' names in obtaining renewal of way-leave.

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

New engine, twenty-five-horse power, in good repair, with everything complete; two fire spades, two rangers, two fire rakers, two picks.

Old engine, fourteen-horse-power, in good repair, with every thing complete; one shovel, two fire rakers, and two rangers.

XXXIX. *LEASE of* MINES *of* COAL *and* IRON-STONE, *with liberty to dig* CLAY *and* LIME-STONE, *and make* BRICKS *and* LIME *for* SALE.

THIS INDENTURE, made the —— day of ——, 18—,

Parties.

BETWEEN [*lessor*], of &c. (who, and his heirs and assigns, unless the contrary appears, are hereinafter called the lessor), of the one part; and [*lessee*], of &c. (who, and his executors, administrators, and assigns, unless the contrary appears, are hereinafter called the lessee), of the other part, WITNESSETH that, in consideration of the rents, royalties, covenants, and stipulations hereinafter reserved and contained, and on the part of the lessee to be respectively paid, observed, and performed, the lessor hereby demises unto

Testatum.

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the lessee, ALL the mines, veins, and seams of coal and iron-stone as well opened as unopened, within and under the several lands and hereditaments situate in ——, in the parishes of —— and ——, in the county of ——, aforesaid, delineated in the plan annexed to these presents; TOGETHER WITH liberty for the lessee and his agents, miners, servants, and workmen, from time to time and at all times during the said term, to enter upon such parts of the said lands as in the said plan are coloured yellow and blue (being the parts appropriated by the mutual consent of the parties hereto for the purposes of this lease), AND there to dig, bore, delve, sink, search for, raise, get, and work the said mines, veins, and seams of coal and iron-stone, and for that purpose to sink such and so many pits and shafts, and to drive and make such and so many gates, head-ways, staples, soughs, levels, and drains (*a*), and to erect such and so many fire-engines, whimseys, cranks, gins, and other machines, and to make use of all such other means as shall be found necessary or convenient for raising, getting, and working the said mines, veins, and seams of coal and iron-stone, and for draining, raising, and discharging the water therefrom, according to the best and most improved method usually practised in such or the like cases, AND to place, stack up, and lay such coal and iron-stone, and the earth, rubbish, and spoil to be raised out of the said pits or shafts and mines, upon the appropriated parts of the said lands, or any of them, or any part thereof, AND to have, take, and carry away, at his will and pleasure, and to convert to and for his own benefit all such coal and iron-stone as shall be gotten or raised from the said mines, veins, and seams; AND ALSO to make such and so many railways, tram-roads, and other roads and ways in, through, and over the appropriated parts of the said lands, as shall from time to time be found necessary or convenient, to or from any convenient place or

Demise.

Liberty to work mines;

to sink pits and erect engines, &c.;

to carry away and dispose of coal, &c.;

authority to make railways, &c.;

(*a*) Some mining terms have been already explained (*ante*, pp. 488, 491), others, peculiar to the coal districts, may be here mentioned. A "bord" or "gate" is a gallery driven across the shaft in opposite directions, upon the seam of coal, occupying the entire height of the seam. "Head-ways" are passages driven at intervals from the gate, at right angles to it. "Staples" are pits or "winzes," connecting an upper and an under seam. Some of the Welsh coal-seams are worked entirely by "day levels" or heads driven from the valleys, without any pits.

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places of delivery, and to do and perform all such other acts and things for carrying away the said coal and iron-stone as shall from time to time be fitting and necessary; And also with liberty of ingress, egress, and regress, in, to, or out of and from the appropriated parts of the said lands, or any part thereof, with horses, asses, carts, waggons, and other carriages or otherwise, as shall be necessary for taking, conveying, carrying away, selling, and disposing of the said coal and iron-stone, in, by, and through such railways, roads, and other ways, or any of them; And also with liberty for the lessee, from time to time and at all times during the said term, to dig for and get fire-clay and other clay, brick earth, loam, and sand, and to make and manufacture the same into bricks, tiles, quarries, and other articles, as well for the use of the said works in or upon the appropriated parts of the said lands or any part thereof, as also for the purposes of sale, and to sell and dispose of such bricks, tiles, and quarries; And to burn lime-stone for the purpose of sale, and to sell and dispose of the same; And generally to do all other necessary and proper acts and things, for laying dry, raising, getting, and working the said mines, veins, and seams of coal and iron-stone, and disposing of the produce thereof, and for digging, getting, and disposing of the several other substances aforesaid, and for deriving the benefit of the liberties, and privileges hereby granted; But subject, as to the several liberties hereinbefore granted, to the covenants and provisoes hereinafter contained; Except, nevertheless, and always reserved unto the lessor and his bailiffs, surveyors, and agents, full liberty, and at all or any time or times during the term hereby granted, at the will and pleasure of him, them, or any of them, to enter upon the appropriated parts of the said lands, and to make use of any of the pits, shafts, windlasses, ropes, and other machinery and apparatus for the time being employed in or about the working and carrying on the said mines and works, in order to view and inspect the state and condition of the said mines and works; And to measure, act, and do as he, they, or any of them shall see occasion for the information of the lessor respecting the said mines and works: To hold the premises hereby demised and granted respectively, with the appurtenances, unto the lessee, from the —— day of ——, 18—, for the term of —— years thenceforth next ensuing, subject to the covenants and stipu-

liberty to dig fire-clay and brick-earth, and to make bricks and burn lime-stone for sale;

Habendum.

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lations herein contained; YIELDING AND PAYING THEREFOR, during the said term, the yearly rent of £——, as and for the royalty or mine-rent in respect of the said mines, veins, and seams of coal, clear of all taxes, rates, assessments, and deductions whatsoever, by four equal quarterly payments in every year; (that is to say), on the —— day of ——, &c.; the first of such quarterly payments to be made on the —— day of ——, 18—: AND ALSO YIELDING AND PAYING the further yearly rent of —— shillings per acre, and so in proportion for any less quantity than an acre, of all such of the appropriated parts of the said lands, coloured yellow in the said map or plan, as at any time or from time to time during the said term shall be actually occupied or employed by the lessee, either for the purpose of carrying on the said works or any of them, or for such agricultural purpose as is specified in the covenant hereinafter contained relating thereto; such last-mentioned rent to commence with such occupation or employment, and thenceforth to continue payable during the then residue of the said term, and to be paid by equal portions on the days above appointed for payment of the said yearly rent of £——; the first payment thereof, whether for the whole or part only of a quarter, according to the time of the commencement of such occupation or employment as aforesaid, to be made on such of the said days as shall first happen after any act done by the lessee, whereupon such rent shall become payable; Subject nevertheless to the proviso hereinafter contained: AND ALSO YIELDING AND PAYING the yearly rent of —— shillings per acre, and so in proportion for any less quantity than an acre, of all such of the appropriated parts of the said lands, coloured blue in the said map or plan, as at any time or from time to time during the said term shall be actually occupied or employed by the lessee for the purpose of carrying on the said works or any of them; such last-mentioned rent to commence with such occupation, &c. [*as before*]: PROVIDED NEVERTHELESS, and it is hereby agreed and declared, that if at any time or times during the said term the lessee shall be desirous of relinquishing the possession of any lands which he shall have entered upon, occupied, or used in pursuance of the liberties hereinbefore granted, and shall give to the lessor six calendar months' previous notice, in writing, of his intention to

Reservation of fixed mine rent for the coal,

payable quarterly.

Surface rent as to particular lands.

Surface rent as to other lands.

Power for lessee to give up parts of land occupied by him, and to determine the surface rent as to such parts, upon giving six months' notice.

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deliver up possession of such lands, such notice to expire on one of the quarterly days of payment hereinbefore mentioned, Then and so often as the same shall happen, the term therein of the lessee shall, from and immediately after the expiration of the said notice and the performance by the lessee of all the covenants and agreements hereinafter contained concerning the same lands up to the period of the delivery of possession thereof, cease and determine; and the rent hereinbefore reserved, and the covenants and stipulations hereinafter contained concerning the same lands on the part of the lessee, shall thenceforth cease and determine, and be absolutely void;

Reservation of royalty for iron-stone.

AND ALSO YIELDING AND PAYING yearly during the said term, as and for the royalty or mine-rent in respect of the said iron-stone, one equal sixth part of the sum at which the same shall be sold or disposed of by the lessee; such rent to be paid at the times and in manner hereinafter expressed: AND

Payment for bricks made either for use or sale.

ALSO YIELDING AND PAYING yearly during the said term at the times and in manner hereinafter mentioned respectively, the rents or sums following, that is to say, the sum of —— pence for every quantity of 1000 bricks (including fire-bricks), tiles, or quarries, which shall be made and used by the lessee, by virtue of these presents, for the purposes of the said mines and works; AND the sum of —— shillings for every quantity of 1000 fire-bricks; AND the sum of —— shillings for every quantity of 1000 other bricks, and of tiles or quarries which shall be made by the said lessee, by virtue of these presents, over and above the bricks, tiles, and quarries, which shall be made and used by him or

Payment for sand used.

them for the purposes of the said works; AND the sum of —— pence for every cart-load of sand which shall or may be gotten or used by the lessee, by virtue of these presents:

Royalties for coal raised above a certain quantity :— large coal,

AND ALSO YIELDING AND PAYING in every year of the said term, within which a quantity of coal, exceeding —— tons, shall be gotten and sold by the lessee, a further and additional rent of —— pence for every ton of such excess which shall consist of the coals commonly called the middle coal and the nether coal,

small coal and slack,

or either of them: AND ALSO YIELDING AND PAYING in every year of the said term, within which a quantity of slack, and of the coal commonly called the smoile coal, and used as slack, or of either of them, exceeding —— tons, shall be gotten and sold by the lessee, a further and additional rent of —— pence

Deficiency of

for every ton of such excess; PROVIDED NEVERTHELESS, and it

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is hereby further declared and agreed that if, in any one year of the said term, the quantity of coal to be gotten and sold by the lessee shall be less than —— tons, or the quantity of slack to be gotten and sold by him shall be less than —— tons, then and so often as the same shall happen, it shall be lawful for the lessee to get the deficiency of coal or slack for any or every other such year in any one or more of the five succeeding years of the said term, if the said term shall so long continue, without being chargeable with any tonnage rent for the excess occasioned in any of such succeeding years, by the getting and selling of such deficiency; but the coals or slack gotten in any succeeding year as aforesaid, shall not be applicable to make up the deficiency of any preceding year or years until the full quantity of —— tons of coal, and —— tons of slack, which ought to have been gotten in such succeeding year, shall have been gotten (*b*): And the lessee hereby covenants with the lessor in manner following (that is to say), That the lessee will pay the several rents and reservations hereinbefore respectively reserved and made payable on the days and in manner hereinbefore appointed for payment thereof respectively, without any deduction; And also that the lessee will, during the said term, pay all the taxes, rates, levies, assessments, and impositions whatsoever (except the land-tax), taxed, charged, assessed, or imposed upon the lands hereby demised, or upon the said several rents and royalties, or upon any erections, buildings, or works to be erected and built or carried on in pursuance of these presents, or upon the lessor or lessee in respect thereof; And also that the lessee will enter or cause to be entered in proper books of account, to be provided and kept by him for that purpose at his counting-house upon the premises (which books shall, at all seasonable times of the

coal raised in any one year may be made up in the course of the five next years.

Covenants by lessee to pay rents and royalties.

To pay taxes, &c.;

except land-tax;

to keep accounts of coal, and suffer books to be inspected.

(*b*) The customary ton in the coal-mining districts, formerly consisted of thirty-two bolls of thirty-six gallons each, or eighteen chaldrons of fifty-three hundredweight each; but the statute 5 & 6 Will. 4, c. 63, sect. 9, enacted that, "all coals, culm, and cannel of every description shall be sold by weight, and not by measure," under a penalty of 40*s*. And Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), whereby the Act of Will. 4 is generally repealed, re-enacts this provision: see sect. 86, and Sched. 6, Part. 2, of the Act of 1878. By sect. 19 of the same Act, it is provided that all trade contracts, sales, dealings, &c., are to be in imperial weights or measures.

Weights and measures.

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day, be open to the inspection of the lessor and his steward and agents, with liberty to take copies or extracts), true, plain, and perfect entries of all the coal (distinguishing between middle and nether coal, and slack and smoile coal), and iron-stone raised and gotten by virtue of these presents, and of all bricks, tiles, and quarries made by virtue of these presents, and of the bricks, tiles, and quarries used in or about the said works, and of the coal, iron-stone, slack, bricks, tiles, and quarries sold by the lessee, together with all such particulars of weights, numbers, quantities, dates and other facts and circumstances, as shall be necessary or proper for the better understanding of such accounts, or to be entered therein in the usual and regular course of business; and will, on being thereunto required by the lessor, verify such accounts by declaration; And also that it shall be lawful for the lessor or his steward or agent to be present at any time or times at the mouths of the pits or shafts whence the said coal or iron-stone shall be raised or gotten, and at the machine or machines when the same shall be weighed, and also at the place or places where the said iron-stone shall be smelted, in case the lessee shall smelt the same, and also at the place or places where the said bricks, tiles, or quarries shall be made or burnt, and to inspect and superintend such operations, and to take notes and minutes of the weights, quantities, and other particulars; And also that the lessee will, on the —— day of —— and the —— day of —— in every year of the said term, make out the said coal account for the half-year immediately preceding the same day, comprising therein all the coal gotten and sold or contracted to be sold during that period, inclusive of the then last settling day, but exclusive of the day on which such account shall be settled and made up, shewing for or in respect of what year or years the coal therein comprised shall have been gotten and sold or contracted to be sold, and shewing the amount of the tonnage rent (if any) due and payable to the lessor for the excess of coal; and will thereupon deliver to the lessor, or his steward or agent, a true and examined copy of such account, signed by the lessee, and verify the same by the production of books and vouchers; And will at the same time pay to the lessor, or to his steward or agent, the amount of tonnage-rent (if any) then due and owing for excess of coal, clear of all deductions; And also, that the lessee, will on each and every of the quarterly days

That lessor or his agents may be present at the weighing of coal, smelting of iron-stone, &c.

To make out and deliver half-yearly accounts;

to produce vouchers;

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hereinbefore appointed for payment of the said yearly rent of £——, make out the iron-stone, brick, tile, quarry, and sand account for the quarter of a year immediately preceding the same day, comprising therein all iron-stone, bricks, tiles, quarries, and sand, gotten, smelted, made and used, and all bricks, tiles, and quarries used for the purpose of the said colliery and works during that period, inclusive of the then last quarter-day, but exclusive of the day on which such account shall be settled and made up; And shall thereupon deliver to the lessor, or to his steward, or agent, a true and examined copy of such accounts, signed by the lessee, and verify the same by the production of books and vouchers; And at the same time pay to the lessor, or to his steward or agent, the full amount of the aforesaid rent or sum of —— pence for every one thousand bricks, tiles, and quarries made and used for the purpose of the said colliery and works, and of —— shillings for every one thousand fire-bricks made, but not so used, and of —— shillings for every one thousand other bricks and of tiles and quarries made, but not so used, and of —— pence for every cart-load of sand gotten and used for the purposes aforesaid, for the quarter of a year included in such accounts, clear of all deductions; And also, that the lessee, will do, or permit to be done, all such acts, matters, and things, in respect to the keeping and delivering copies of accounts, the inspection of accounts, and otherwise, as shall be necessary or convenient for enabling the lessor, or his steward or agent, to obtain the full benefit of the several rents, renders, and reservations hereinbefore contained; And also, that the lessee, will, at all times during the said term, supply to the said lessor, at the mouth of the pits, such quantity of coal as he shall require for smelting the iron-stone to be gotten as aforesaid, at and for the then market price thereof; And also, such quantity of slack as he shall require, at the price of —— shillings per ton; and the coal and slack to be so sold and provided shall be accounted for by the lessee, as coal and slack sold within the intent of the reservation and covenants hereinbefore contained; And also that the lessee will not use, consume, or apply any of the coal or slack to be raised and gotten from the mines, veins, and seams of coal hereby demised during the said term, otherwise than in or upon the appropriated parts of the said lands, and for the purposes of the said mines and works, and for the

to make payments for bricks, sand, &c.;

to do all other acts for the lessor's information;

to supply lessor with coal for smelting his portion of iron-stone at the pit's mouth at the market price; and slack at — *s.* per ton.

Not to consume coal except for the purposes of the mine, and domestic purposes.

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domestic purposes of the lessee, and his agents, colliers, miners, and other workmen to be employed by him or them in and about the same colliery and works; AND will not use or consume more than —— tons of coal per annum for such colliery and domestic purposes (for which no rent or royalty is hereby reserved or intended to be made payable), but will from time to time, with all convenient speed, sell, at the mouth of the pit or shaft, all the coal to be raised and gotten as aforesaid, and will not coke the same or any part thereof; AND ALSO that the lessee will not during the said term build, or set up, any building or buildings, erection or erections, or other structure or structures, in or upon any part of the appropriated parts of the said lands for the purpose of smelting the iron-stone to be gotten and raised pursuant to these presents; and will not smelt or attempt to smelt such iron-stone, or any part thereof, in or upon the appropriated parts of the said lands without first obtaining the consent in writing of the lessor for that purpose; AND will not, during the like period, get sand from any part of the appropriated parts of the said lands other than such part or parts thereof as shall be approved of by the lessor, or his steward or agent; AND ALSO that the lessee will make and manufacture into bricks, tiles, or quarries, in or upon the appropriated parts of the said lands all the clay, brick-earth, and loam hereinbefore authorized to be gotten; AND ALSO that the lessee will, during the said term, in a proper and workmanlike manner, repair, amend, maintain, scour, and cleanse, and keep in good and sufficient order and repair, according to the usage and custom of similar undertakings in the said county of ——, all such parts of the said lands as shall from time to time be occupied or employed by the lessee pursuant to these presents, with the fences and appurtenances thereunto belonging, and all the erections, buildings, structures, engines, machinery, railways, roads, and other conveniences which now are or shall or may at any time or times during the said term be erected, set up, or made by the lessee for winning and getting the said mines, veins, and seams of coal and iron-stone, or otherwise carrying on the said works; AND ALSO that the lessee, and his servants, agents, and workmen, will at all times during the said term (unless prevented by unavoidable creep, thrust, crush (*c*), or

Not to consume more than —— tons, but to sell.

Not to build for smelting, nor to smelt iron-stone without license.

Not to get sand without license.

To manufacture clay and brick-earth.

To repair and keep in order fences, erections, &c.

To work mines constantly under superintendence of lessee.

(*c*) "Creep" is a sinking of the columns of coal left for the

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other accident), work the said mines, veins, and seams of coal and iron-stone, and carry on the other works and mining operations hereby authorized to be carried on, in a proper and workmanlike manner, according to the most approved and skilful methods used or pursued in other works of the same nature in the said county of ——, and under the inspection, superintendence, and control of the lessor or his steward, agent, or surveyor; And will not at any time during the said term wilfully or negligently carry on or work any new pits or mines so near to any old works adjoining thereto as, by weakening the pillars or partitions between the same or otherwise, to occasion any destruction, damage, or injury to the said lands, or any part thereof, or expose the same to the risk or danger thereof (*d*); And also that the lessee will not during such period as he shall occupy such parts of the said lands as are coloured yellow, or any of them, pursuant to these presents, depasture the same with cattle, or use the same otherwise than for the purpose of carrying on the colliery and works hereby authorized to be carried on, or for mowing or cutting and carrying away the grass growing thereon, and converting the same to his own use, which he is hereby authorized to do; And also that the lessee will from time to time at his own costs, bring to bank on the said lands all the manure and dung to be made and produced by the horses and cattle to be employed underground in the mines hereby demised, and will permit the same, and also the manure and dung to be made and produced at the surface of the said lands, or such

Not to work mines negligently or dangerously.

Not to depasture certain closes.

To raise manure produced in the mines.

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support of the roof of the mine, accompanied by a rising of the floor or "pavement;" and caused either by the smallness of the columns, or the softness of the "pavement." "Thrust" or "sit" is a sinking of the roof of the mine, owing to similar causes. "Crush" is a giving way of the supporting column itself.

(*d*) Covenants to leave pillars and walls for the support of the superincumbent strata are not of course, in leases of coal mines, or—which are often very similar in their nature—of iron or salt mines. When the seam is thin, it is not an unfrequent practice to extract the whole of the coal, allowing the external strata to collapse, which is called the "long-way," or the "Shropshire method." And even in the thicker seams, the method with reference to which the clause in the text is framed (technically called the "post and stall" way), is now giving place to a variation of the Shropshire method, called "pannel working," by which the whole of the coal is won. The special clause in leases of this kind must always be framed with reference to the stipulations and intentions of the parties.

As to covenants to leave pillars.

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part thereof respectively as shall not be used for the manuring of the said lands, to be removed and used by the lessor, or his tenants, without payment; And also that the lessee will, at all times when the said mines shall be in work, convey, or cause to be conveyed gratis down from the surface into and through the said mines and works, by, in, or upon the engines or machines by which he, or his agents, workmen, miners, or servants shall severally be conveyed into and through the same, such person or persons as the lessor, or his steward or agent for the time being, shall at any time or times appoint for the purpose; and permit the said person or persons to survey and inspect the said mines and works, and see whether the same are kept in good and substantial order and repair, and are worked, managed, and carried on in a fair and workmanlike manner, according to the custom of similar undertakings in the said county of ——, and according to these presents; And will give such explanations as shall be required respecting the same to the person or persons making such survey and inspection; And after every such survey and inspection, will re-convey such person or persons, by and in manner aforesaid, from and out of the said mines and works; And in case, on any such survey and inspection, the lessee shall be found to be working or using the said mines and works, or any of them, in an unworkmanlike or improper manner, and the lessor, or his steward or agent for the time being, shall give notice in writing to the lessee, or leave the same for him at the counting-house upon the premises, to suspend the further working of the said mines and works until full satisfaction and amends shall be made for the damage or injury which shall have been sustained or occasioned by or to the lessor by reason of the said mines and works being so improperly worked or used; and immediately after such notice shall be given or left as aforesaid, the prosecution of the said mines and works shall be suspended accordingly; And also that the lessee will, as often as the pits or shafts sunk shall, by reason of the exhaustion of the mines, veins, or seams, become useless, fill up the same pits or shafts, or arch over the same with bricks, in a substantial, secure, and workmanlike manner, burying therein the spoil and rubbish which shall have been raised or gotten out of the said pits or shafts; And will cover over the mouths of the said pits or shafts with good earth or soil, and at the

To convey lessor's agents through mines to inspect repairs, &c.;

and to convey them out again.

Upon notice of miswork-ing, &c., the work to be suspended until repara-tion is made.

To fill up abandoned pits and shafts;

to bury rubbish;

and level the surface;

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same time level the land or ground immediately surrounding or adjacent to the same pits or shafts, so as to render the surface of the same pits or shafts, and of the land connected therewith, fit for tillage and cultivation, according to the custom of the country; And will, when and as any erections, buildings, engines, furnaces, machinery, iron work, or other apparatus to be erected, built, constructed, or fixed by the lessee, in or upon the appropriated parts of the said lands, during the said term, shall be taken down or removed, in like manner level the site or surface of the land or ground immediately surrounding or adjacent to the same, so as to render such land fit for tillage and cultivation, according to the custom of the country; And also that the lessee will from time to time, at his own costs, immediately after he shall have gotten and exhausted the clay, brick, earth, sand, and loam, for the making of bricks, tiles, and quarries, from any part or parts of the appropriated parts of the said lands, fill up, level, and lay down the same with grass or clover seeds in a husbandlike manner; And also that the lessee will, from time to time, upon demand, pay to the several occupiers and tenants for the time being of the appropriated parts of the said lands, or any of them, reasonable satisfaction for any damage that may be committed or occasioned on their respective lands, or the crops growing thereon, by the working of the said mines, or carrying or not carrying away the produce thereof, or otherwise by reason of any of the works or operations to be carried on pursuant to these presents; And also that the lessees will at the expiration or other sooner determination of the said term, peaceably and quietly yield and surrender up to the lessor the mines, veins, seams, minerals, and premises, hereby demised and granted (other than and except so far as the same shall have been worked out and exhausted by virtue of these presents), with the levels, drains, soughs, water-courses, shafts, air, and other pits, roads, ways, and other conveniences appertaining and belonging thereto, except the wrought or cast-iron rails, rollers, chains, and other iron-work appertaining to the said ways or roads which the lessee is hereby authorized to remove, provided he shall then have duly performed and observed the covenants on his part herein contained, except so far as prevented by unavoidable creeps, thrusts, crushes, or other accidents; And will, at the expiration or sooner determination of the said term, in case the

to level the sites of buildings removed;

to fill up clay and sand pits, and lay down the surface with clover and grass seeds;

to pay compensation to tenants;

to yield up premises at end of the term in repair;

on request to fill up, &c., any pits, &c., that

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lessor shall in writing request the same (but not otherwise), fill up and level all and every and such and so many of the pits, shafts, levels, drains, water-courses, roads, ways, and other conveniences appertaining to the ungotten and unexhausted mines, veins, and seams (if any) as he may be so requested to fill up and level; And will render the surface thereof fit for tillage and cultivation, in such manner as is hereinbefore provided with respect to the surface of the exhausted pits or shafts. And the lessor hereby covenants with the lessee, that the lessee, paying the several rents, royalties, and sums of money, which shall, by virtue of these presents, be payable, and observing and performing all the covenants and conditions on his part herein contained, may at all times during the said term peaceably hold and enjoy the premises hereby demised and granted, without any interruption or disturbance by the lessor or any person or persons claiming through, under, or in trust for him; And further, may, at any time or times within the space of six calendar months after the expiration or other determination of the said term, take away and have all such coals and iron-stone as shall, at or before such expiration or other determination of the said term, be brought to bank at all or any of the pits of or belonging to the premises; And also within such space of time, may use and repair all ways and roads which may be necessary or requisite for the removal of such coal and iron-stone, and may take away for his own use all such houses and other erections as shall not be built of stone or brick (although the same may be roofed with slate or tile), and all steam and other engines, whimseys, gins, mills, rollers, rails, chairs, blocks, sleepers, staiths, and other iron and wood work, whether embedded in brick-work or masonry, or not, so that the same wood or iron-work is not part of any erection or building of stone or brick (other than a furnace); and all brattices or sollars (*e*), and stoppings of wood or stone work, air-tubes, and air-furnaces;

may not be exhausted.

Covenant by lessor for quiet enjoyment;

that lessee may remove coals at bank within six months after determination;

may repair roads and remove trade-fixtures within same six months.

"Brattice."

Sollar."

(*e*) A "brattice" is a vertical partition, made in a shaft, for the purpose of ventilation, when the mine is not furnished with separate "downcast" and "upcast" shafts. A "sollar" is an horizontal wooden platform, sometimes made in a level, to facilitate the ventilation; but the term does not seem to be appropriate in the present instance, as the narrow levels in which sollars are useful, are not of frequent occurrence in coal mines. As a general conveyancing term, "sollar" signifies an attic, or room above the principal cornice of a building: Jac. Law. Dict.

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the same erections, machinery, and iron and wood work having been erected or placed upon or about the premises by the lessee during the said term (*f*): PROVIDED ALWAYS, that, in case the lessee shall be desirous of putting an end to the term hereby granted at the expiration of the first seven years thereof, and shall give unto the lessor or his agent not less than a year's previous notice of his or their intention so to do, and shall, at or before the expiration of such seven years, duly pay the several rents and sums of money hereby reserved and made payable, and perform and fulfil the several covenants on his part herein contained, then, and in such case this present demise shall, at the expiration of the first seven years thereof, absolutely cease and determine. PROVIDED ALSO [*proviso for reference of disputes to arbitration*, p. 519].

Power for lessee to determine term at end of seven years.

Arbitration clause.

IN WITNESS, &c.

XL. *LEASE of a Seam of* COAL *and* CLAY PIT *by* MORTGAGEES *and a* MORTGAGOR (*a*) *to Two Lessees as* TENANTS IN COMMON, *with Liberties for working the same.* RESERVATION *of* SURFACE RENT, *and of* ROYALTY *for* COAL, *fluctuating according to Market Prices, and other* ROYALTIES. PROVISION *in case of partial* FAILURE *of* MINE, *&c. Liberty for Lessors to use Shafts made by Lessees for working Mines not demised; and other Special Provisions.*

THIS INDENTURE (*b*), made the —— day of ——, 18—, BETWEEN [*mortgagee*], of &c., and [*mortgagee*], of &c. (who, and the survivors and survivor of them, and heirs and

Parties.

(*f*) The greater part of the articles enumerated in the above covenant are such as the lessee would be justified in removing, without any authority for that purpose, being either not fixtures at all, or coming within the description of trade fixtures, which it is well known are not within the general rule: *ante*, p. 311.

As to authorizing lessee to remove fixtures.

(*a*) The Conveyancing and Law of Property Act, 1881, does not empower mortgagors or mortgagees in possession to grant mining leases: see *ante*, p. 81.

(*b*) Stamp, *ad valorem* on fixed surface rent: see *ante*, p. 336.

Stamp.

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assigns of such survivor, and other the person or persons for the time being entitled to the reversion of the hereditaments hereby demised expectant on the term hereby granted, unless the contrary appears, are hereinafter collectively called "the lessors"), of the first part; [*mortgagor*], of &c., of the second part; and [*lessee*] and [*lessee*], both of &c. (who, and their respective executors, administrators, and assigns, unless the contrary appears, are hereinafter called "the lessees"), of the third part, WITNESSETH, that in consideration of the several rents and royalties, covenants, conditions, and stipulations hereinafter reserved and contained, and on the part of the lessees to be paid and performed, the lessors, at the request of the said [*mortgagor*], hereby demise, and the said [*mortgagor*] hereby demises and confirms, unto the lessees, ALL the mine, vein, bed, or stratum of ten-yard coal, commonly called the ——, and such part of the mine, bed, or stratum of common brick-clay, as the lessees shall want and be desirous of working, respectively lying and being in and under all those eighteen several closes, pieces, or parcels of land, situate, lying, and being at ——, in the parish of —— and the parish of ——, both in the county of ——, and containing by admeasurement fifty-five acres or thereabouts; and which are now, or were late, in the several occupations of [*tenants*], and are severally delineated in the plan hereunto annexed; TOGETHER WITH liberty for the lessees, and their agents, miners, workmen, and servants, to enter upon the said lands, or any part thereof, and to occupy so much and such parts thereof as may be necessary for the carrying on the works of the said mines; the lessees first giving one calendar month's notice in writing to the respective tenants or occupiers of the said lands, or leaving the same for them at their respective usual places of abode, and specifying, in every such notice, the names and particulars of the fields or field and quantity of land intended to be entered upon and taken possession of by the lessees, and the lessees also making reasonable compensation to the respective tenants or occupiers for the time being of the lands so entered upon and taken possession of by them as aforesaid, for all injury and damage to be done to the said lands, and to the corn and other crops then standing or growing thereupon; such compensation, in case the parties cannot agree respecting the same, to be determined by arbitration, in manner hereinafter

Testatum.

Parcels.

Reference to plan.

Liberty to enter upon and occupy lands.

giving notice to tenants;

and making compensation.

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mentioned; And also liberty for the lessees to open, sink, dig, drive, work, and make any pits, shafts, adits, soughs, tunnels, drains, canals, watercourses, fences, ways, paths, roads, passages, and railways, in, under, or upon the said lands, or any part thereof, but not to sink any pit or pits in or upon the gardens (*b*) now in the respective occupations of —— and ——; And to win, get, work, raise up, stack, carry away, sell, and dispose of all the said mine of ten-yard coal, and to get the said common brick-clay, and to convert the same into bricks, tiles, or quarries; And to make coke upon the said lands, or any part thereof; And to build, erect, set up, and maintain all such engines, gins, whimseys, machinery, houses, kilns, sheds, huts, and other erections whatsoever upon the said lands, as may be deemed necessary or expedient for the more effectually working, consuming, and disposing of the said coal, and getting and converting the said common brick-clay, and the making of coke; And generally to do and perform all such other acts as may be necessary to be done and performed for the purpose of laying, placing, stacking, stowing, and exposing to view, selling, consuming, and disposing of and carrying away all such thick or main coal, and slack, and the coke to be made upon the said lands, and for the making and converting into bricks, tiles, or quarries, the said common brick-clay, to the greatest advantage; Except nevertheless and reserved out of the demise hereby made, unto the lessors during the said term, all such other seams, strata, veins, and mines of coal as are situate and lying either above or beneath the said mine or stratum of ten-yard coal, and all iron-stone, pot and pipe-clay, fire-clay, stone, and all other mines and minerals whatsoever; And also liberty for the lessors and their workmen, agents, and labourers, to have free ingress, egress, and regress, for the purpose of using, occupying, and enjoying the hereinbefore excepted mines and premises, and for the purpose of working, digging, breaking up, getting, carrying away, converting, and selling the hereinbefore excepted coal, iron-stone, mines, minerals, clay, and stone, at their will and pleasure; And, for the purposes last aforesaid, and without making any payment or compensation in respect thereof, to make use of and deepen

Also to open pits, &c.;

and to win and carry away coal, and get brick-clay;

to set up engines, &c.

Exceptions and reservations of all other mines above or beneath the demised mines, and other minerals, &c.;

with power of entry to work the excepted mines;

to make use of shafts disused by lessees.

(*b*) As to what are gardens, within a clause of the kind, see *Gilbert* v. *Tomison*, 4 D. & Ry. 222.

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all or any of the pits or shafts which have already been made by the lessors, or which shall or may hereafter be made or sunk by the lessees, on any of the said lands, when they, the lessees, shall have worked out such pits, and have discontinued the using of such shafts; and to erect and construct all such erections, furnaces, kiln-works, machinery, and conveniences, as he or they may think necessary for all or any of the purposes aforesaid; But so as that the lessors, in the getting and working of the above excepted mines, or in the use or enjoyment of any of the powers hereby reserved, do not obstruct, hinder, or prevent the lessees from getting, converting, and disposing of the mines hereby demised to the best advantage, and do make such compensation and abatement as are hereinafter covenanted to be made: To HOLD the premises hereby demised unto the lessees as tenants in common, from the twenty-fifth day of March, 18—, for the term of thirty years thence next ensuing: YIELDING AND PAYING therefor, during the said term, for every acre of the surface of the said lands that shall from time to time be entered upon and used and occupied by the lessees, for the purpose of working and getting the said mine of ten-yard coal and common brick-clay, or for any of the purposes hereinbefore mentioned, the yearly rent of £——, and so in proportion for a less quantity than an acre, by four equal payments in each year on the twenty-fourth day of June, &c., without any deduction or abatement whatsoever for taxes or otherwise (except the land-tax); the first payment thereof to be made on the first of the said days of payment which shall happen next after the said lands shall be so entered upon and occupied by the lessees as aforesaid; and the said rent to continue payable during all the then residue of the said term, whether the said lands shall continue to be used by them or not, subject nevertheless as hereinafter mentioned; and the quantity of the said land for the time being in the occupation of the lessees shall be ascertained, in case of disagreement, by arbitration, in manner hereinafter mentioned: AND ALSO YIELDING AND PAYING, during the said term, the following rents or royalties: (that is to say), so long as and whenever, during the said term, the regular market price of large or best coal shall not exceed nine shillings per ton, then the royalty or rent to be paid in respect of such large or best coal shall be 2*s.* 3*d.* for every ton weight of such large or best coal, to be won, raised, or gotten from

Lessors not to obstruct lessees by exercise of powers.

Habendum.

Reddendum of surface rent.

Royalties varying according to market price.

For large or best coal 2*s.* 3*d.* per

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and out of the said mine, and so in proportion for any less quantity than a ton; and so long as and whenever, during the said term, the regular market price of lumps or round coal shall not exceed 4*s*. 6*d*. per ton, the rent or royalty to be paid in respect of such lumps or round coal, to be won, raised, or gotten from and out of the said mine, shall be 1*s*. for every ton weight of such lump or round coal, and so in proportion for any less quantity than a ton; and so long as and whenever, during the said term, the regular market price of coke shall not exceed 1*s*. 6*d*. per sack, the rent or royalty to be paid in respect of such coke as shall be made upon the said lands, shall be 3*d*. for every sack, and so in proportion for any less quantity than a sack: But so often as the regular market price of large or best coal shall exceed 9*s*. per ton, then the rent or royalty to be paid in respect of every ton of such large or best coal, shall be 2*s*. 3*d*., together with one-third part of the sum such large or best coal shall sell for by the ton, for the time being, above the sum of 9*s*. per ton, and so in proportion for any less quantity than a ton: And so often as the regular market price of lumps or round coal shall exceed 4s. 6*d*. per ton, then the rent or royalty to be paid in respect of every ton of lumps or round coal so to be raised or gotten from and out of the said mine, shall be 1*s*., together with one-third part of the sum which such lumps or round coal shall sell for by the ton, for the time being, above the sum of 4*s*. 6*d*. per ton, and so in proportion for any less quantity than a ton; and so often as the regular market price of coke shall exceed 1*s*. 6*d*. per sack, then the rent or royalty to be paid in respect of every sack of coke made upon the said lands shall be 3*d*., together with one-sixth part of the sum which such coke shall sell for by the sack, for the time being, beyond the sum of 1*s*. 6*d*. per sack, and so in proportion for a less quantity than a sack; AND ALSO YIELDING AND PAYING the sum of 1*d*. per ton for all slack that shall be raised and gotten during the said term from and out of the said mine (except only such part thereof as shall be consumed on the said lands in manner hereinafter mentioned), and so in proportion for any less quantity than a ton; And also the sum of 1*s*. 6*d*. for every 1000 bricks, tiles, or quarries to be made from the common brick-clay hereby demised, except such part of the said bricks and quarries as shall be used in and about the buildings and erections now standing, or hereafter to be erected, on the said

ton when market price does not exceed 9*s*.

For lumps or round coal 1*s*. per ton when market price does not exceed 4*s*. 6*d*.

For coke 3*d*. per sack when market price does not exceed 1*s*. 6*d*.

When market price is above the specified prices;

royalty of third on such excess;

1*d*. per ton for slack;

1*s*. 6*d*. per thousand for bricks.

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lands, or in or about the working and converting of the mine hereby demised, and so in proportion for any less quantity than a thousand; And in case in any quarter of a year during the first year of the said term, the quantity of best or large coals that shall have been actually raised and gotten from and out of the said mine, shall not amount to the full quantity of 5,000 tons, Then YIELDING AND PAYING during the first year of the said term (in addition to the royalties or reservations hereinbefore reserved in respect of the quantity of such best or large coal which shall have been actually raised and gotten in any such quarter of a year), such further sum of money (exclusive of the said surface rent) as would have been payable, according to and under the fluctuating reservations hereinbefore contained, in case the full quantity of 5,000 tons of such coal had been actually raised and gotten by the lessees as aforesaid, in such quarter of a year; And in case in any quarter of a year during the second year of the said term, the quantity of best or large coals that shall have been actually raised and gotten from and out of the said mine, shall not amount to the full quantity of 6,250 tons, Then also YIELDING AND PAYING during the said term (in addition to the royalties or reservations hereinbefore reserved in respect of the quantity of such best or large coals which shall have been actually raised and gotten in any such last-mentioned quarter of a year), such further sum of money (exclusive of the said surface rent) as would have been payable according to and under the fluctuating reservations hereinbefore contained, in case the full quantity of 6,250 tons had been raised and gotten by the lessees, in such last-mentioned quarter of a year; And in case in any one quarter of a year, during the residue of the said term, and until the said mines shall be incapable of producing 7,500 tons per quarter (such incapacity to be ascertained by arbitration, in manner hereinafter mentioned), the quantity of best or large coals, that shall have been actually raised and gotten from and out of the said mine, shall not amount to the full quantity of 7,500 tons, Then YIELDING AND PAYING during the said term, in addition to the royalties or reservations hereinbefore reserved, in respect of the quantity of such best or large coals which shall have been actually raised and gotten in any such last-mentioned quarter of a year, such further sum of money (exclusive of the said surface rent) as

If quantity of coals worked in any quarter of first year falls short of five thousand tons,

Reddendum in respect of deficiency during such quarter.

Reddendum for deficient quantity in second year.

Reddendum for deficiency in quantity of coals during the residue of the term.

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would have been payable, according to and under the fluctuating reservations hereinbefore contained, in case the full quantity of 7,500 tons of such coal had been actually raised and gotten by the lessees in such last-mentioned quarter of a year; Nevertheless, the lessees in case of their having made up and paid for any such deficiency or failure as aforesaid, shall be at liberty, from time to time in any succeeding quarter of a year, when and as the quantity or weight which shall be actually raised and gotten in each or any of those succeeding quarters of such year shall exceed the several and respective quantities hereinbefore mentioned, to make up and re-imburse themselves such sum or sums of money as shall have been paid for such deficiency or deficiencies in quantity as aforesaid, by selling and disposing of such excess in quantity or quantities of the said best or large coals, as, at the rate of the aforesaid fluctuating reservations, shall amount to the sum or sums of money they shall have so paid as aforesaid, and without paying or being liable to pay any rent or royalty for such excess of quantity; And it is hereby agreed and declared, that all the before-mentioned rents, royalties, and sums of money shall be paid in manner hereinafter provided and agreed upon, by equal quarterly payments in every year during the said term, on the —— day of ——, &c., without any deduction or abatement whatsoever, and that the first payment thereof shall be made on the —— day of ——, 18—: Provided always, that none of the aforesaid rents, royalties, or reservations (except the said surface rent), shall be payable during such period as the working of the said mine shall be suspended or stopped by reason of any fault or failure in the said mine, or by any inevitable accident, the lessees using their utmost endeavours to remove and remedy such hindrance or cause of suspension or stoppage; and that any disagreement as to what shall be deemed such fault or failure as aforesaid, or otherwise respecting any stoppage or suspension, shall be referred to arbitration in manner hereinafter mentioned: Provided further, that in case a partial stoppage or suspension only shall happen by reason of any such fault, failure, or inevitable accident, Then the lessees shall work such pits or shafts, to which such fault, failure, accident, suspension, or stoppage shall not extend, and shall pay the several rents, royalties, and sums of money hereinbefore reserved, only in proportion

But deficiency paid for in any quarter may be worked in any succeeding quarter without further payment.

Times of payment of royalties before reserved.

Royalty to cease during the suspension of the works by accident, &c.

In case of partial failure, &c., proportional rent to be payable.

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to the extent of the works of the said mines and colliery to which such fault or failure, accident, and consequent suspension or stoppage, shall not extend; such proportion (in case of disagreement) to be ascertained by arbitration, in manner hereinafter mentioned; PROVIDED ALSO, that, if any such accident, suspension, or stoppage, shall be occasioned by any improper act, neglect, or wilful default of the lessees, or their agents, servants, or workmen, then, and in every such case, the whole of the said rents, royalties, and sums of money shall continue to be paid by the lessees in the same manner as the same rents, royalties, and sums of money would have been payable in case such suspension or stoppage had not taken place; PROVIDED ALSO, that, in case at any time during the continuance of the said term, the mine of ten-yard coal hereby demised shall fail or be completely and effectually worked out and exhausted, or shall become utterly incapable of being further worked, by reason of some inevitable accident, not happening by neglect or unskilfulness (the fact of such failure and exhaustion, or of such inevitable accident, in case of disagreement, to be ascertained by arbitration, in manner hereinafter mentioned), and the lessees shall be desirous of quitting and giving up the possession of the mines and lands hereby demised, on any of the quarterly days or times hereinbefore appointed for payment of the said mine rents or royalties, and of such their desire shall give notice in writing to the lessors two calendar months next immediately preceding any such quarterly day, then, and in such case, upon full payment of all arrears of the surface and other rents, royalties, and sums of money hereinbefore reserved, and performance of all the provisoes, covenants, and agreements herein contained and on the part of the lessees to be performed, in relation to the mode of quitting the said lands, mines, and hereditaments on the regular expiration of the said term, this lease, and every covenant, clause, matter, or thing herein contained, shall on such quarterly day determine and be void; PROVIDED ALSO, that the quantity and weight of the coals which shall be raised, won, and gotten from time to time from and out of the said mine, shall be ascertained as to such part thereof as shall be carried away from the said lands by means of boats, by a proper and accurate gauge of the boats in which such coal shall be so carried away, and such part thereof as shall be

If suspension happen by default of lessees, whole rent to be payable.

Proviso for avoiding lease in case of accident to mine, &c.

Mode of ascertaining the quantities raised.

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carried away and disposed of by land carriage, by means of a proper and accurate weighing machine or machines to be forthwith erected for that purpose, as hereinafter provided: PROVIDED ALSO that no rent, royalty, reservation, or sum or sums of money, made payable as aforesaid, shall be payable by the lessees for or on account of any slack to be used or consumed by means of the steam-engines erected or to be erected on the said lands solely for the purpose of working and draining the said mine; or for or on account of such coals consumed by the labourers or workmen to be employed by the lessees, or by any one agent or cheque clerk to be employed by them in or about the said mine and works as are usually allowed to them for domestic purposes, but not for any other purpose; nor for or in respect of any slack or coal to be used and consumed in the burning and making of bricks, tiles, or quarries so to be used and employed in any of the pits, shafts, works, drains, soughs, tunnels, and walls for keeping out or preventing the communications of damps or fire within any of the pits now sunk or hereafter to be sunk upon the said lands; nor in respect of any bricks, tiles, or quarries to be used and employed in the building or erection, or in the reparation from time to time, of any furnaces, engines, wharfs, quays, warehouses, bridges, houses, erections, or buildings of what nature soever, within, under, or upon the said lands, or in anywise in the works of the said mines during the said term: PROVIDED ALSO, that, if the lessees shall at any time during the said term, convert into coke any of the large or best coals which shall be got and raised from the said mines, then and in every such case, the lessees will and shall pay the royalty hereinbefore reserved upon such best or large coals so to be converted into coke as aforesaid, and not the royalty hereinbefore reserved and made payable for or in respect of coke: PROVIDED ALSO, that it shall be lawful for the lessees, at the expiration or other determination of the said term, to remove and dispose of all the engines, machinery, implements, articles, and things whatsoever, used or employed in or about the works of the said mine (except the brick-work, and the roofs erected and built for the security of the said engines and machinery, and the timbers necessary to support the said roofs, and except agricultural fixtures), unless the lessors

No rent to be payable for slack used on the lands;

or consumed by the workmen or agent employed;

or in the making of bricks to be used in the works.

Royalty to be payable upon best coals made into coke

Lessees may carry away engines at the end of term (*i*);

unless lessors shall be desirous of purchasing same.

(*i*) As to clauses of this kind, *vide ante*, p. 311.

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shall be desirous of purchasing the said engines, machinery, implements, articles, and things, or any part thereof, such desire being signified to the lessees at least one calendar month before the expiration or other determination of the said term, by some writing under the hand of the lessors or some or one of them, unless the said term shall become suddenly determinable by the act or default of the lessees so as to render such previous notice impracticable; in which case the lessors shall be at liberty to purchase the said engines, machinery, articles, and things, on giving one week's notice or intimation thereof, within fourteen days after his or their entry on the said lands; and in either of the said cases the price or sum to be paid for such engines, machinery, articles, and things, or for such part thereof as shall be so intended to be purchased by the lessors shall be ascertained, in case of disagreement, by arbitration, in manner hereinafter mentioned: PROVIDED ALSO, that it shall be lawful for the lessees at any time or times hereafter during the said term, upon giving twenty-one days' notice in writing, under the hands of them or one of them, unto the lessors to fell and cut down such timber or timber-like trees, now growing or at any time hereafter to grow upon the said lands, as shall be deemed obstructions and necessary to be felled and cut down for the more conveniently working of the said mine and getting and converting the common brick-clay hereby demised; such timber and timber-like trees, when felled and cut down, to be at the sole and absolute disposal of the lessors: And that any dispute which may arise respecting what trees it may be necessary to fell and cut down for the purpose aforesaid, shall be decided by arbitration, in manner hereinafter mentioned: PROVIDED ALSO, that the lessees, in working and getting the said mine and brick-clay, shall not do any wilful damage or injury to any of the messuages and other buildings now standing and being in and upon the said lands: and in case of any damage or injury being done thereto by reason of the working and getting of the said mine and brick-clay, the lessees shall forthwith, at their own expense, repair and amend the messuages and other buildings to which any such damage or injury shall be done or extended: AND THE LESSEES DO HEREBY jointly, and as a separate covenant each of them doth severally covenant with the lessors, that the lessees will [*pay rent and royalties*, *ante*, p. 533]: PROVIDED ALWAYS,

Lessees to be at liberty to cut timber which shall obstruct the working of the mines, on giving notice.

Same when felled to be at the disposal of the lessors.

Proviso that lessees will repair damages done to buildings.

Covenants by lessees— to pay rent and royalties.

Payments

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and it is hereby agreed and declared, that the said rents and royalties hereby reserved may be paid by bills of exchange, or other good and negotiable drafts or promissory notes, payable in London, respectively dated on the several and respective quarterly days hereinbefore mentioned, and to fall due and become payable at a period not exceeding two calendar months from the date or respective dates thereof, and to be drawn and indorsed by or in the names of the lessees, or the person or persons who for the time being shall carry on the works of the said mine: But such bills, drafts, or notes shall not be deemed a satisfaction for the rents, royalties, reservations, and sums of money, or any part thereof, for which they shall be given, unless such bills, drafts, or notes shall be duly honoured and paid when and as they shall become due respectively; And also, that the lessees will [*pay taxes, &c., ante,* p. 533]; And further that the lessees will, from time to time and at all times during the said term, fence out, or cause to be fenced out, with good and substantial posts and double rails, such parts of the said lands as they may dig, open, or use, for the time being, for the purpose of working the said mines, and the pits, shafts, workings, roads and ways, and all other works and premises, at any time used or made by virtue of these presents, so as to protect the adjoining lands and the persons, crops, goods, and cattle of the owners or tenants thereof from all injury, and will at all times during the said term, keep and preserve such fence or fences in good order and substantial repair; And also will make in the fences of such roads and ways a sufficient number of gates for the convenient occupation of the adjoining lands; And also will provide a sufficient and convenient communication over or across any and every road or way made by virtue of these presents, for the use of the occupiers of the adjoining lands, so that the severance of such lands may cause as little inconvenience as may be to the occupiers thereof; And also will erect and maintain on all roads or ways made by virtue of these presents, gates or bars, so as to preserve the inclosure of the adjoining lands, and prevent trespasses; And further, that the lessees will during the said term, get and raise the several quantities of large or best coals hereinbefore agreed to be gotten or raised, in pursuance of the reservations hereinbefore contained, and subject to the terms and conditions thereof, and

may be made by bills of exchange.

To pay taxes, &c.

To fence the land to be used.

To raise the several quantities stipulated for;

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will not get or cause to be gotten a greater quantity of lumps or round coals than shall be equal to one-fifth part of the whole quantity of coals gotten, exclusive of slack; And, in case a greater quantity of lumps or round coals shall be gotten than shall be equal to one-fifth part of the whole quantity gotten, then such excessive quantity of lumps or round coals shall be paid for by the lessees as best or large coals; And further, that the lessees will not at any time during the said term, permit or suffer any common brick-clay, that may be gotten from and out of the bed or stratum of common brick-clay hereby demised, to be carried away from the said lands, but will cause such part of the said common brick-clay as they from time to time may think fit to convert into tiles, bricks, or quarries, to be so converted upon some convenient part of the said lands; And further, that the lessees will, within six calendar months after the execution of these presents, at their own costs and charges, erect and set up, on some convenient and suitable part of the said lands one or more good, serviceable, and correct weighing machine or machines, to the satisfaction of the lessors, and will keep and preserve the same in good and substantial order and repair during the said term; And further, that the lessees will not during the said term remove or carry away, or permit or suffer to be removed or carried away, any coals from the said lands, without causing the quantity or weight thereof to be carefully ascertained, by gauging the boat or boats in which the same shall be contained in case such coals shall be removed in any boat or boats, or by weighing the coals so carried off, in case the same shall be removed by land carriage; And further, that the lessees will work the said mine, and raise or get, or cause to be raised and gotten, the coal and slack therefrom, by means of shafts and pits to be sunk and made upon the lands under which the said mine lies, and not elsewhere; and will in case it shall be necessary for the better and more effectually working of the said mine to sink any new pits or shafts, lay the brick-work necessary to be used and employed in the sinking and making of such new pits or shafts in good mortar, in a substantial and workmanlike manner; And further, will, previously to the sinking and making of any pit or shaft upon the said lands for any purpose whatsoever, and previously to the getting of any common brick-clay, or the stacking of any coal, or the burning of any coke, or the making of any kiln, or the

not to permit any common clay to be carried off.

To erect weighing machine.

Not to permit coals to be carried off without being gauged or weighed.

To get the mine by pits on the land.

To pare off the soil before opening pits, &c.;

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depositing of any soil or rubbish thereon, spade and pare off and carry away all the turf and surface soil from off such part of the said lands as may then be in their occupation, for the purposes of working the said mine, and lay up the same in heaps in some convenient part of the said lands, and keep and preserve, and at the expiration or other determination of the said term, leave the same on the said lands for the use and benefit of the lessors, or permit them at any time previously to remove the same; And will leave open, and protect and preserve with pit-eye pillars, every pit and shaft to be made and sunk by them in and upon the said lands, and leave the bricks and curbs in all and every of the said shafts, for the use and benefit of the lessors upon being paid and allowed by them such reasonable compensation in respect of such pit-eye pillars, as, in case of disagreement, shall be awarded and settled by arbitration in manner hereinafter mentioned; And also, that the lessees will during the said term, according to the best of their judgment, skill, and discretion, continue uninterruptedly (suspensions and stoppages by reason of any fault or failure in the mine or any inevitable accident only excepted) to work, manage, get, raise, carry away, sell, and dispose of the said mine, and proceed to bore, and search for the same, and dig and drive such other pits, shafts, levels and openings as may be deemed requisite and likely to tend to the discovery, winning, and getting thereof; And will during the said term, raise and draw the slack that may be gotten in the said mine, or so much thereof as may be necessary to preserve the said mine clean, and not exposed to any damage by fire, and for the purposes aforesaid; And also that the lessees will constantly, during the said term, employ in and about the said mine and works, a proper number of good and skilful miners, colliers, workmen, servants, and labourers, and also of horses, cattle, carts, carriages, engines, machinery, utensils, tools, and other articles requisite for the carrying on and working of the said mine in such a workmanlike manner as shall tend to the mutual benefit, profit, and advantage of the several parties hereto; And also will, at their own cost and charges, at all times during the said term, maintain and keep the said lands and also all and singular the engines, machinery, whimseys, gins, shafts, erections, and buildings now standing and being, or at any time during the said term to be erected and built upon the said lands, or from time to time substituted in

and preserve and leave same upon the land.

To work mine uninterruptedly.

To raise slack.

To employ proper number of workmen.

To keep premises and machinery in repair.

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the place thereof, in good and tenantable order and repair; And will, at the expiration or other sooner determination of the said term, deliver up all the pits and shafts made and sunk, or hereafter to be made and sunk, in or upon the said lands, in a good and serviceable condition, and in good repair, without filling up or otherwise injuring the same, or rendering them in anywise useless or unserviceable for working and getting the said mine, or the mines hereinbefore excepted out of this demise; And will, in case the lessors, shall by any writing under their hand or hands, request the same (but not otherwise), fill up and level all such of the said pits or shafts as they may be so requested to fill up and level, and restore the said lands into a state proper for cultivation, so far as circumstances will permit; but it is hereby expressly provided and declared that the lessees shall not be required or held liable to fill up or level such pits or shafts as are now made and sunk upon the said lands, or to level and restore to a state proper for cultivation such parts of the said lands as are now broken up for the purpose of working the said mine, such pits or shafts as last mentioned being delineated and marked out in the map or plan hereunto annexed. And further, that in case the lessors, at the expiration or other determination of the said term, shall be desirous of purchasing all or any part or parts of the engines, whimseys, and machinery, tools, implements, ropes, chains, rollers, or other articles or things then being used and employed in the works of the said mine, and which they the lessees shall or may be authorized to remove and carry away, the lessees will, upon receiving notice in writing of such desire, by the space of six calendar months before the expiration or other determination of the said term, or —— days after the determination thereof in the event hereinbefore mentioned, leave and yield up unto and for the lessors all or any, or such part of the said engines, whimseys, machinery, tools, implements, ropes, chains, rollers, and other articles and things as aforesaid, the lessors paying such price or prices for the same as shall, in case of disagreement, be awarded and settled by arbitration, in manner hereinafter mentioned; And further, that the lessees will not during the said term, nor after the expiration or other determination thereof, do, commit, or suffer any wilful act, matter, neglect, or thing whatsoever, which may in anywise damage, endanger, obstruct, or

To deliver up shafts in serviceable condition.

If requested, to fill up pits and restore land to cultivation.

Lessors to be at liberty at the end of term to purchase engines, &c., on six months' notice.

Lessees not to do or neglect any act so as to endanger mines.

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postpone the hereinbefore excepted mines and premises, or the future working thereof; And also, that the lessees will, during the said term, keep, or cause to be kept, in some convenient part of the said lands, or as near thereto as may be convenient to all the parties interested therein, regular books, wherein shall be daily entered fair and open, just, correct, particular, and regular accounts in writing, from time to time, of the several quantities of large or best coals, lumps or round coal, slack and clay, which shall from time to time be gotten or raised from and out of the said mines, and of the quantity of coke, and of bricks, tiles, and quarries, made upon the said lands, and of such quantities of the said articles as shall be sold and carried away, or used, consumed, and employed in or about the works of the said mine and lands, and of the prices, and of the several times and dates of such gettings, raisings, sales, conversions, use, and consumption, and also of the numbers of the boats, and the names of the owners and steerers thereof, and also of the owners of waggons, carts, carriages, horses, and other beasts, in and by which the same articles may be carried away respectively, and also will make such entries in the said books of account, at the time or respective times of ascertaining the said several weights, prices, and quantities; And also will permit the lessors or their agents, at all reasonable times, to inspect the said books of account, and to make copies thereof, or extracts therefrom; And will, on the Saturday next succeeding each of the quarterly days or times aforesaid, in each year during the said term, at their own expense, make out and deliver unto the lessors, or their agent or agents, a true, full, and correct copy of the said books of account for the then preceding quarter; And further, will permit the agents, bailiffs, cheque clerks, and viewers of the lessors, during the said term, constantly or occasionally, as he or they shall think fit, to reside in some convenient dwelling-house of the lessees in and upon the said lands, without any interruption or disturbance by the lessees, or their agents, workmen, or servants, without paying any rent for the same; And also will permit the lessors, or their agents, workmen, servants, or any other person or persons whom they may appoint, to enter upon the said lands, mine, and premises, at any seasonable time, and to survey and inspect, and make plans of the said mines and works, and to see whether the same are in good

Lessees to keep books of account on the land;

and suffer lessors to inspect books;

to deliver quarterly accounts;

to suffer lessors' agents to reside on premises.

Lessors to be at liberty to enter upon and examine the mine.

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and substantial order, condition, and repair, and are worked, managed, and carried on in a proper and workmanlike manner, according to the true intent and meaning of these presents; and will help and assist such person or persons so entering as aforesaid by means of their agents and other workmen, and permit them to have the use of the engines, implements, and utensils for the purposes aforesaid; And further, that the lessees will from time to time, upon demand, pay to the several occupiers and tenants for the time being of the lands under which the said mines are situate, reasonable satisfaction for any damage that may be committed or occasioned on their respective lands, or the crops growing thereupon, by working the said mines, or carrying or not carrying away the produce thereof, or any materials, to or from the said premises, the amount of such payment or satisfaction, in case of dispute, to be settled by arbitration, in manner hereinafter mentioned; And also, that the lessees will not during the said term, assign or underlet the premises hereby demised, in parts or parcels, or in a less quantity and proportion than the whole of the said premises, or in a less proportion than their respective whole undivided shares or interest in the entirety of the same, without the previous consent in writing of the lessors; PROVIDED ALWAYS, and it is hereby agreed and declared that, unless and until the lessors shall require payment to them of the said rents and royalties hereby reserved, and shall give to the lessees or leave for them upon the said lands a notice in writing requiring such payment, the said several rents and royalties shall be paid to the said [*mortgagor*], his heirs or assigns, whose receipts shall be sufficient discharges for the same: PROVIDED ALWAYS that, in case at any time all or any of the said rents and royalties, or any part thereof respectively, shall be unpaid for twenty-one days next after the same shall become due, whether the same shall have been legally demanded or not, it shall be lawful, in case such default in payment shall happen prior to such notice having been given or left as aforesaid, then for the said [*mortgagor*], his heirs or assigns, but in case such default in payment shall happen subsequently to such notice, then for the lessors to enter and distrain upon the said mines and lands, and upon the coal, slack, coke, bricks, tiles, quarries, or clay, horses, engines, machinery, plant, live and dead stock, and goods and chattels of every description which may be in or upon the said mine

Lessees to make satisfaction to tenants for injury done to lands;

not to assign or underlet in parcels.

Proviso that rents may be paid to mortgagor till notice.

Power of distress.

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or the surface of the said lands, and the distress and distresses then and there found to take and dispose of in like manner as landlords may do for rent in arrear on common leases for years; and out of the money arising thereby to retain and take all arrears of the said rents, royalties, and reservations, and also the costs and charges occasioned by the non-payment thereof: PROVIDED ALSO, and these presents are upon this express condition, that in case all or any of the said rents and royalties, or any part thereof respectively, shall be unpaid by the space of forty-two days next after the same shall become payable, whether the same shall have been legally demanded or not, and no sufficient distress or distresses can or may be found or gotten on the said mines and lands to answer such arrear or arrears; or in case the lessees shall make default in the performance or observance of any of the covenants, conditions, and stipulations herein contained and on their part to be performed and observed, Then, and in any such case, it shall be lawful for the said [*mortgagor*], his heirs and assigns, until such notice shall have been given or left as aforesaid, and after such notice shall have been given or left as aforesaid, for the lessors into the said mines, lands, and premises hereby demised, or into any part thereof, in the name of the whole to re-enter, and thereupon the said term shall absolutely cease and determine: AND EACH OF THEM, the lessors respectively, and the said [*mortgagor*], so far as relates to the acts and deeds of himself, and of all persons claiming under him, hereby covenants with the lessees that, they paying the several rents and royalties hereby reserved, and performing and observing all the several covenants, conditions, and stipulations herein contained, and on their part to be performed and observed, may at all times during the said term peaceably hold and enjoy the said mines, lands, and premises hereby demised, without any interruption or disturbance by the lessors or the said [*mortgagor*], or any person claiming under or in trust for them respectively; And also that the lessees may use and enjoy, during the said term, the pits and shafts now sunk upon the said lands; AND FURTHER, that in case the lessors or the said [*mortgagor*], his heirs or assigns, shall at any time during the said term, enter upon or take possession of any part of the said lands, for the purpose of working and getting the hereinbefore excepted mines of coal, iron-stone, clay, stone, and minerals, the lessors

Proviso for re-entry.

Covenant for quiet enjoyment.

To pay compensation for use of machinery, &c., in working excepted mines.

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or the said [*mortgagor*], his heirs or assigns (as the case may be), will, within three calendar months next after they or he shall so take possession as aforesaid, pay and allow unto the lessees compensation for all necessary pit-eye pillars that shall be left in such pits or shafts for the support only and preservation thereof, and for all and every engines, whimseys, machinery, articles, and things to be used by them or their agents, workmen, and miners, in the working, getting, raising, and converting of the hereinbefore excepted mines of coal, iron-stone, clay, stone, and minerals, and will allow a proportional abatement out of the surface-rent hereinbefore reserved in respect of such part of the said lands then in the occupation of the lessees as shall be so taken, entered upon, and occupied by the lessors or by the said [*mortgagor*], his heirs or assigns, for the purposes aforesaid; the amount of the compensation and abatement aforesaid to be determined, in case of disagreement, by arbitration, in manner hereinafter mentioned: PROVIDED ALWAYS, and it is hereby agreed and declared, that in case at any time during the said term the lessors shall be desirous of selling or demising all or any part or parts of the iron-stone and heathen coal lying under the said lands, by royalty or otherwise, they will give six calendar months' notice in writing of such their desire to the lessees, or leave the same at their respective places of abode, and will in such notice specify the price, rent, or royalty, or the several prices, rents, or royalties for which they shall be so willing to dispose of or demise the said iron-stone and heathen coal, or any part thereof; And in case the lessees shall be willing to purchase the said iron-stone and heathen coal, or to accept a lease thereof upon the terms mentioned in such notice, and shall notify their acceptance of the said terms to the lessors within six calendar months next after the delivery of the said notice, Then the lessors will, at the costs of the lessees, execute, or cause to be executed, all such deeds or instruments as may be necessary for completing such sale, or granting such lease of the said iron-stone and heathen coal, as the case may be; AND FURTHER, that in case the lessees shall refuse to purchase or to accept a lease of the said iron-stone and heathen coal, upon the terms, and at the prices, rents, or royalties so to be proposed by the lessors, and shall, within two calendar months after such offer made by the lessors, notify to the lessors the terms upon which they may be will-

If lessors sell or let iron-stone and heathen coal, the same to be first offered to the lessees.

Proviso in case lessees shall reject the terms proposed, but shall offer other terms.

ing to purchase or to accept a lease of the said iron-stone and heathen coal, and in case the lessors shall reject the same, then the lessors will not sell or demise all or any part of such iron-stone and heathen coal unto any other person or persons whomsoever, unless at a price or sum greater than that which shall have been so offered by the lessees as aforesaid; PROVIDED, that notice shall be given by the lessees of the terms upon which they are willing to accept a lease of, or to purchase, such iron-stone and heathen coal, within the said six months after the lessors shall have given such notice of their desire to grant such lease, or contract for such sale, as aforesaid; and in default of such notice by the lessees, the lessors shall be at liberty to sell or demise the said iron-stone and heathen coal unto any person or persons whomsoever, and upon whatever terms they may think proper: PROVIDED ALWAYS, that unless and until the lessors shall have given or left such notice for payment to them of the said rents and royalties hereby reserved as aforesaid, all powers, consents, notices, and acts herein vested in or required or authorized to be exercised, given, accepted, or done by the lessors, may be effectually exercised, given, accepted, or done by the said [*mortgagor*], his heirs or assigns [*Arbitration Clause, ante*, p. 519].

IN WITNESS, &c.

XL. **Lease of Seam of Coal and Clay Pit by Mortgagees and Mortgagor to Tenants in Common.**

Power to the mortgagee, until lessors require payment of rents, &c., to them, to exercise the lessees' powers.

Arbitration clause.

XLI. *LEASE of* COAL MINES *to a Company by a* TENANT FOR LIFE *under the* SETTLED LAND ACT, 1882 (*k*).

THIS INDENTURE (*l*), made the —— day of ——, 18—, BETWEEN [*tenant for life*], of, &c., of the first part; [*trustee*], of, &c., and [*trustee*], of, &c., of the second part; and the —— Coal Company, Limited, of the third part: WHEREAS, by an indenture of settlement, dated, &c., and made between [*parties*], the mines and hereditaments hereinafter mentioned, and intended to be hereby demised, were, with other hereditaments, limited to the uses therein men-

(*k*) As to mining leases by limited owners of settled estates under statutory powers, see *ante*, pp. 31, 33.

(*l*) Stamp, *ad valorem* on *minimum* rent, see *ante*, p. 336.

Stamp.

XLI. Lease of Coal Mines by Tenant for Life Under Settled Land Act, 1882.

tioned, whereby the said [*tenant for life*] is now tenant for life in possession of the same premises without impeachment of waste, and by the indenture now in recital the said trustees were appointed trustees thereof for the purposes of the Settled Land Acts. NOW THIS INDENTURE WITNESSETH, and it is hereby agreed and declared, as follows :—

Testatum.

Interpretation clause.

1. In these presents (unless the contrary appears) the expression "the lessor" includes the said [*tenant for life*] and other the person or persons for the time being entitled to the reversion of the hereditaments and premises intended to be hereby demised expectant on the determination of the term hereby granted: The expression "the trustees" includes the said [*trustees*] and other the trustees for the time being, for the purposes of the Settled Land Acts of the said indenture of settlement: the expression "the company" includes the said [*lessee*] and their successors and assigns: and the expression "the premises," unless otherwise restricted, includes the whole of the mines and hereditaments intended to be hereby demised.

Demise.

2. In consideration of the rent hereby reserved, and of the covenants and conditions hereinafter contained, and on the part of the company to be observed and performed, the lessor, in exercise of the power in this behalf given to him as such tenant for life as aforesaid by the Settled Land Act, 1882, and of any other power whatsoever, him hereunto enabling,

Parcels.

demises unto the company ALL AND EVERY the mines, delfs, beds, and veins of coal and cannel already opened and found, or which hereafter shall be found or discovered, in any part or parts of the said settled lands, situate in the several townships of —— and ——, in the county of ——, in whose occupation soever the same, or any part thereof, now are or hereafter during the term for which the aforesaid mines are intended to

Habendum.

be hereby demised, shall happen to be TO HOLD the premises, together with the several liberties and powers hereinafter granted, unto the company, from the —— day of ——, 18—, for the term of sixty years next ensuing.

Liberties, powers, and privileges to work mines;

3. For the consideration aforesaid, the lessor grants unto the company full and free liberty for the company, by themselves, their servants, agents, or workmen, from time to time, during the said term, to enter into, upon, and within the lands aforesaid, and to bore, search for, dig, sink, get, slack, load, take, carry away, sell, and dispose of the coal and cannel

XLI. Lease of Coal Mines by Tenant for Life Under Settled Land Act, 1882.

within and from and out of every part of the lands aforesaid at their will and pleasure, and to have and receive for their own use all profits arising from such sales: And also from time to time to sink any pits and shafts, and to make any soughs, tunnels, drains, and watercourses within any part or parts of the lands aforesaid: And also to erect and make, and from time to time, as exigencies may require, to pull down, and remove any engines, gins, whimseys, wheels, or other machines, and proper and convenient works whatsoever, in or upon any of the lands aforesaid, for the draining, unwatering, or laying dry, and for working and carrying on, the collieries, and for the use of such engines, machines, and necessary works to collect and divert all streams of water flowing, running, or arising within the lands aforesaid, and for the like purpose to make reservoirs to hold the waste water; And also to make any roads or ways navigable, cuts, trenches, tunnels, docks, wharves, and places and conveniences on the lands aforesaid, for the banking, stacking, conveying, and carrying away, such coals and cannel: And also, for the accommodation of colliers and workmen, to erect and build cottages and dwelling-houses upon such parts of the said lands as shall from time to time be appointed by the lessor, or his agent for the time being; and, without any such appointment, to erect and build any cottages or dwelling-houses contiguous to any fire-engine, or at the mouth of any navigable tunnel, or adjoining to any wharf or coal-yard, that may be made at the mouth of any such tunnel, for the habitation of a person or persons necessarily attendant on such fire-engine, or at such tunnel, wharf, or coal-yard: And also to deposit upon a convenient part of the said lands, to be approved by the lessor or the agent for the time being acting in the management of the —— estate, all coal, cannel, and slack gotten from the said mines, and all rubbish, earth, and spoil brought to the surface therewith, and all materials used in working the said mines: And also to get stone, sand, and gravel for making roads, and clay or loam for making bricks, in some convenient place or places, within or upon the lands aforesaid, to be used only in or about the colliery or coal and cannel works, and for such cottages and dwelling-houses as aforesaid, and not for any other use or purpose whatsoever; such stone, sand, gravel, clay, and loam to be gotten in such places or parts of the said lands as shall, from time to

to sink pits, &c.;

to erect engines;

to make roads;

to erect cottages;

to deposit minerals, rubbish, and materials;

to get stone and make bricks;

XLI. Lease of Coal Mines by Tenant for Life Under Settled Land Act, 1882.

time, be appointed for that purpose by the said lessor, or the agent for the time being acting in the management of the —— estate, and not elsewhere, upon previous application made by the company to the lessors or such agent as aforesaid; And if, after application made for the several purposes aforesaid, the lessor or such agent as aforesaid, for the time being acting in the management of the —— estate, shall refuse or neglect to make such appointment for the purposes aforesaid, for the space of twenty-one days, then and in such case it shall be lawful for the company or their agents to erect such cottages and buildings, and to get such stone, sand, gravel, clay, or loam for the purposes last aforesaid, in some convenient place or places which they shall fix upon, on giving one month's notice in writing for that purpose to the lessor, or such agent as aforesaid, of such their intention, and of the place where they intend to erect such cottages and buildings, or to get such stone, sand, or gravel respectively as aforesaid, unless within one month from the personal service of such notice the lessor, or such agent as aforesaid, shall make such appointment as aforesaid for the purpose or purposes required:

to do other necessary acts;

And also full liberty of ingress, egress, and regress to and for the company, and their agents, servants, workmen, and customers, on foot or with horses and other animals, carts, waggons and carriages, and machines of every description, in, over, and through any part or parts of the said lands, for the getting, loading, taking, conveying, and carrying away the coals and cannel from the mines hereby demised, or for bringing and laying down materials for sinking pits or making roads, or doing any other works for the more effectual getting and carrying away the coals or cannel, or doing any other proper and convenient and necessary works for carrying on the colliery:

to remove machinery at end of term.

And also, at the end or sooner determination of the said term, to take down, remove, carry away, and dispose of all such railed roads, engines, wheels, tools, and utensils as are or shall be erected, made, and brought upon the said lands, for the working and getting the mines, or which shall have been used in or about the same, unless the lessor shall be desirous of purchasing the same or any part thereof, and of such desire shall give not less than —— days' notice before the expiration or sooner determination of the term; in which case it shall be lawful for the lessor to take all or such of the said railed roads, engines, wheels, tools, and utensils

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as he shall so desire to purchase as aforesaid, on paying to the company such a fair valuation for the same as such railed roads, engines, wheels, tools, and utensils may be worth to carry off, such valuation to be ascertained by arbitration in manner hereinafter mentioned.

Reddendum.

4. The company shall yield and pay for the premises hereby demised and granted respectively, during the said term, on the —— day of —— and the —— day of —— in every year, the rents and royalties hereinafter mentioned, that is to say: In respect of the mines hereby demised, a rent after the rate of £—— for every acre that shall be gotten and raised thereout of the thickness of one foot, including, measuring, and reckoning therein and therewith all pillars, walls, and ranges which the company may think proper to leave to support the roof of the mines hereby demised, and so in proportion for a greater or less quantity in thickness than a foot of each and every acre which the company shall yearly get within the lands aforesaid: And in case in any half-year during the said term, the company shall not get and raise such a quantity of coal and cannel out of the mines hereby demised, as, according to the said footage rent, shall produce a clear minimum rent of £——, then such a sum as, together with the footage rent payable in respect of coal and cannel actually gotten and raised during such half-year, shall amount to the clear minimum rent of £——: And in respect of the right of outstroke from other mines, a royalty after the rate of —— per ton of twenty hundred-weight for all coal, cannel, stone, or other minerals brought to surface during the preceding half-year from any mine or mines other than the mines hereby demised, through the pits whether existing or hereafter to be sunk during the said term, in any part of the said lands, every payment of such royalty to be made on the rent day next ensuing after the said right of outstroke shall have been exercised: Provided always, that no pillars, walls, or ranges that may be left for the support of the roof, nor any fault or bristle, shall be deemed to be any defect in regard to the measurement of the mines hereby demised, or any deficiency in the same, unless any such fault or bristle shall exceed one-fourth part of an acre: And that in all cases where any such fault or bristle shall happen and be discovered, immediate notice thereof in writing shall be given to the lessor,

Footage rent.

Minimum rent.

Royalty for outstroke from mines under other land.

Pillars, faults, &c., to be measured in, except faults, &c., exceeding a quarter of an acre.

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his or their agent or agents, in order that the same may be fairly tried, measured, or ascertained: And that no rent shall be paid for any fault which shall exceed one-fourth part of an acre as aforesaid: Provided always that if and whenever the company shall for any half-year have paid the minimum rent of £—— without having actually gotten in such half-year such a quantity of coal and cannel out of the mines hereby demised, as, according to the said footage rent, would have produced a clear minimum rent of £——, and the company shall in any subsequent half-year or half-years get such a quantity of coal and cannel out of the same mines, as, according to the footage rent aforesaid, would produce a half-yearly rent exceeding £——, the company shall not be liable to pay any rent (other than the minimum half-yearly rent of £——) for such quantity of coal and cannel gotten and raised out of the mines hereby demised, as shall be required to make up the deficiency, but no excess of footage rent paid for any preceding half-year shall be allowed to make good the deficiency in any subsequent half-year.

Average clause.

Mode of payment of rents.

5. The several rents and royalties hereinbefore reserved shall, until the company shall receive from the trustees notice in writing to the contrary, be paid in the proportions and in manner following, that is to say: three-fourths of the said rents and royalties shall be paid to the lessor, and the remaining one-fourth thereof to the trustees, to be set aside by them as capital money arising under the Settled Land Act, 1882. And the company hereby covenant with the lessor, and also with the trustees, that they the company will pay the said several rents and royalties hereinbefore reserved, on the days and in the proportions and manner hereinbefore mentioned.

Covenant by lessees to pay rent.

Lessee's covenants.

And the company hereby covenant with the lessor as follows:—

To pay taxes, &c.;

6. The company will, during the said term, also pay all leys, taxes, rates, charges, assessments, and impositions of every description, which are now or shall at any time hereafter be charged or imposed upon, or in respect of the mines and premises hereby demised, or the rents or royalties hereby reserved, or any part thereof respectively, and from time to time keep freed and discharged the lessor, and his estates, lands, hereditaments, goods and chattels, of and from the same and

every part thereof, and from the payment thereof or of any part thereof.

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7. The company will, at the expiration or other sooner determination of the said term, peaceably yield, deliver up and surrender the mines and premises hereby demised, and all and every the cottages, dwelling-houses and buildings, which shall hereafter be erected and built on the said lands, with the appurtenances, unto the lessor.

to deliver up the mines, &c., at the end of the term;

8. The company will forthwith proceed to work and prosecute the colliery and mines, and they, and each of their agents, servants, and workmen will, during the said term, in the working of all or any of the mines hereby demised, observe and keep good and true levels, and get the same mines respectively clean and fairly before them, and in all things work the same in a fair, honest, and good workmanlike manner, and as other works of the like nature are usually or ought to be worked, and with as little damage as may be to the surface of the lands aforesaid: And also will leave substantial and sufficient walls, ranges, and pillars, as often as and where proper and necessary to be left, supporting the roof and roofs of such mines, levels, and airways, as shall be necessary from time to time to be made in the said mines, for the getting and carrying on the same.

to work the mines properly.

9. The company will, four times in every year during the said term, if they shall be hereunto required, within twenty days from the time of any such request in writing by the lessor, or his agent or agents, leave for him or them at —— a true, just, and exact measurement of the quantity of each bed or mine, and the thickness thereof, which shall have been gotten since the last measurement delivered in, particularizing also the place or places where the same shall have been gotten, such account to be from time to time signed by the manager or principal agent of the company.

to deliver measurements;

10. It shall be lawful for the lessor, or his agent or agents to be appointed for that purpose, and the company will permit him or them, as often as he or they or any of them shall think fit, from time to time during the said term, to descend any pits or shafts into the mines hereby demised, to view and see that the same are fairly, duly, and properly worked, according to the covenants and agreements herein contained, and to inspect, measure, and dial the same, so as to ascertain the real and actual quantity of coal or cannel

to permit the lessor to descend into the mines to view;

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gotten, or which may remain to be gotten by virtue of this demise, and to return back in like manner; and the company shall give and afford them or any of them all reasonable aid and assistance for the purposes aforesaid.

To weigh coal, &c., raised by outstroke from adjoining mines.

11. The company will set up at some convenient place or places, to be approved of by the lessor or the agent for the time being acting in the management of the —— estate, upon the said lands one or more good and properly constructed weighing machines, and will weigh or cause to be weighed therein all coal, cannel, and other minerals brought to surface from time to time during the said term from any other mine or mines other than the mines hereby demised through the pits whether existing or hereafter to be sunk during the said term in any part of the said lands; And will cause the weights ascertained as aforesaid to be duly registered at the machine house or houses; And will at the end of each day when the weights shall have been ascertained as aforesaid, cause the total weights and quantities of the coal, cannel, and other minerals so weighed as aforesaid to be entered in proper books of account to be kept for the purpose; And will give not less than —— days' notice to the lessor of the time of every such weighing; And will permit the lessor to employ any person or persons to be present on his behalf at such weighing; and to keep an account thereof, and to check the accounts so to be kept by the company and entered as aforesaid.

To fence off pits, &c.

12. The company will, at their own costs and charges, fence off, and keep effectually fenced off such parts of the said lands as shall from time to time during the said term be used for pits, ways, or roads, navigable tunnels, trenches, wharfs, or bank-room, or otherwise, in or about the working of the mines hereby demised, from other the adjoining lands of the lessor, and also fence the eyes of pits, and will hang and keep in repair sufficient and convenient gates in such fences, for the necessary and convenient occupation of such lands, and for the passing and re-passing of the lessor and his lessees, tenants, and the agents, servants, and workmen of him, them, or any of them, on horseback or on foot, or with cattle, carts, or carriages, to and from such lands for all purposes whatsoever.

To pay compensation for damages.

13. The company will pay to the lessor or his lessees or tenants, as the case may be, on the —— day of ——, in every year during the said term full compensation for all damage that shall be sustained by breach, waste, or spoil of ground or

otherwise to be occasioned by the sinking of pits, driving or making of soughs or drains, banking of coal, cannel, or slack, heap-room or wharf-room, or by making or using any ways, roads, water-courses, ditches, cuts, trenches, or sluices, or getting stone, digging clay, or making bricks, or otherwise in the prosecuting and carrying on the intended works, or the taking or using of all or any of the liberties or privileges hereinbefore granted in, upon, or through any part of the said lands, such compensation (if not agreed upon between the parties interested) to be ascertained by arbitration, as hereinafter mentioned.

to fill up disused pits, &c.;

14. The company will, at their own proper costs and charges, with all convenient speed, when and as often as any pit or road shall be disused, well and effectually fill up and level the same, and carry away and dispose of the slack, stone, and rubbish which shall remain round any such pit or upon any such road after filling up and levelling the same, and at the expiration or other sooner determination of the said term, will clear the said lands, and every part thereof, from the stone, rubbish, and slack that shall arise or be occasioned by the digging or working of the said mines hereby demised, or by banking or laying coals or cannel thereon, or by roads made or used, or by any other works that shall be made or carried on for any of the purposes hereinbefore mentioned; And will in a workmanlike manner level the brows, crops, ways, roads, ditches, fences, holes, and other places that shall be made for any of the purposes aforesaid, and ditch up the old fences, and set with quick-wood all such gaps as shall be made in any of the old fences, and will fill up and level all such eyes, pits, shafts, reservoirs, and holes, as shall then remain in the said lands, or any part thereof: Provided always, that if the lessor shall desire to have any such ways, roads, pits, or fences preserved and kept open, and shall give reasonable notice thereof to the company, in that case such ways, roads (with the liberty nevertheless for the company, subject to the condition hereinbefore mentioned, to remove the rails and sleepers of any railed ways), pits, or fences, touching which such notice shall be so given, shall thereupon remain and be left open accordingly in the same condition as such ways (not being railed ways), roads, pits, or fences shall happen to be at the time of such notice given, and thereupon and from thenceforth the company shall be discharged from filling up, fencing about, levelling, or taking any further care thereof, and from

unless lessor otherwise directs.

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all damages that may thereafter happen therefrom: PROVIDED ALSO that the company shall not, in cleansing the lands aforesaid from the slack, stone, and rubbish in manner aforesaid, be obliged to carry the same from off such lands entirely; but may lay and bestow the same in some convenient place or places, to be appointed by the lessor or his agent or agents for that purpose, such places not to be more than —— yards distant from the pits, roads, or places, from which such slack, stone, or rubbish shall be to be removed; the best soil shall be laid uppermost, and the whole levelled in a workmanlike manner, so as to render the same at least equal in quality and value to the adjoining lands, the company paying to the lessor, or his lessees or tenants respectively, compensation for the damage done to his or their lands in or about the filling up and levelling the works aforesaid, such compensation (if not agreed upon between the parties interested) to be settled by arbitration as hereinafter mentioned.

Lessees may throw rubbish into pits.

To permit lessor to inspect plans.

15. The company will permit the lessor, from time to time during the said term, to inspect and make extracts from and copies of all such plans, remarks, and accounts of borings, as the company shall make or cause to be made, or which they shall be in, or can obtain possession of, in anywise, and touching or concerning the mines hereby demised, or the nature, situation, and circumstances thereof.

Lessor's covenant for quiet enjoyment.

AND THE LESSOR HEREBY COVENANTS with the company as follows:—

16. The company rendering the accounts aforesaid, paying the rents, duties, and sums of money hereinbefore reserved and made payable, and observing and performing the covenants, conditions, and agreements hereinbefore contained, and on their part to be observed and performed, shall and may peaceably and quietly hold and enjoy the colliery, and coal and cannel mines and premises hereby demised, with all and every the liberties and privileges hereinbefore granted for and during the said term, without interruption or disturbance from or by the lessor, or any person or persons claiming by, from, or under him, or under the said indenture of settlement.

Power of distress.

17. When and so often as default shall be made in the payment of the rents, royalties, and sums of money herein reserved, or any of them, or any part thereof respectively, by

the space of twenty days next after any of the days hereinbefore appointed for payment thereof respectively, it shall be lawful for the lessor to enter into and upon the said lands or any part thereof, and to take, seize, and distrain at any of the pits or pits' eyes of or belonging to the colliery or coal or cannel works, or the brows or banks, or at, or within any of the tunnels or trenches intended to be made as hereinmentioned, or at any part, wharf, dock, or place, all or any part of the coals or cannel that shall be gotten, or any of the engines, whimseys, boats, vessels, machines, wheels, gears, horses, tools, instruments, utensils, goods, chattels, and effects whatsoever, which shall or may be found upon or within the said lands, or any part thereof, or belonging to the colliery or coal and cannel works, or to the company, and to sell and dispose of such distress and distresses until the rent, royalty, or sum of money, which shall so happen to be in arrear as aforesaid, together with all costs, charges, and expenses attending such distress and sale, shall be fully paid and satisfied.

Proviso for re-entry.

18. When and so often as any such default shall be made in payment of the said rents, royalties, and sums of money as aforesaid, or if and so often as shall be a breach of any of the covenants or agreements by the lessees herein contained, or if and so often as the company shall commit any voluntary waste in or upon the lands aforesaid, or any part thereof, otherwise than in proper exercise of the liberties hereinbefore granted, or shall enter into, make, or execute any composition with, or assignment for the benefit of their creditors, or shall, or commence to be wound up under any Act of parliament for winding up joint stock or other companies, then, and in any such case, it shall be lawful for the lessor, into all and singular the demised mines and premises, now or hereafter during the said term to be opened, or into any of them in the name of the whole, to re-enter, and the same and every part thereof to recover, re-possess, and enjoy, as of his former estate, as if these presents had never been made.

Proviso as to notices.

19. All notices hereby required, or authorized to be given, shall be in writing: And any notice hereby authorized or required to be given to the lessor shall be deemed to be duly and sufficiently given if personally delivered to the lessor, or if left for him at his last known place of abode in the United Kingdom, or if delivered to the agent for the time being,

XLI. Lease of Coal Mines by Tenant for Life Under Settled Land Act, 1882.

acting in the management of the —— Estate, or to such other person, and in such manner as the lessor shall from time to time in writing direct: And any notice hereby authorized or required to be given to the company shall be deemed to be duly and sufficiently given and delivered, if given personally to the secretary for the time being of the company, or left for him at the registered offices for the time being of the company, or if given to or left for the purser, manager, or principal captain of the said mines, either personally, or at his or their respective dwelling-house or dwelling-houses, or at the office or counting-house of the said mines.

Arbitration clause.

20. If any question, dispute, or difference [*Arbitration Clause, ante*, p. 519].

In witness, &c.

XLII. *LEASE of Limestone Quarries and Works.*

Parties.

THIS INDENTURE (*a*), made the —— day of ——, 18—, Between [*lessor*], of &c., of the one part, and [*lessee*], of &c., of the other part; WITNESSETH as follows:—

Testatum.

1. [*Interpretation clause, ut ante*, p. 374, *mutatis mutandis.*]

Demise of quarries and works.

2. In consideration of the rents, renders, reservations, and payments hereby reserved, and of the covenants, conditions, and agreements herein contained, and on the part of the lessee to be paid, observed, and performed respectively, the lessor hereby demises unto the lessee, All the quarries, delph-pits, and beds of limestone, spar, and other minerals of all kinds whatsoever, which now are, or during the term hereby granted shall or may be, open or discovered upon or underneath all or any of such lands of the lessor, situate at ——, in the county of ——, as are delineated in the map or plan hereunto annexed, Together with the several liberties, licences, and privileges, But subject to the several exceptions and reservations hereinafter mentioned respectively, To hold the premises (except as herein is excepted and reserved) unto the lessee from the —— day of ——, 18—, for the term of —— years thence next ensuing, at and subject to the several rents,

Habendum.

Stamp.

(*a*) Stamp *ad valorem* on fixed yearly rent, *ante*, p. 336.

renders, payments, covenants, conditions, and agreements hereinafter reserved and contained respectively.

XLII. Lease of Limestone Quarries and Works.

3. For the consideration aforesaid, the lessor grants full liberty and licence unto the lessee and his agents, workmen, labourers, and servants during the said term to open, dig, search for, work and get all such limestone, spar and other minerals in or upon the premises, or any part thereof, and to erect, build, and set up, in or upon the same, such buildings (except dwelling-houses other than for workmen, labourers, and servants employed thereon, and those to be erected only on such sites or places as shall be approved in writing by the lessor or his agent), kilns, engines, and machinery, and to do all such things as shall be found necessary or expedient for the better and more effectually getting and raising such limestone, spar, and other minerals, and the working and carrying on of the premises, and the business and matters connected therewith, and for the burning, converting, and making such limestone into lime; and also to lay, place, and stack the said limestone, spar, and other minerals, and all such earth, clay, stones, and rubbish as shall be gotten, collected, or thrown up in the working of the premises, or any part thereof, and the business connected therewith, upon or as near to the premises as conveniently as may be, and as is usually done or practised in the like cases; and to convert to and for his proper use and benefit, all such limestone, spar, and other minerals and lime as shall or may be gotten, raised or made, as aforesaid, from the premises or any part thereof.

Grant of licence to work quarries.

4. For the consideration aforesaid, the lessor also grants liberty and licence unto the lessee and his agents, workmen, labourers, and servants, to make such and so many waggon roads, tramways, railways, and approaches to the premises (and particularly a railway from the premises, through and over the lands of the lessor to join a railway now in course of construction over lands belonging to the lessor, and over other lands belonging to Sir [A. B.], and by means thereof to communicate with the —— Railway, at or near ——), and to do all other reasonable acts and things necessary or proper for the carrying away of the said limestone, spar, and other minerals and lime as shall from time to time be necessary or expedient; And also full liberty of ingress and egress in, to, out of, and from the premises or any part thereof, with horses, carts and waggons, and other carriages, or otherwise, as shall

Grant of licence to make roads, &c.

Right of way.

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be necessary for conveying, carrying away, selling, and disposing of the said limestone, spar, and other minerals and lime, in, by, or along all such roads and ways, or any of them or any part thereof; And also to make and construct one or more wharf or wharves for the deposit of coals and other things, with the privilege of carrying and conveying the same coals over and along all such roads or ways, and to and from such wharf or wharves, or such and so many of the said liberties, powers, and privileges respectively, as the lessor can or ought to grant and demise, but not further or otherwise; And also (as far as the lessor is entitled thereto, and can or may lawfully demise the same, but not further or otherwise) the use of a certain sough or level, called the —— level, for the better enabling the lessee to get and raise the said limestone, spar, and other minerals and lime, Together with all rights, members and appurtenances to the said quarries and works hereby demised, or any of them belonging, or in anywise appertaining.

License to make a wharf.

Exception and reservation to lessor of right of entry.

5. Out of the present demise is excepted and reserved to the lessor and his servants and tenants and other persons authorized by him, full and free liberty and licence of passing and repassing at all reasonable times through, across, and along the roads, ways, and premises hereby demised or any of them (except with horses, cattle, carts, or carriages along the line or lines of any such railway or railways as aforesaid), without let or disturbance of the lessee; And also full and free liberty to, and licence for, the lessor, his agents or workmen to enter into and upon all or any part of the said quarries, works, and premises hereby demised at all reasonable times in the day time to inspect the then state and condition thereof as is hereinafter provided.

Reddendum of rents and royalties.

6. The lessee shall yield and pay during the said term for the premises the clear yearly rent of £125, and the further rent or sum of 3*d.* for every ton of limestone, spar, or other minerals (except lead ore), over and above the quantity of 10,000 tons, that shall be gotten or raised from the premises and sold or removed therefrom, or converted into lime, or otherwise converted or manufactured for sale on the premises, in every year of the said term, by virtue of this present demise; And also, the further rent of £—— for every acre, and so in proportion of every less quantity than an acre of the lands of the lessor, which shall or may be taken or used by the lessee at

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any time or times during the said term for any of the purposes or in the exercise of any of the powers or privileges hereinbefore contained (except the land actually destroyed and made waste by getting and taking the limestone therefrom by virtue of these presents), the said last mentioned rents, and also the said several rents or sums of £125 per annum, and of 3*d.* per ton for limestone and other minerals (except lead ore), over and above the quantity aforesaid, to be respectively payable half-yearly during the said term, on the —— day of ——, and the —— day of ——, in every year, clear of all deductions whatsoever, (except land tax and landlord's property tax), the first payments of such rents respectively to be made on the —— day of ——, 18—.

Reddendum of one-sixth of lead ore.

7. The lessor shall also yield and render to the lessee for his own use and benefit one full and clear one-sixth part or share of all the lead ore which may be found, dug, raised, or gotten, from, and out of the said lands, or any mines, veins, pipes, or flats therein or in any part or parts thereof by virtue of this present demise, after the same shall have been made merchantable and fit for smelting and refining free and clear of and from all charges and expenses attending the raising, getting, and making the same merchantable, and all other deductions whatsoever, when and as often as the same lead ore shall be weighed and measured by the agent or other person or persons who shall be authorized by the lessor to weigh and measure the same and before any part of the said lead ore shall be removed from the mines or places where the same shall from time to time be respectively raised or gotten.

Lessee's covenants

And the lessee hereby covenants with the lessor in manner following, that is to say:

to pay and render rents and royalties;

8. The lessee will duly yield, pay, and render the said several rents, sums, and royalties hereby reserved respectively, at the times and in manner hereinbefore appointed with respect to the same respectively; And will also from time to time and at all times during the said term [*covenant to pay taxes, rates, &c., ut ante*, p. 533].

and taxes, &c.;

to keep books of account;

9. The lessee will keep true and accurate books of account of all the limestone and other minerals (except lead ore), and lime which shall be gotten, sold, and removed from the premises or converted, or manufactured thereon as aforesaid, wherein he will from time to time

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enter the quantity or quantities of the said limestone and other minerals (except lead ore), and lime, sold, or removed, or converted, or manufactured as aforesaid; And will at the end of every three calendar months during the said term make out and deliver to the lessor or his agent or agents a fair and correct abstract of the said books of account for the then last preceding three calendar months, and by himself or his agent or agents to verify the same upon oath if required; And also permit the lessor and his agent or agents at all reasonable times to inspect the said books of account, and to take copies thereof or extracts therefrom.

to repair;

10. The lessee will during the said term at his own costs and charges well and effectually repair, preserve, and maintain all and singular the dwelling-houses, buildings, sheds, roads, ways, and passages which are or in consequence of the liberties hereby granted shall be built, erected, or made in or upon the premises, in good and substantial repair, order, and condition in all respects, and in such repair, order, and condition will at the end or sooner determination of the said term peaceably and quietly leave and yield up the same premises unto the lessor, save and except railways, steam-engines, cranes, and other machinery, and fixtures which shall be erected, set up, fixed, or made by the lessee for the purpose of trade.

not to commit damage and trespass, or to pay compensation therefor;

11. The lessee, his agents, servants, workmen, chapmen, and customers, will, during the said term, commit and do as little trespass and damage as may be to the tenants and occupiers for the time being of the said lands by the use and exercise of the liberties, powers, and privileges hereinbefore granted; and the lessee will over and above the said rents and payments hereby reserved or made payable, pay and allow to the occupier or occupiers of the said lands or any part thereof the yearly sum of £3 for every acre of such lands (and so in proportion for any less quantity than an acre), that shall be trespassed upon, injured or damaged by the works and operations aforesaid, other and except such lands as may be properly taken and used for any roads, or ways, or for the erection of buildings, or for the actual quarrying and getting of the said limestone and other minerals, such payments and allowances to be made to the occupier or occupiers of the said lands on the —— day of ——, in each year, and to be continued till the lands or grounds

so to be trespassed upon, injured, or damaged shall have been made good again and put in a proper state and condition.

to fence off quarries;

12. The lessee will, during the said term, at his own costs and charges, use all necessary and proper means to fence off and guard all the quarries, pits, shafts, openings, railways, and roads now made or hereafter to be made, and make full satisfaction to the occupier or occupiers of such lands as aforesaid, for all such loss, injury, or damage as shall or may be sustained by him there, or any of them by reason of horses, cattle, or sheep falling into or getting upon the said quarries, pits, shafts, openings, railways, roads, or works or otherwise by the neglect or default of the lessee, his agents, servants, or workmen to use all such necessary and proper means as aforesaid, when and immediately after such loss, injury, or damage shall happen, the amount to be ascertained by arbitration in manner hereinafter provided.

to allow lessor to pass along roads, &c.;

13. The lessee will permit the lessor and his tenants, agents, servants, and labourers, and all persons duly authorized by him to pass and repass without let or hindrance across and over any railway or railways, but not along the lines thereof, and across, and over, and also along any other roads or ways whatsoever leading to or from the said quarries and works or any part thereof on foot or on horseback, or with horses, cattle, carts, waggons, or other carriages, at his or their convenience respectively, but so that such passing and repassing shall not disturb or interrupt the reasonable use and enjoyment by the lessee of the liberties and privileges hereby granted more than the case shall require, and so also as that the person or persons so passing or repassing shall do as little damage to the said roads and ways as the nature of the case will admit of.

to remove and lay soil;

14. The lessee, his agents, servants, and workmen, will, before he or they open, sink, or make any quarry, pit, shaft, or opening, or any road or way under or by virtue of these presents, remove and take away the soil from such part of the land as is intended to be used for any of such purposes to the depth of ten inches at least, and lay the same in some proper and convenient place near thereto, so that either it may be preserved and kept for the purpose of being again laid thereon when any such quarries, pits, shafts, or openings, shall be filled up and any such roads or ways shall be disused, or that the lessor

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may at his option remove and take away or otherwise dispose of the said soil as he shall think proper.

not to damage timber, fences, &c.;

15. The lessee will during the term do as little damage or injury to the timber and other trees, and to the fences growing or being upon any part or parts of the said lands as the nature of his works and operations will reasonably admit of, and that when any of the fences are unavoidably destroyed or injured the same shall be replaced or amended by and at the expense of the lessee in a proper and workmanlike manner as may be required by the lessor, or his agent or agents, and to his or their satisfaction.

to work quarries in proper manner;

16. The lessee will, during the said term, work and carry on the said quarries and works in a proper and workmanlike manner, and after the best and most approved method of working and carrying on similar quarries and works in the neighbourhood, and will leave open and in good working condition and repair all the pits, delphs, shafts, and drifts which shall be in use or in anywise serviceable in the working and carrying on the same quarries and works.

to permit lessor and his agents, &c., to inspect state of works;

17. It shall be lawful for the lessor and his agents, bailiffs, servants, or workmen, at all times in the daytime, and at his and their free will and pleasure, to go into and upon the premises to view and inspect the state and condition thereof, and to make such other observations and examinations into and concerning the same as he, they, or any of them shall think proper, and in case the lessee shall be found to be working or using the said quarries or works in an improper or unworkmanlike manner, then and in such case it shall be lawful for the lessor to give notice in writing to the lessee or his agent or agents to stop and discontinue the further working of the said quarries and works until full satisfaction and amends shall have been made for the loss, damage, or injury which shall have been occasioned or sustained to or by the lessor by reason of such improper working or uses as aforesaid, such satisfaction and amends to be ascertained, in case of disagreement between the parties hereto, by arbitration in manner hereinafter provided.

to permit lessor to carry on works on default of lessee;

18. If in the course of working and carrying on the said quarries and works, or of making any railways or roads, or doing any other act or thing by virtue of these presents, any vein or veins, or pipe or pipes of lead ore, shall happen at any time during the term to be found or discovered by the lessee

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or any other person or persons employed by or under him, within or upon the premises; and if it shall happen that he or they shall neglect or refuse effectually to work and quarry all and any the said veins, pipes, and works of lead ore, and shall work part or some of them only, and shall permit and suffer others of them to stand unwrought for the space of three months together at any one time, then and in every such case, and as often as it shall so happen, it shall and may be lawful to and for the lessor, and his and their servants, agents, workmen, and he and they are hereby authorized and empowered, after the expiration of six calendar months' previous notice in writing to the lessee, and upon such of the said veins, pipes, and works of lead ore only as shall happen to stand so unwrought as aforesaid, to enter, and they and any of them only to have, take, and enjoy, and either to permit and suffer them or any of them from thenceforward to continue standing and unwrought, or at his and their will and pleasure to work and prosecute, and the ore and spar there found to take and carry away and convert to his and their own proper use and benefit without any account to be rendered or delivered to, or any interruption or interference on the part of the lessee, or for or in respect of the same or any part thereof, and without making any compensation for the same or any part thereof, and in working and prosecuting such veins, pipes and works of lead ore, and raising the ore and spar therefrom, to enter upon, go down, and pass and re-pass along, and all and every the shafts, pits, and premises hereby demised, for the more effectually and conveniently working the same veins, takes, and pipes and works of lead ore, and from raising the lead ore therefrom, without any such interruption or interference or making any such compensation as aforesaid.

To carry on railway only limestone, &c., gotten from the premises.

19. The lessee, or any person or persons employed by or under him, will not at any time or times during the continuance of this demise, carry or convey, or be concerned in carrying or conveying, any limestone, lime, or gritstone, along or upon the said railway so intended to be made to communicate with the said —— Railway as aforesaid, or allow or permit such railway to be used for any other purpose or purposes whatsoever, for the purpose of carrying or conveying any limestone, lime, or gritstone, other than

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such as shall be gotten, raised, made, or produced under or by virtue of this present demise.

To convey on railway limestone, &c., from lessor's adjoining lands at specified rate.

20. The lessee will from time to time and at all times during the said term, when required so to do by the lessor or his agent or agents, carry and convey along the said line of railway so intended to be made as aforesaid, or along any part thereof, to the said —— Railway, all such gritstone as shall or may be gotten or raised from any part or parts of the said lands, estates, and premises of the lessor (such gritstone so to be carried and conveyed not to exceed the weight of one ton on each waggon), on being paid the sum of —— per ton for the conveyance and carriage of such gritstone along the line of the said railway.

Lessor's covenants:

AND THE LESSOR HEREBY COVENANTS with the lessee as follows, that is to say:—

for quiet enjoyment;

21. The lessee paying the said rents or sums of money hereby respectively reserved and made payable, and observing and performing the several covenants and agreements hereinbefore contained, which on his part and behalf are or ought to be paid, observed, or performed, shall and may peaceably and quietly have, hold, occupy, possess, and enjoy the premises for and during the said term, without the interruption, molestation, or denial of the lessor, or any other person or persons whomsoever, lawfully claiming or to claim by, from, or under or in trust for him.

to pay land tax;

22. The lessor will from time to time, and at all times during the said term, pay and satisfy and discharge the land-tax assessed or imposed upon the said quarries and premises hereby demised, or upon any part thereof, and from time to time indemnify the lessee from and against the payment thereof.

to renew lease, if requested.

23. The lessor will, at the costs and charges of the lessee, if thereto requested by him, at any time before the expiration of the first seven years of the said term, grant another lease of the premises to the lessee for the further term of seven years, to commence from the expiration of the term hereby granted, at the same rents, and containing the like covenants and agreements as are in these presents contained (this present covenant excepted), he the lessee executing a counterpart thereof.

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PROVIDED ALWAYS, and it is hereby agreed and declared as follows :—

Proviso for re-entry.

24. If the said rents or sums of £—— per ton for limestone, spar, or other minerals or produce (except lead ore) over and above the quantity aforesaid gotten, raised, or obtained, and sold or removed or converted into lime, or otherwise converted or manufactured for sale on the premises, and of £—— per acre, for the lands or grounds taken or used for the purposes hereinbefore expressed, or the payment or render of the said one-sixth part of the said lead ore to be discovered, gotten, and raised as aforesaid, hereinbefore severally reserved and made payable, or any part or parts thereof respectively, shall happen to be in arrear unpaid or unrendered for the space of —— days next over or after any of the said days or times when the same ought to be paid or rendered as aforesaid, and the same shall be lawfully demanded at the expiration of those twenty-one days, or at any time afterwards, and shall not be paid or rendered at the time of such demand, or if the lessee shall not in all other respects observe, perform, and keep all and singular the covenants, conditions, stipulations, matters, and things hereinbefore reserved and contained, and which, on his part and behalf, ought to be observed, performed, and kept, then, or in any of such cases respectively, it shall be lawful for the lessor to enter into, and upon, all and singular the premises, or into any part thereof, in the name of the whole, to re-enter, and the same to have again and enjoy as in his former estate, anything herein contained to the contrary thereof in anywise notwithstanding.

Power for lessee to determine lease at end of six months.

25. It shall be lawful for the lessee, at the expiration of six calendar months of the term hereby granted, by giving six calendar months' previous notice in writing to the lessor, to determine and make void these presents, and the term hereby granted, anything hereinbefore contained to the contrary in anywise notwithstanding.

Proviso as to notices.

26. All notices hereby required or authorized to be given to the lessors or lessees respectively shall be in writing, and shall be deemed to be sufficiently given and served if given and served in any of the manners provided by the 67th section of the Conveyancing and Law of Property Act, 1881, with regard to notices authorized or required by that Act to be given to lessors and lessees respectively.

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Arbitration clause.

27. And, lastly, if any dispute or disputes shall arise or happen between the parties hereto touching or concerning the working and carrying on the said quarries and works, or any other matter or thing hereinbefore contained, then and in such case the said disputes shall be referred to and determined by two indifferent persons, one to be chosen by each party, and in case such referees cannot agree, then the same shall be referred to and determined by such third or other person as the said referee shall choose and elect for that purpose, and whatever award and determination the said referees or umpire respectively shall make of and concerning such dispute or disputes as aforesaid, they, the said parties hereto, hereby severally covenant with each other to abide by and perform the same, and for enforcing the performance and observance of any such award or determination, it is hereby agreed that the same and the submission thereto herein contained, or which may be entered into in or by any separate instrument, shall from time to time be made a rule in Her Majesty's High Court of Justice, Queen's Bench Division, ——, on the application of the lessor or the lessee.

In witness, &c.

XLIII. *LEASE of a* Cotton-mill *and* Machinery.

Parties and interpretation clauses.

THIS INDENTURE (*m*), made the —— day of ——, 18—, Between [*lessor*], of &c. (who and his heirs and assigns, unless the contrary appears, are hereinafter called the lessor), of the one part: And [*lessee*], of &c., and [*lessee*], of &c., carrying on the trade or business of cotton-spinners under the style or firm of —— and Co. at ——, in the county of —— (who and their respective executors, administrators, and assigns, unless the contrary appears, are hereinafter called the lessees), of the other part: WITNESSETH, that in consideration of the rent hereby reserved, and of the covenants by the lessees, and provisoes hereinafter contained,

Parcels.

the lessor hereby demises unto the lessees, All that cotton-mill or factory and shed situate and being on the —— side

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Stamp.

(*m*) Stamp *ad valorem* on amount of rent, *ante*, p. 336.

XLIII. Lease of Cotton Mill and Machinery.

of —— Street, in the parish of ——, in the county of ——, know by the name of —— Mill, with the engine-house, boiler-house, and the —— cottages and buildings thereto adjoining, and usually occupied therewith: And also the steam-engine, boilers, shafting, gearing, and machinery, water-pipes, fittings, effects, and things now being in or upon the said mill and premises belonging to the lessors, and particularly described in the schedule hereunder written, which said cotton-mill, factory, shed, and premises, are now in the occupation of the lessees; And which said mill or factory, engine-house, boiler-house, warehouse, and buildings are delineated in the plan drawn in the margin of these presents, and are therein edged with a —— line: To hold the said cotton-mill and all other the premises hereinbefore expressed to be hereby demised unto the lessees for the term of —— years, from the —— day of ——, 18—; Yielding and paying therefor the yearly rent of £——, and so in proportion for any less period than a year, in advance as a forehand rent on the —— day of ——, the —— day of ——, the —— day of ——, and the —— day of ——, the first quarterly payment of the said rent to be made on the —— day of —— next, clear of all deductions except in respect of the landlord's property or income tax; And the lessees hereby do and as a separate covenant each of them doth covenant with the lessor, That the lessees, or one of them, will pay the said rent on the days and in manner hereinbefore appointed for payment thereof respectively; And also will, during the said term, pay all existing and future taxes, rates, assessments, and outgoings of every description for the time being payable either by landlord or tenant in respect of the said premises, except the landlord's property or income tax; And also will forthwith put the said cotton-mill, factory, and the fixed machinery therein, in good and sufficient repair, working order, and condition, to the satisfaction of the lessor; And also will paint, in a proper and workmanlike manner and with good materials, all the inside of the windows, doors, wood and iron work, and whitewash and cleanse the whole of the said mill, buildings, and premises, at least once in every —— years during the said term, and as often as may be required to be done by any Act or Acts of Parliament now or which may hereafter, during the continuance of this demise, be in force for the regulation of mills or factories; And also will, during the said term,

Habendum.

Reddendum.

Lessees' covenants;

to pay taxes;

to put premises in repair;

to paint.

XLIII. **Lease of Cotton Mill and Machinery.**

to keep in repair ;

well and sufficiently repair, maintain, and keep the said mill, and buildings (except the outside walls and woodwork, and the roofs and principal timbers), and also the said steam-engines, steam-boilers, shafting, gearing, gas and water-pipes, fittings, and things of every kind belonging to the lessors in, upon, and about the said mill, buildings, and premises, in good and tenantable repair, working order, and condition, ordinary wear and tear, or damage by fire or other inevitable accident, only excepted; AND ALSO will permit the lessor and his agents, surveyors, and workmen, twice or oftener in every year, at seasonable times in the daytime, to enter upon the said mill, buildings, and premises respectively to view the condition thereof, and give and leave notice in writing upon the same premises respectively for the lessees of all defects and want of repair there found; AND ALSO will, within one calendar month after every such notice, well and sufficiently repair and make good such defects and want of repair whereof notice shall have been so given or left; AND IN CASE the lessees shall neglect or refuse to repair and make good such defects within the time aforesaid, it shall be lawful for the lessor, his agents, servants, and workmen, to enter at any time into and upon the said mill, buildings, and premises respectively, and to do and make such repairs and amendments as the said demised premises respectively may require; and the lessees will forthwith repay to the lessor all sums of money which shall be expended by him on account of such repairs and amendments, with interest thereon at the rate of —— per cent. per annum from the time of the same sums having been expended; And in case the lessees shall neglect or refuse so to do upon application made to them for that purpose, then it shall be lawful for the lessor to distrain upon the said demised premises, or any part thereof, for all such sums of money, and together with all costs and expense of such distress as landlords may do for rent in arrear or otherwise at his option to commence any action for the recovery thereof as liquidated damages; AND ALSO will not, without the previous licence in writing of the lessor, assign, underlet, or part with the possession of the said mill, buildings, and premises respectively, or any part thereof, but such consent shall not be unreasonably withheld (*mm*); AND

to permit lessor to inspect ;

to repair upon one month's notice.

Power for lessor to repair on lessee's default.

Not to underlet without lessors' consent.

To insure cottages.

(*mm*) See as to clause, *ante*, p. 453, note (*c*).

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ALSO will, during the said term, insure and keep insured against loss or damage by fire in the —— Insurance Office, or in some other good and responsible office, to be approved by the lessor, the said mill or factory in the name of the lessor, in the sum of £—— at least, and pay the annual premiums for keeping the same on foot, and deposit the policy and last receipt with the lessor; and if the lessees shall neglect, or refuse to effect, and keep on foot such insurance, then it shall be lawful for the lessors to advance and pay such money as shall be necessary for that purpose, and all money so paid with interest thereon after the rate of £—— per cent. per annum shall be recoverable by the lessor in the same manner as is hereinbefore provided with respect to monies which may be paid by the lessors in repairing and amending the demised premises, on breach of the covenant by the lessees to repair; and in case the said cottages or any of them shall be destroyed or damaged by fire, the money which shall be received by virtue of such insurance shall belong to and be received by the lessor; AND ALSO will, at the expiration or sooner determination of the said term, deliver up to the lessor the said mill, cottages, buildings, steam-engines, steam-boilers, shafting, gearing and machinery, gas and water pipes, and premises expressed to be hereby demised, and all fixtures, fittings, and things which shall be fixed on or set up or used in or upon the said mill, buildings, and premises respectively by the lessees during the said term in such good and substantial repair, working order, and condition as aforesaid, reasonable use and wear thereof in the meantime only excepted, and in all respects in such state as shall be consistent with the due performance of the several covenants hereinbefore contained: AND THE LESSOR HEREBY COVENANTS with the lessees that they, paying the said rents hereinbefore received and performing and observing all the covenants by them herein contained may peaceably hold and enjoy the said demised premises during the said term without any interruption or disturbance by the lessor, or any person claiming under him: AND ALSO that the lessor will, during the said term, at his own cost and charge, well and sufficiently repair, amend, and keep the outside walls and wood-work, and the roofs and principal timbers of the said mill, engine-houses, boiler-houses, weighing places, offices, cottages, buildings, and premises: AND ALSO will keep

To deliver up at end of term.

Lessor's covenants for quiet enjoyment.

To repair outside.

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in good repair and condition, and in a proper, useful state, the said chimney and the flues and drafts therein; And also will paint all the outside wood and iron-work of the said demised premises in a workmanlike manner twice over with good and appropriate oil colour; And also will whitewash the walls opposite to the said mills and buildings and all other places requisite for the purpose of increasing the light in the same mill, buildings, and places in every third year of the said term: Provided always, that if and whenever any part of the said yearly rent shall be in arrear for —— days (whether the same shall have been legally demanded or not), or if and whenever the lessees or any of them whilst the premises or any part thereof shall remain vested in them for all or any part of the said term, shall be adjudicated bankrupts, or compound with their or his creditors, or suffer the said term or the premises or any part thereof to be taken in execution, or if and whenever there shall be a breach of any of the covenants and agreements by the lessees hereinbefore contained, the lessor may re-enter upon any part of the premises in the name of the whole, and thereupon the said term shall absolutely determine: Provided also that if at any time during the said term the said mill, buildings, cottages, and premises, or any part or parts respectively, shall be burnt down, or destroyed or damaged by fire, so as to render the same untenantable or unfit for the use and occupation of the said lessees, then and in such case, upon payment by the lessees of the said rent up to the day of such destruction, these presents and every clause and thing herein contained (except as to any remedy for any breach then committed of any covenant herein contained) shall thenceforth cease and determine: Provided also that if the said mill, buildings, cottages, and premises shall be damaged by fire in some immaterial part, and so as not to render the same wholly untenantable or unfit for the use and occupation of the lessees, a proportionate part of the said yearly rent shall be deducted and allowed out of the usual quarterly payments thereafter until the same buildings shall be repaired and reinstated by the lessor: Provided also that in case the weaving shed, part of the premises expressed to be hereby demised, shall for any period between the —— day of ——, and the —— day of ——, remain unlet by the lessees, and unoccupied, then the lessor will, for so much

Re-entry in default of payment of rent.

Lease to determine on destruction of premises by fire.

Abatement of rent in case of damage by fire.

Provision that if shed be not let in —— months rent to abate at £—— per annum for the time.

LXIII. Lease of Cotton Mill and Machinery.

of the said period of —— months as the said weaving shed shall remain unlet and unoccupied, deduct and allow to the lessees from the yearly rent hereby reserved a sum at the rate of £—— per annum for so much of the said period of —— months as the said weaving shed shall so remain unlet: PROVIDED ALSO that if the lessees shall at any time within a period of three years from the commencement of this demise be desirous of having the steam-engine, the said mill or factory, altered by converting the same into a steam-engine on the —— principle, and of such desire shall give to the lessor a notice in writing at any time within the period of three years, then the lessor will, with all convenient speed, at his own expense, do and execute such alterations in the said steam-engine as shall be necessary to convert the same into a steam-engine on the —— principle, and the lessees will pay to the lessor a yearly sum equal to £—— per cent. in the nature of rent on the amount which shall be expended by the lessor in and about such alterations, the said percentage to be paid from the time of completing the said alterations and on the days hereinbefore appointed for payment of the yearly rent hereby reserved, and to be recoverable by distress as rent in advance: PROVIDED LASTLY that if any dispute or question shall arise under these presents, or as to any clause, matter, or thing herein contained, such dispute or question shall be referred to the arbitration of two indifferent persons, one to be chosen by the lessor and the other by the lessees, or in the event of such persons being unable to agree then to an umpire chosen in the usual manner, and the decision of such referees or their umpire, as the case may be, shall be binding and conclusive on all parties.

Provision for erection of new engine, —— per cent. to be paid by lessee on outlay.

Arbitration clause.

IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

XLIV. *LEASE by* MORTGAGEES *and a* MORTGAGOR (*n*).

Parties, and interpretation clause.

THIS INDENTURE (*o*), made the —— day of ——, 18—, BETWEEN [*mortgagee*], of, &c., and [*mortgagee*], of, &c. (who and the person or persons for the time being entitled to the reversion in the hereditaments hereby demised expectant on the term hereby granted, unless the contrary appears, are hereinafter called the lessors), of the first part; [*mortgagor*], of, &c., of the second part; and [*lessee*], of, &c. (who and his executors, administrators, and assigns, unless the contrary appears, are hereinafter called the lessee), of the third part:

Recitals of title of mortgagees,

WHEREAS under or by virtue of an indenture of mortgage dated ——, &c., and expressed to be made between [*parties*] (being a mortgage to secure to the said [*mortgagee*] and [*mortgagee*] the repayment by the said [*mortgagor*] of a sum of £——, with interest thereon as in the same indenture is mentioned), the [*lessors*] are mortgagees of the fee simple of the hereditaments hereinafter described and intended to be hereby demised:

and mortgagor.

AND WHEREAS the said [*mortgagor*] is the owner of the fee simple and inheritance of the said hereditaments, subject to the said mortgage.

Testatum.

NOW THIS INDENTURE WITNESSETH that in consideration of the premium (*p*) or sum of £—— now paid by the lessee at the request of the said [*mortgagor*] to the lessors in part payment and satisfaction of their said mortgage debt of £—— (the receipt of which sum of £—— the lessors hereby acknowledge), and in consideration

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(*n*) As to the statutory powers of mortgagors and mortgagees respectively, when in possession to grant occupation and building leases, see *ante*, p. 80. The concurrence of mortgagees and mortgagors in leases (where the mortgage was made after the 30th of December, 1881), will be comparatively seldom necessary. Such concurrence will, however, be required, if the statutory powers are expressly excluded by the mortgage deed: or if the terms of the proposed lease are not within the statutory powers, as in the case of the above Precedent. The concurrence of mortgagees and mortgagor will also be required in the case of mining leases, for a precedent of which, see Precedent XL., p. 541.

(*o*) Stamp, as a conveyance by way of sale in respect of the amount of the premium, and *ad valorem* in respect of the rent: *ante*, p. 336.

(*p*) A memorandum of the payment of the premium in part satisfaction of the mortgage debt should be indorsed on the mortgage deed.

XLIV. Lease by Mortgagees and a Mortgagor.

of the covenants on the part of the lessee to be observed and performed and provisions herein contained, the lessors, at the request of the said [*mortgagor*], hereby demise and the said mortgagor hereby demises and confirms unto the lessee, ALL [*parcels*], TO HOLD the premises unto the lessee from the —— day of ——, 18—, for the term of —— years next ensuing, YIELDING AND PAYING, &c.: AND THE LESSEE hereby covenants with the lessors, and as a separate covenant with the said [*mortgagor*], in manner following [*Covenant to pay rent and taxes, ante*, p. 444. *Add other lessee's covenants according to the nature of the property and the intention of the parties*]. AND EACH OF THE LESSORS respectively and the said [*mortgagor*], so far as relates to the acts and deeds of himself and of persons claiming under, through, or in trust for him respectively, hereby covenants with the lessee that the lessee paying the said rent and observing and performing all the covenants on his part herein contained, may peaceably enjoy the premises hereby demised without interruption or disturbance from or by the lessors or the said [*mortgagor*] or any of them, or any person or persons claiming under, through, or in trust for them or any of them [*Add any special covenants by the lessors*]. PROVIDED ALWAYS that in the meantime, and until the lessors shall require to have the receipt of the rents and profits of the said premises, and shall give unto the lessee, or leave at the said premises, notice in writing requiring the lessee to pay the rent hereby reserved to the lessors, the said rent shall be paid to the said [*mortgagor*], his heirs and assigns; AND the receipt or receipts of the said [*mortgagor*], his heirs or assigns, shall, until such notice shall be given or left as aforesaid, be a good and sufficient release and discharge for the said rent, or any part thereof, unto the lessee; AND (*q*) if, at any time or times previously to such notice being given or left as aforesaid, the said rent of £——,

Demise.

Habendum.

Reddendum.

Lessee's covenants.

Lessors' and mortgagor's covenants.

For quiet enjoyment.

Proviso for payment of rent to mortgagor until notice by mortgagee.

Proviso that mortgagor's receipts, until such notice, shall be good discharges.

Proviso, that until notice by mortgagees, mort-

(*q*) The covenants will generally run as in the case of an ordinary lessor, except as otherwise indicated in the text, and also except that (i) the power to enter and view the premises will be given "to the lessors and to the said [*mortgagor*], his heirs and assigns, and their respective agents," &c.: (ii) the insurance will be effected in the joint names of the lessors (*i.e.*, the mortgagees) and the lessee in an office to be approved by the lessors, but the lessee will covenant to produce the policy, &c. "to the lessors and also to the said [*mortgagor*], his heirs and assigns."

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gagor may distrain for rent.

or any part thereof, shall be unpaid by the space of fourteen days after the respective days or times whereon the same ought to be paid as aforesaid, Then, and in such case, and so often as the same shall happen (although no lawful demand shall have been made thereof), it shall be lawful for the said [*mortgagor*], his heirs and assigns, to enter into and distrain upon the hereditaments and premises hereby demised, for the said yearly rent, or so much thereof as shall be then in arrear; And the distress and distresses then and there made, to take, lead, carry away, and impound, and detain and keep, and in due time afterwards to sell and dispose of, or otherwise to act therein according to law; to the intent that, by the ways and means aforesaid, the said [*mortgagor*], his heirs or assigns, may be fully paid and satisfied the arrears of the said rent, and also the costs, charges, and expenses which shall be sustained or incurred in consequence of any such distress or distresses; Provided always, &c. [*that* "the lessors" *may re-enter on non-payment of rent, or breach of covenants, ut ante*, p. 445]. In witness, &c.

Proviso for re-entry.

XLV. *LEASE for* Lives, *with* Covenant *for* Renewal (*r*), *at the dropping of the first Life, on Payment of a Fine—*[*Form of Covenant for Renewal in Lease for Years, in Note*].

Parties.

Recital of former lease, with covenant for renewal;

THIS INDENTURE (*s*), made the —— day of ——, Between [*lessor*], of, &c. (who and his heirs and assigns, unless the contrary appears, are hereinafter called the lessor), of the one part, and [*lessee*], of, &c. (who and his heirs and assigns, unless the contrary appears, are hereinafter called the lessee), of the other part: Whereas, by an indenture of lease, dated the —— day of ——, and made between the said [*lessor*] of the one part, and the said [*lessee*] of the other part, the said [*lessor*] demised unto the said [*lessee*], his heirs and assigns, the messuage or tenement and hereditaments hereinafter described, for the lives of [*cestuis que vie*], of, &c., and the lives and life of the survivors and survivor of

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Construction.

(*r*) As to the construction of covenants for renewal of leases, see *ante*, p. 217.

Stamp.

(*s*) Stamp *ad valorem* on amount of rent reserved, *ante*, p. 336.

XLV. Renewable Lease for Lives.

them, at the yearly rent of £—— payable quarterly: And in the said indenture of lease was contained a covenant on the part of the said [*lessor*], that upon the decease of either of the said [*cestuis que vie*], he the said [*lessor*], his heirs or assigns, would, at the request of the said [*lessee*], his heirs or assigns, and upon the surrender of the said lease, and the payment of the sum of £—— by way of fine, execute a new lease of the said premises to the said [*lessee*], his heirs or assigns, at the same yearly rent, and with and subject to such and the same covenants, provisoes, and agreements (including the covenant now in recital), as were reserved and contained in the above-recited lease. And whereas the said [*deceased cestui que vie*], one of the *cestuis que vie* named in the said indenture of lease, died on or about the —— day of —— last past, and the said [*lessee*] has accordingly called upon the said [*lessor*] to grant him a renewed lease in pursuance of his said covenant, for the life of [*new cestui que vie*], now of the age of —— years, or thereabouts, in the room of the said [*deceased cestui que vie*] deceased: And whereas, by a deed-poll under the hand and seal of the said [*lessee*], bearing even date herewith, the said [*lessee*] has surrendered unto the said [*lessor*], and his heirs, All and singular the said messuage and premises, to the intent that the said [*lessor*] may grant a new lease to him thereof during the lives of the said [*surviving cestuis que vie*] and the said [*new cestui que vie*] respectively, as hereinafter is mentioned. NOW THIS INDENTURE WITNESSETH, that in pursuance of the above-recited covenant, and of the said surrender, and also in consideration of the sum of £—— to the lessor paid by the lessee, at or before the execution of these presents (the receipt whereof is hereby acknowledged), he the lessor hereby grants, demises, and conveys unto the lessee, All that messuage, &c. [*describe parcels*]: To hold the premises unto the lessee, from the date of these presents, during the lives of the said [*three cestuis que vie*] and the lives and life of the survivors and survivor of them: Yielding and paying therefor yearly during the said demise, and so in proportion for any less period than a year, the yearly rent or sum of £—— by equal quarterly payments, on the —— day of ——, &c., in every year, clear of and from all present and future taxes, rates, assessments, deductions, and abatements whatsoever, the first payment thereof to be made on the —— day of —— next ensuing (if the said [*cestuis que*

death of one *cestuis que vie*;

surrender.

Testatum.

Demise.

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vie], or any one of them, shall be then living); and YIELDING AND PAYING for any fractional period of a quarter which may happen to elapse between the commencement of this present demise, or any one of the days of payment hereinbefore named, and the decease of the last survivor of them the said [*cestuis que vie*], a proportion or rateable share of the said yearly rent, according to the length or duration of such period. [*Add covenant by lessee to pay rent and taxes, &c., ut ante*, p. 444, *and keep demised premises in repair, &c., ante*, p. 448]. AND the lessor hereby covenants with the lessee that, in case the lessee shall, upon the decease of either of them, the said [*cestuis que vie*], be desirous of taking a further or renewed lease of the said premises for another life, and shall, as is hereinafter more particularly mentioned, within the space of three calendar months next after such decease, give notice in writing of such desire unto the lessor, or leave for him such notice at his last known place of abode in England, and shall nominate any person in the room or stead of the *cestui que vie*, who shall have so died, he the lessor will, at the request, and at the cost of the lessee, and on the surrender of this present lease (such surrender to be at the like cost), and on payment of the sum of £—— by way of fine or premium for such renewal, forthwith duly make and execute unto him the lessee a new lease of the said premises for the life of the person so to be nominated, and the lives and life of such of the said [*cestuis que vie*] as shall be then living, and of the survivors and survivor of them, at the same yearly rent, and with and subject to such and the same covenants, provisoes, and agreements, including this present covenant, as are herein contained: AND FURTHER that if, within the said period of three calendar months after the decease of any one of them the said [*cestuis que vie*], and before any renewed lease or leases shall have been granted of the said premises by virtue of the covenant hereinbefore contained, any other or others of the said [*cestuis que vie*], shall depart this life, then it shall be lawful for the lessee, if he shall think proper, to name or insert another life or lives in the lease so to be granted as aforesaid in the room of the life or lives which shall so drop, he or they paying unto the lessor, within the said period of three calendar months after the dropping of the first life, the further sum of £—— in respect of the said life, or each of the said lives, as the case may be, which shall be so inserted

Reddendum for fraction of a quarter.

Covenant by lessor to renew at the dropping of a life;

on surrender of present lease, and payment of a fine.

in the said lease, it being the intention of the parties hereto that the lessee shall not be obliged, unless he shall think proper, provided he renews within the period aforesaid, to incur the expense of a further or additional lease or leases, in respect of the dropping of the said second and third lives as aforesaid (*t*). IN WITNESS, &c.

XLV. Renewable Lease for Lives.

XLVI. *UNDERLEASE, by a Person holding under a* RENEWABLE LEASE *comprising other Property—* COVENANT *by* LESSEE *to* EXPEND *a* SUM *in* IMPROVEMENTS *— to keep the Premises, with the* IMPROVEMENTS, *in Repair—to* PAY *a Fine to the Lessor, on* ASSIGNING, *&c.* COVENANT *by* LESSOR *to* PAY *the* RENT *and* PERFORM *the* COVENANTS *of the* ORIGINAL LEASE—LESSEES *to be entitled to* DEDUCT *out of his* RENT *any* PAYMENTS *he may be*

(*t*) The ordinary form of a covenant for renewal in a lease for *years* is as follows :—

"AND the lessor hereby further covenants with the lessee that in case the lessee shall be desirous of taking a new lease of the premises hereby demised, after the expiration of the term hereby granted, and shall, at least six calendar months before the expiration thereof, signify such his desire, by a notice in writing, to be delivered to the lessor, or left at his usual or last known place of abode in England, he the lessor will, at or before the expiration of the said term, at the costs and charges of the lessee, and on payment of the sum of £—— by way of premium or fine for such renewal, forthwith make and execute unto him and them a new lease of the premises hereby demised, for a term of —— years, to commence from and after the expiration of the term hereby granted, at the like rent, and with and subject to the like covenants, provisoes, and agreements, as are herein contained, except only this present covenant or agreement for renewal [or including this present covenant for renewal]," &c.

Covenant for renewal in lease for years.

The expression "the lessee" will, of course, be explained in the interpretation clause to include the "executors, administrators, and assigns," of the lessee.

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called upon to make.—POWER *of* DISTRESS *on the Lessor's* OTHER PROPERTY, *by way of further* INDEMNITY. COVENANT *by* LESSOR *to* PROCURE RENEWAL *of* ORIGINAL LEASE, *and to grant a new Underlease on such Renewal; but* LESSEES *to be at Liberty to* OBTAIN *a* LEASE IMMEDIATELY *from the* SUPERIOR LANDLORD.—*Acknowledgment of Right of Lessees to production of original* LEASE.

THIS INDENTURE (*u*), made &c., 18—, BETWEEN [*lessor*], Parties. of &c., of the one part, and [*lessees*], of &c., of the other part; WITNESSETH that, in consideration of the yearly *Testatum.* rent hereby reserved, and of the covenants and agreements herein contained, and on the part of the said [*lessees*], their executors, administrators, and assigns, to be respectively paid, observed, and performed, the said [*lessor*] hereby demises unto the said [*lessees*], ALL THAT piece of ground, situate on Parcels. the west side of —— Street, in the parish of —— aforesaid, and intended to form the north-east corner of a new street, called —— Street, TOGETHER with the messuages and buildings now standing or being upon the said piece of ground, and which are intended to be pulled down; AND ALSO all the messuages and buildings to be erected and built on the site of the messuages and buildings to be so pulled down; which piece of ground, with the abuttals thereof, is particularly delineated and described in the plan thereof, drawn in the margin of these presents; and which said piece of ground, with other property, is held by the said [*lessor*], under a lease granted to him by [*original lessor*], of &c., by indenture, dated the 2nd day of July, 18—, for a term of twenty-one years, from the 25th day of March then last, and which indenture contains a covenant on the part of the said [*original lessor*], to grant a renewed lease, at the expiration of the fourteenth year of the said term, for a like term of twenty-one years, and with the like covenant for renewal as is therein contained; TO HOLD the premises hereby demised unto the said [*lessees*], from the 24th day of June, 18—, for the term of ten years and three-quarters of another year, wanting —— days (*v*); YIELDING AND PAYING therefor yearly,

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Stamp. (*u*) Stamp, *ad valorem* on amount of rent, *ante*, p. 336.

(*v*) Leaving a nominal reversion in the present lessor.

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during the term hereby granted, except the last three-quarters of a year wanting —— days, the rent of £—— by equal quarterly payments, on the 29th day of September, &c., in every year, clear of all deductions; the first of such quarterly payments to be made on the 29th day of September, 18—; AND ALSO YIELDING AND PAYING for the last three-quarters of a year, wanting —— days, of the said term, the rent of £——, to be payable, clear of all deductions as aforesaid, on the days and in the manner hereinafter mentioned; (that is to say), the sum of £—— by two equal payments on the 29th day of September and the 25th day of December next preceding the expiration of the said term, and the remaining sum of £—— on the last day but one of the said term (*x*): AND the said [*lessees*] do hereby, and each of them doth hereby, covenant with the said [*lessor*], That the said [*lessees*], their executors, administrators, or assigns, will, during the term hereby granted, pay the rents hereby reserved, at the times and in manner aforesaid; AND ALSO, that the said [*lessees*], their executors, administrators, or assigns will pay and discharge the land-tax and sewers' rates, and all other taxes, rates, assessments, and impositions whatsoever, now taxed, rated, assessed, charged, or imposed, or which at any time or times hereafter, during the continuance of this demise, shall be assessed, charged, or imposed upon the said premises, or any part thereof, or upon the landlord or tenant in respect

the three-quarters of a year wanting two days.

By two equal payments.

Joint and several covenant to pay rents,

and taxes.

(*x*) A deduction will be made from the last payment in respect of the days wanting. It sometimes happens that persons having renewable leases, and who are desirous of selling a portion of the demised property, instead of *assigning* such portion to a purchaser, grant an underlease, for a premium, at a nominal rent, leaving in themselves (as in this case) a bare reversion of a few days only; and by this means the right of renewal is reserved. In such case the term of the *reddendum* should be—

Demise at nominal rent.

"YIELDING AND PAYING therefor yearly, during the said term, the rent of a peppercorn if the same be lawfully demanded."

In such a case, as the lessor retains no substantial interest in the premises, he has no occasion for any covenants on the part of the lessee further than to secure the performance of the covenants in the original lease. His own covenants will be the same as in the text, except as to that which respects the deduction of the original rent out of the sub-rent, if paid by the underlessee (*vide post*, p. 597), which, of course, will not apply.

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thereof; And also, that the said [*lessees*], their executors, administrators, or assigns, will, within the space of two years from the day of the date of these presents, expend in making substantial new erections, buildings, and improvements upon the premises hereby demised, the full sum of £—— (they being at liberty for that purpose, and hereby undertaking to pull down and remove the messuages and buildings now standing on the said piece or parcel of ground, or any of them) conformably to the general plan of building agreed upon between the said [*lessor*] and the said [*original lessor*], and under the inspection and control of, as well as the surveyor of the said [*original lessor*], his heirs or assigns, as the surveyor of the said [*lessor*], his executors, administrators, or assigns, and to be executed and finished to the satisfaction of such respective surveyors; And that the said [*lessees*], their executors, administrators, or assigns, will within the time aforesaid, produce for the inspection as well of the said [*original lessor*], his heirs or assigns, as of the said [*lessor*], his executors, administrators, or assigns, or their respective surveyors for the time being, the bills and receipts of the several workmen and tradesmen to be employed in or about such erections and buildings, or such other satisfactory evidence as may reasonably be required, in order to prove that the said sum of £—— has been actually laid out and expended in manner aforesaid; And also, that the said [*lessees*], their executors, administrators, or assigns, will, at their own expense, during the term hereby granted, in all respects well and sufficiently uphold, preserve, and keep the said premises, with all the buildings to be erected and built thereon, in manner aforesaid, and also the walls, fences, drains, sinks, sewers, and appurtenances thereunto belonging, in good and tenantable repair and condition; And also that the said [*lessees*], their executors, administrators, or assigns, will, at the expiration or other sooner determination of the said term, peaceably yield up unto the said [*lessor*], his executors, administrators, or assigns, the said premises, with the buildings to be so erected and built thereon as aforesaid, in good and tenantable repair and condition, together with all such fixtures, fastenings, improvements, and things as at any time or times, during the continuance of this demise, shall be set up or affixed in, upon, or to the said premises, or any part thereof: And also [*covenant to insure against fire, ut ante*, p. 414, *or*

to expend a specified sum in improvements:

to keep the premises with improvements in repair;

to deliver up possession at end of term;

to insure.

p. 449 (*y*), *and power for lessor* (*z*) *to enter to examine repairs, and covenant to make repairs accordingly, ut ante*, p. 449]: AND ALSO, that in case the said [*lessees*], their executors, administrators, or assigns, shall, at any time or times hereafter, be desirous of assigning or under-letting, or otherwise disposing of the said premises, or any part or parts thereof, for the whole or any part of the term hereby granted, Then the said [*lessees*], their executors, administrators, or assigns, will, previously to the making or executing any and every assignment, to be at any time or from time to time made, of the whole of the said premises, for the whole unexpired residue of the term hereby granted, pay to the said [*lessor*], his executors, adminis-

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To pay a fine to the lessor on assigning or under-letting.

(*y*) The state of the liability of the landlord and tenant, in the event of the destruction or damage of the demised premises by fire, has been already adverted to: *ante*, p. 200. Few points create more discussion and controversy in preparing leases, than the question, as to what is the footing on which the parties ought to stand in regard to this liability; the tenant, on the one hand, contending that he ought not to be fixed with the loss arising from a misfortune, against which the utmost care may not secure him, as where the fire is occasioned by the negligence of his servants, or (which is a much stronger case) where it has originated in another house, and been communicated to his premises; and particularly as the landlord, whose beneficial interest in the property is generally so much larger than his own, has the opportunity of insuring—the landlord, on the other hand, insisting that having parted with the possession, and thereby with all power of preventing fire, he ought to be exempted from all risk; and that the lessee may protect himself from the injury arising from his liability under the covenants by an insurance, and with greater certainty than he (the landlord) has it in his power to do, since any insurance *he* may effect is liable to be invalidated by the act of the lessee, without his knowledge; as by having combustible materials on the premises, erecting stoves, &c. The latter is certainly an important consideration, and affords an argument for throwing at least *some* portion of the risk on the tenant: it suggests, too, that a covenant not to do any act to invalidate fire insurances may well be inserted, where the insurance and rebuilding by the lessee are not effectually provided for. See a covenant of this nature, *ante*, p. 466. Upon the principle, that the tenant ought to bear a part of the risk, the suspension of the rent during the period of the premises remaining uninhabitable is, and with some reason, generally objected to on the part of the landlord. But where the lessor is the party to rebuild, it seems to be merely just that the rent should be suspended if he neglects to do so within a reasonable time: *ut ante*, pp. 445, 464.

Liabilities of lessor and lessee in case of fire, &c.

(*z*) In underleases this power should be made to extend to the original landlord, where a similar power of entry is reserved to him by the original lease.

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trators, or assigns, a sum equal to a moiety of the amount of one year's rent hereby reserved, by way of fine, and will, previously to the execution of any and every assignment, to be at any time or from time to time made, of any part less than the whole of the said premises, for the whole of the term hereby granted, pay to the said [*lessor*], his executors, administrators, or assigns, the sum of £——, by way of fine, and will, previously to the making or executing of any and every under-lease, or other disposition, to be at any time or from time to time made, of the whole or any part of the said premises, for any part less than the whole of the term hereby granted, pay unto the said [*lessor*], his executors, administrators, or assigns, a sum equal to one moiety of one year's rent intended to be reserved on such under-lease or disposition, if such rent shall exceed the sum of £——; but if such rent shall be nominal only, or shall be less than the yearly sum of £——, then the sum of £—— by way of fine;

Disputes to be settled by original lessor.

And that, in case any question, controversy, or dispute shall arise, during the said term, between the said [*lessees*], their executors, administrators, or assigns, and any other tenant or tenants, under-tenant or under-tenants of the said [*original landlord*], his heirs or assigns, occupying premises near or adjoining to the premises hereby demised, concerning any light, water-course, annoyance, or other matter or thing relating to the said premises, then and so often as the same shall happen, the said [*lessees*], their executors, administrators, or assigns, shall submit to and abide by such award or determination as the said [*original lessor*], his heirs or assigns, shall make or declare, in writing, concerning every such question or dispute: And the said [*lessor*] hereby covenants with the said [*lessees*] that he, the said [*lessor*], his executors, administrators, or assigns, will duly pay the rent reserved by the lease so granted to him by the said [*original lessor*] as aforesaid, and observe and perform the covenants, conditions, and agreements therein contained on the part of the said [*lessor*], his executors, administrators, and assigns, to be observed and performed; and will keep the said [*lessees*], their executors, administrators, and assigns, indemnified against the payment of the same rent, and the performance of the same covenants, conditions, and agreements, except so far as such covenants, conditions, and agreements are conformable to the covenants, conditions, and agreements herein-

Covenant by lessor to pay the rent reserved by the original lease;

and perform the covenants;

and keep the lessees indemnified therefrom.

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before contained, and ought to be observed and performed by the said [*lessees*], their executors, administrators, and assigns (*a*); AND FURTHER, that it shall be lawful for the said [*lessees*], their executors, administrators, and assigns, from time to time to deduct and retain out of the rent hereinbefore reserved, any sum or sums of money which they shall have paid to the said [*original lessor*], his heirs and assigns, in consequence of any distress or distresses made by him or them upon the premises hereby demised, for the rent reserved by the said indenture of lease of the 2nd day of July, 18—, or in order to avoid any such distress or distresses from being made, and all costs and expenses which shall have been incurred by the said [*lessees*], their executors, administrators, or assigns, by reason of the non-payment of the said rent by the said [*lessor*], his executors, administrators, or assigns, or by reason of the non-performance, by him or them, of any of the covenants contained in the said indenture of lease, and which on his or their part ought to be performed, whether such rent or breach of covenant shall have accrued or occurred within the same period as the rent out of which the said monies shall be deducted, or at any antecedent or other period (*b*); AND ALSO (*c*), that in case the said [*lessees*], their executors, administrators, or assigns, shall at any time hereafter, during the continuance of this demise, pay or expend any sum or sums of money for the purposes and in manner aforesaid, exceeding in amount the rent which shall, for the time being, happen to be then due from them under or by virtue of the present underlease, it shall be lawful for the said

Lessees may deduct payments made to the original landlord out of the rent.

Power of distress on lessor's other property, by way of further indemnity.

(*a*) *Vide ante*, p. 88.

(*b*) If the lessor has become possessed of the lease by assignment, and especially if such assignment be recent, add—

"or before the said [*lessor*] became possessed of the said indenture of lease, and the premises therein comprised."

As to the necessity of these words, in order to authorize the deduction, *vide ante*, p. 248.

(*c*) Where the rent reserved by the original lease is more than the sub-rent, and indeed, where this is not the case, as the former may be in arrear, or the expenses consequent on its non-payment may augment the sum paid by the under-lessee beyond the amount of the sub-rent payable by him, or there may be no rent due on his own lease for nearly half a year after he has made the payment, it seems to be reasonable to arm the under-lessee with this power of distress on the other property comprised in the original lease. But see next note.

As to clause giving power of distress.

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[*lessees*], their executors, administrators, and assigns, to enter into and distrain upon all or any part of the messuages, lands, and hereditaments, demised to him, the said [*lessor*], in and by the said indenture of lease of the 2nd day of July, 18—, and not comprised in the present under-lease, for all such sum or sums of money as they the said [*lessees*], their executors, administrators, or assigns, shall have so paid or expended as aforesaid, and the distress and distresses then and there made, to dispose of, according to law, in the same manner as in case of distresses by landlords for rent reserved upon leases for years; To THE INTENT that the said [*lessees*], their executors, administrators, or assigns, may be fully satisfied all sums of money and expenses which they, or any of them, shall have paid or incurred by any of the means aforesaid, as well as the expenses incident to such distress or distresses (*d*); AND ALSO that the said [*lessees*], their executors, &c. (*covenant for quiet enjoyment, ut post*, p. 602); AND FURTHER, that he the said [*lessor*], his executors, administrators, and assigns, and all persons lawfully claiming by, from, or under him, will, upon the expiration of the fourteenth year of the term of 21 years granted by the said indenture of the 2nd day of July, 18—, procure a new lease of all the premises comprised in the said indenture of lease to be granted to him or them by the said [*original lessor*], his heirs or assigns, in pursuance of his covenant hereinbefore mentioned, for a term of 21 years thenceforth, at the like rent, and with the like covenants and agreements (including the said covenant for renewal (*e*)), as are contained in the said indenture of the 2nd day of July, 18—; AND ALSO that he, the said [*lessor*], his executors, administrators, and assigns, and all persons whosoever, lawfully claiming by, from, or under him or them, will, upon such renewal by the said [*original lessor*], his heirs or assigns, grant and execute to the said [*lessees*], their executors, administrators, or assigns,

Covenant by lessor to renew the original lease;

and upon such renewal to grant an underlease to the present lessees.

(*d*) As to the validity of such powers of distress, see *Allen* v. *Givers*, Moore, 135; *Casamajor* v. *Strode*, 2 Swan. 357; they do not seem to be licences to take possession of chattels as a security for a *debt* within the Bills of Sale Acts, see *post*, p. 792; but it may perhaps be doubted whether they do not fall within sect. 6 of the Act of 1878, see *post*, p. 801.

(*e*) *Or*, "except the said covenant for renewal," as the case may be.

XLVI. **Underlease, with Provisions for the Indemnity of the Lessees, Renewal, &c.**

or unto such other person or persons as they shall direct, an under-lease or under-leases of all and singular the premises hereby demised for the whole of the term created by such new demise as aforesaid, except the two last days thereof, under and subject to such and the same rent, covenants, provisoes, and agreements, as in these presents are reserved and contained, including this present covenant (*f*), they, the said [*lessees*], their executors, administrators, and assigns, on their part, paying a proportional part of the fines, fees, and other expenses attending such renewal, by the said [*lessor*], his executors, administrators, or assigns, with all the expenses of such under-lease or under-leases, which proportional part, it is hereby agreed, shall be fixed and determined by the improved values to be from time to time set by the [*original lessor*] upon the lands and tenements to be comprised in every such renewed lease; and the amount of the payment so to be made by the said [*lessees*], their executors, administrators, or assigns, upon every such renewal, shall be settled and adjusted, in case of dispute concerning the same, by reference to the person who for the time being shall be the surveyor or agent of the said [*original lessor*], his heirs or assigns. PROVIDED ALWAYS, that it shall be lawful for the said [*lessees*], their executors, administrators, and assigns, at any time hereafter to apply for and procure from the said [*original lessor*], his heirs or assigns, an original lease to be granted unto them the said [*lessees*], their executors, administrators, and assigns, of the premises hereby demised for their own use and benefit, and that in such case the said [*lessor*], his executors, administrators, or assigns, will, at the cost of the said [*lessees*], their executors, administrators, or assigns, join and concur in making such surrender of the premises hereby demised, as they the said [*lessees*], their executors, administrators, and assigns, shall require, and that upon such lease being granted, the covenants and agreements hereinbefore contained on the part of the said [*lessor*], for the renewal of the lease of the said premises, and the covenant on the part of the said [*lessees*] to pay a proportional part of the fine and expenses on every such renewal, shall cease, determine, and be absolutely void, anything hereinbefore contained to the contrary thereof in anywise notwithstanding: PROVIDED

Under-lessees to pay proportion of fine, &c.

Lessees to be at liberty to obtain a new license directly from the original lessor.

Proviso for re-entry.

(*f*) *Or*, "except this present covenant," as the case may be.

XLVI. **Underlease, with Provisions for the Indemnity of the Lessees, Renewal, &c.**

ALWAYS that, in case the said yearly rents hereby reserved, or any part thereof respectively, shall be in arrear by the space of —— days (whether the same shall have been legally demanded or not); or if the said [*lessees*], their executors, administrators, and assigns, shall not, in all respects, perform, observe, and keep all the covenants herein on their part contained; then, and in any such case, it shall be lawful for the said [*lessor*], his executors, administrators, or assigns, into and upon the said premises, or any part thereof in the name of the whole, to re-enter and to re-possess and enjoy the same as of his former estate, and this present demise shall thereupon absolutely cease and determine. AND LASTLY, the said [*lessor*] hereby acknowledges the right of the said [*lessees*], their executors, administrators, and assigns, to the production of the said indenture of lease of the 2nd day of July, 18—, and to delivery of copies thereof, and he hereby undertakes for the safe custody thereof. IN WITNESS, &c.

Acknowledgment of right to production of lease.

XLVII. *UNDERLEASE for the entire* TERM *reserved by the Original Lease, except the last Seven Days thereof, in consideration of a Premium.* COVENANTS *by* UNDERLESSEE *to pay Rent, and to observe the Covenants of the Original Lease, and indemnify the Underlessor therefrom.*

Parties.

THIS INDENTURE (*g*), made &c., BETWEEN [*lessor*], of &c., of the one part, and [*lessee*], of &c., of the other part:

Recitals;

WHEREAS by an indenture of lease, dated, &c., and made between [*parties*], the messuage and hereditaments hereinafter described and intended to be hereby demised, were demised unto the said [*lessor*] from the —— day of ——, 18—, for the term of ninety-nine years thereafter next ensuing, at the yearly rent of £——, and subject to the lessee's covenants and conditions therein contained:

of original lease;

of agreement for underlease.

AND WHEREAS the said [*lessor*] has agreed to grant unto the said [*lessee*] an underlease of the said premises for the term and in manner hereinafter mentioned:

Testatum.

NOW THIS INDENTURE WITNES-

Stamp.

(*g*) Stamp, *ad valorem* on rent as a lease, *ante*, p. 336; and also as a conveyance in respect of the premium.

XLVII. Underlease with Provision for Indemnity of Lessor.

SETH, that, in consideration of £——, on or before the execution of these presents paid to the said [*lessor*] by the said [*lessee*] (the receipt whereof is hereby acknowledged), and of the rents and lessee's covenants hereinafter reserved and contained, he the said [*lessor*] hereby demises unto the said [*lessee*] ALL THAT messuage, &c. [*describe parcels*]: AND all other (if any) the premises comprised in and demised by the hereinbefore-recited indenture of lease, TO HOLD the said premises hereby demised unto the said lessee from the —— day of ——, 18—, for all the residue then unexpired of the said term of ninety-nine years granted by the said indenture of lease, except the last seven days thereof: YIELDING AND PAYING therefor during the said term hereby granted the yearly rent of £——, by equal quarterly payments, on the four usual quarter days, commencing with the 29th day of September, 18—, without any deduction, landlord's property tax only excepted: AND THE SAID [*lessee*] hereby covenants with the said [*lessor*], that he the said [*lessee*], his executors or administrators, will pay the yearly rent of £—— hereby reserved, at the times and in manner aforesaid; AND will, during the said term, at all times observe and perform all the covenants, agreements, and conditions contained in the hereinbefore recited indenture of lease, and on the part of the lessee to be observed and performed, except the covenant for payment of the rent thereby reserved; AND will keep the said [*lessor*], his executors, administrators, and assigns, indemnified against the observance and performance of the same covenants, agreements, and conditions, and from all actions, claims, and demands in respect thereof; AND ALSO will, at the expiration or sooner determination of the term hereby granted, peaceably yield up unto the said [*lessor*], his executors, administrators, or assigns, the said premises hereby demised in such good and tenantable repair and condition as the same ought to be at the determination of the term therein granted by the hereinbefore-recited indenture of lease, pursuant to the covenant in that behalf contained in the same indenture, to the intent that the said [*lessor*], his executors, administrators, or assigns, shall not, under such covenant as last aforesaid, be liable to pay any moneys to his or their superior landlord or landlords by reason of any want of reparation, painting, or other works required to be done by the lessee in and by the

Demise.

Parcels.

Habendum.

Reddendum

Covenant by lessee to pay rent;

to observe covenants, &c., of original lease;

but to indemnify under-lessor therefrom.

to deliver up premises at end of term;

XLVII. **Underlease with Provision for Indemnity of Lessor.**

hereinbefore-recited indenture of lease: AND FURTHER, that it shall be lawful for the said [*lessor*], his executors, administrators, or assigns, as well as for his and their superior landlord or landlords for the time being of the said premises, his or their agents, stewards, or surveyors, with or without workmen, twice or oftener yearly, during the said term hereby granted, in the daytime (first giving two previous days' notice in writing), to enter upon the said premises, and every part thereof, to take account of fixtures, and view the condition thereof, and of all defects, decays, and wants of reparation, or of painting and other works as aforesaid, that shall be found, to give or leave notice in writing, at or upon the said premises, or any part thereof, for the said [*lessee*], his executors, administrators, or assigns, to repair and supply the same defects, decays, and wants within the space of three calendar months from the time of giving or leaving such last-mentioned notice, and that the said [*lessee*], his executors, administrators, or assigns, will repair and supply the same according to the terms of such notice; AND THE SAID [*lessor*] hereby covenants with the said [*lessee*], that he the said [*lessor*] will duly pay the rent reserved by the hereinbefore-recited indenture of lease, and keep the said [*lessee*], his executors and administrators, indemnified against the same, and from all actions, claims, and demands in respect thereof: AND ALSO that he the said [*lessee*], his executors and administrators, paying the rent hereby reserved, and performing and observing the covenants on his and their part herein contained, shall quietly hold and enjoy the premises hereby demised, and every part thereof, during the term hereby granted, without any interruption or disturbance by the said [*lessor*], his executors, administrators, or assigns, or any person or persons lawfully or equitably claiming through or under him, them, or any of them: PROVIDED ALWAYS, that in case the said rent hereby reserved shall be in arrear, &c. [*Proviso for re-entry, ut ante, p.* 600]: AND LASTLY [*Acknowledgment of right to production of* "the hereinbefore-recited indenture of lease," *ut ante, p.* 600].

to permit lessor, &c., to enter to view and take account of fixtures, &c., and leave notices;

to repair on notice.

Lessor's covenants; to pay superior rent;

for quiet enjoyment.

Proviso for re-entry.

Acknowledgment, &c.

IN WITNESS, &c.

XLVIII. *LEASE of a qualified* RIGHT *of* WAY, *at a certain Rent, with an* ADDITIONAL RENT *for every* OCCASION *on which the Way shall be* USED *for certain* PURPOSES. COVENANTS *by* LESSEE *to* PAY RENTS—NOT *to* ERECT *any* BUILDING *on adjoining* PREMISES *belonging to him above a certain Height—Not to* USE *the* WAY *for the before-mentioned* PURPOSES. POWER *to* LESSOR *to* DISTRAIN *for Rents on Lessee's* ADJOINING PREMISES—*also to* DETERMINE LEASE *in case of* NON-PAYMENT *of* RENT, *or if* LESSEE *should* ERECT *any* BUILDING *contrary to his Covenant.*

THIS INDENTURE (*h*), made &c., BETWEEN [*lessor*], of &c. (hereinafter called the lessor), of the one part, and [*lessee*], of &c. (hereinafter called the lessee), of the other part. WHEREAS the lessor is seised of or entitled in fee-simple to a certain messuage, tenement, or building, called —— Street Chambers, situate, &c., and which messuage, tenement, or building is divided or parcelled out into divers chambers or apartments, which are let by the lessor to different persons as or for counting-houses, and the entrance or access to such chambers, apartments, or counting-houses, is through a passage or way leading from the east side of —— Street aforesaid, along the south side of the aforesaid messuage, tenement, or building, called ——, the ground and soil of which said passage or way, and the freehold and inheritance thereof, are also the property of the lessor; AND WHEREAS the lessee is possessed of or entitled to a messuage or tenement and yard or garden belonging to and immediately behind the same, situate on the east side of —— Street aforesaid, for an unexpired term of seventy years, from the —— day of ——, which lastly mentioned messuage or tenement and yard or garden adjoin the said messuage, tenement, or building called —— Street Chambers, and are separated therefrom by the way or passage hereinbefore mentioned, which way or passage runs along and bounds the whole of the north side of the messuage or tenement and yard or garden of or belonging to the lessee as aforesaid; AND WHEREAS the lessee is about to erect a counting-house and warehouse in

Recital that lessor is entitled;

that lessee is possessed of an adjoining messuage.

Of lessee's intention to erect a count-

(*h*) Stamp *ad valorem* on rent reserved, *ante*, p. 336. Stamp.

XLVIII. **Lease of a Right of Way.**

ing-house, &c., and agreement for demise of right of way.

the yard or garden behind the said messuage or tenement of or to which he is so possessed or entitled as aforesaid, and being desirous of having an entrance or access to the said counting-house and warehouse by or through the said way or passage, he has requested the lessor to grant to him a right of way through the aforesaid passage to the said intended counting-house and warehouse, for the period and in manner hereinafter mentioned, which he the lessor has agreed to do:

Testatum.

NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the yearly rent hereinafter reserved, and of the covenants hereinafter contained, on the part of the lessee to be respectively paid and performed, the lessor hereby demises unto the lessee

Demise.

Liberty of way.

free liberty and right of way and passage, and of ingress, egress, and regress, to and for him and them, and the clerks, apprentices, servants, and friends of him, them, and every of them, and all and every other person and persons going to and coming from the said counting-house and warehouse, so intended to be built by the lessee as aforesaid, or either of them (except as hereinafter excepted), from time to time and at all times, from the hour of nine o'clock in the morning until nine o'clock in the evening, daily, during the term hereby granted, in, to, and from the counting-house and warehouse, so intended to be built as aforesaid, or either of them, to go, pass, and repass on foot, in, by, and through the way or passage hereinbefore mentioned as separating or dividing the messuage or tenement so belonging to the lessee as aforesaid, from the messuage, tenement, or building called —— Street Chambers as aforesaid; SAVE AND EXCEPT nevertheless, and it is hereby agreed that these presents shall not be construed to grant or give a right of passage to or for any person or persons bringing or carrying to or from the said intended warehouse and counting-house, or either of them, any coal or ashes, night-soil, dirt, or filth, or any other matter or thing whatsoever, which may be or become a nuisance to the person or persons for the time being occupying the said chambers or apartments of or belonging to the lessor as aforesaid, or any of them, nor to or for any person or persons bringing or conveying to or from the said counting-house or warehouse, or either of them, any meat or any other articles of provision, for the supply or use of the family of the said

Exception in respect of certain purposes.

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lessee, or of other the person or persons for the time being occupying the said messuage or tenement situate on the south side of the said way or passage, or the said intended counting-house or warehouse): To HOLD AND EXERCISE the liberty and right of way and passage, and of ingress, egress, and regress hereinbefore mentioned (except as before excepted), unto and by the lessee, from the —— day of —— in the year ——, for the term of seventy years thence next ensuing; YIELDING AND PAYING therefor, yearly during the said term, and so in proportion for any less period than a year, the yearly rent or sum of £——, by equal half-yearly payments, on the —— day of —— and the —— day of —— in every year, free from all taxes and without any other deduction whatsoever, the first payment thereof to be made on the —— day of —— next; AND ALSO YIELDING AND PAYING, over and above the said yearly rent or sum of £——, the further yearly rent or sum of £——, upon the —— day of —— in every year, for each and every occasion in which the lessee shall, during the said term, bring or carry, or permit to be brought or carried, by his or their servants or agents, or the servants or agents of any person or persons employed by him or them, in, through, or over the way or passage hereinbefore mentioned to be the property of the lessor and situate on the south side of the said chambers or apartments as aforesaid, to or from the said counting-house or warehouse so intended to be built by the lessee, as aforesaid, any coal, ashes, night-soil, dirt, or filth, or any other matter or thing whatsoever, which may be or become a nuisance to the person or persons for the time being occupying or using the chambers or apartments situate and being on the north side of the said way or passage as aforesaid, or any of them, or any meat or other provisions for the supply or use of the family of the lessee, or of such other person or persons for the time being occupying the said messuage or tenement of the lessee, or such intended counting-house or warehouse as aforesaid; the first payment of such additional and contingent rent or rents, as aforesaid, to be made on the said —— day of —— next, after the said way shall have been used for any of the purposes aforesaid, and to continue payable during the whole residue then to come of the said term; AND, in consideration of the premises, the lessee hereby covenants with the lessor in manner following: (that is to say), that he, the

Habendum for seventy years.

Reddendum.

Reddendum of additional rent in case way shall be used for certain purposes.

Covenant to pay the rent;

XLVIII. **Lease of a Right of Way.**

lessee, will, from time to time during the term hereby granted, duly pay unto the lessor, the said rent of £——, and the said contingent rent or rents (if the same shall become payable), on the respective days on which the same rents shall respectively become payable as aforesaid, without any deduction whatsoever on account of present or future taxes or otherwise; And will not, at any time or times during the said term, erect or permit to be erected in or upon the said yard or garden of him the lessee, appurtenant to and situate behind the said messuage or tenement in —— Street aforesaid, which he is now possessed of or entitled to as aforesaid, or in or upon any part or parts thereof, any outhouse, counting-house, warehouse, or other building whatsoever which shall exceed ten feet in height, to be computed from the present level or surface of the said yard or garden; And that he the lessee will not, at any time or times during the said term, permit the passage or way hereinbefore mentioned to belong to him the lessor, to be made use of by any person or persons whomsoever, coming to or going from the said counting-house or warehouse, so intended to be built by him the lessee, for the purpose of carrying or conveying coals, ashes, night-soil, dirt, filth, or any other thing which may be or become a nuisance to the person or persons for the time being occupying the apartments or chambers situate on the north side of the said passage as aforesaid, or any of them, or for the purpose of supplying the family of the lessee, or other the person or persons occupying the said messuage, situate on the south side of the said passage or way as aforesaid, or the said counting-house or warehouse so intended to be built as aforesaid, with any meat or other articles of provision whatsoever; And the lessor hereby covenants with the lessee, that it shall be lawful for the lessee, and his clerks, servants, apprentices, and friends, and all and every other person or persons (except as before excepted) going to and coming from the counting-house or warehouse so intended to be built as aforesaid, from time to time and at all times, from the said hour of nine o'clock in the morning to the hour of nine o'clock in the evening, daily, during the said term hereby granted (he the lessee, during such term paying the said rent of £——, and such contingent rent or rents as aforesaid, if the same shall have become payable, and performing all and singular the covenants hereinbefore contained on his and their

not to erect any building on adjoining premises belonging to lessee above certain height;

not to use the way for certain purposes.

Covenant for quiet enjoyment.

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parts), to go, pass, and repass on foot, into and from the said counting-house or warehouse intended to be built as aforesaid, in, by, and through the said way or passage hereinbefore mentioned, without any hindrance or disturbance whatsoever, of, from, or by the lessor, or any person or persons claiming by, under, or in trust for him: PROVIDED ALWAYS, that, in case the said rent of £——, or the said contingent rent or rents (if the same shall have become payable), or any of them, or any part thereof respectively, shall, at any time or times during the said term of seventy years, be unpaid by the space of fourteen days next after either of the respective days hereby appointed for the payment thereof respectively; THEN, and in every such case, it shall be lawful for the lessor, into and upon the said messuage or tenement and premises in —— Street aforesaid, of or to which the lessee is possessed or entitled as aforesaid, or into and upon any part thereof, or into and upon the counting-house and warehouse so intended to be built, or any part thereof, to enter, and distrain for the same rent or rents and all arrears thereof respectively, and the distress and distresses then and there found to deal with according to law, in like manner as landlords are authorized to do for rent in arrear; TO THE INTENT that thereby and therewith the lessor, may be fully paid and satisfied the said yearly rent of £——, and all arrears thereof, and the said contingent rent or rents, or so much thereof respectively as shall be then remaining due and unpaid, and all costs and expenses whatsoever occasioned by the non-payment thereof respectively (*h*): PROVIDED ALSO, that, in case the said rent of £——, or any part thereof, or the said contingent rent or rents, shall be unpaid by the space of twenty-eight days next after the time or respective times on which the same respectively ought to be paid as aforesaid (whether lawfully demanded or not); or in case the lessee shall, at any time or times during the said term of seventy years, erect, or cause or suffer to be erected, in or upon the said yard or garden of him the lessee, appertaining to and situate behind the said messuage or tenement in —— Street aforesaid, or in or upon any part or parts thereof, any outhouse, counting-house, warehouse, or other building whatsoever, which shall exceed ten feet in height

Power to distrain.

Power to determine the lease.

(*h*) As to powers of distress of this kind, see *post*, p. 801.

XLVIII. **Lease of a Right of Way.**

from the present level or surface of the said yard or garden as aforesaid; THEN, and in either of the said cases, the demise hereby made, and the said term of —— years, shall thereupon absolutely cease and determine: PROVIDED LASTLY, that, in these presents, unless the contrary appears, the expression "the lessor" shall include as well the said [*lessor*] as his heirs and assigns, and the expression the "lessee" shall include the said [*lessee*], and his executors, administrators, and assigns. IN WITNESS, &c.

Interpretation clause (*i*).

XLIX. *LEASE of a* RIGHT *of* SHOOTING, *&c.* (*k*).

THIS INDENTURE (*l*), made the —— day of ——, 18—,

Parties.

BETWEEN [*lessor*], of &c., of the one part; and [*lessee*], of &c., of the other part:

Testatum.

WITNESSETH that, in consideration of the rent and lessee's covenants hereinafter reserved and contained, the said [*lessor*] hereby demises unto the said [*lessee*],

Demise of right of sporting;

ALL that the sole and exclusive right (subject as hereinafter mentioned) of shooting, fowling, coursing, fishing, and sporting in, over, and upon the farms, closes, woods, coppices, and plantations, situate in the several parishes of —— and ——, in the county of ——, and particularly described in the schedule hereunder written, and containing altogether —— acres or thereabouts;

and keeper's cottage.

AND ALSO all that keeper's cottage or lodge, and the kennels, offices, and outbuildings thereto belonging, situate at —— aforesaid, and now or late in the occupation of [*occupant*]:

Habendum.

TO HOLD the premises unto the said [*lessee*] from the —— day of ——, 18—, for the term of —— years,

Reddendum.

if the said [*lessee*] shall so long live: YIELDING AND PAYING therefor the yearly rent of £——, and so in proportion for a less period than a year, to be paid by two equal half-yearly payments on the —— day of —— and the —— day of —— in every year, the first payment to be made on the —— day

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Deed necessary.

(*k*) A right of shooting being an incorporeal hereditament can only be effectually demised by deed: see *Bicol* v. *Higginson*, 6 A. & E. 824; *R.* v. *Thurlston*, 1 E. & E. 502.

Stamp

(*l*) Stamp *ad valorem* on amount of rent reserved, see *ante*, p. 336.

XLIX. **Lease of a Right of Shooting.**

of ——, 18—; AND THE SAID [*lessee*] HEREBY COVENANTS with the said [*lessor*] in manner following, that is to say: that he the said [*lessee*] will pay the said rent hereby reserved at the times and in manner hereinbefore mentioned; AND will also pay all rates for the time being payable in respect of all the premises hereby demised, and if the said [*lessor*] shall at any time be required to pay any rate or rates in respect of any of the rights of sporting hereby demised (*m*), that he the said [*lessee*] will repay to the said [*lessor*] all sums which shall be paid by him in respect of any such rate or rates as last aforesaid, the same to be recoverable by the said [*lessor*] as rent in arrear; AND also that the said [*lessee*] will exercise the said rights and privileges in a proper and sportsmanlike manner; AND will, during the said term, at his own cost, keep at least —— gamekeeper and —— assistants; and will use his best endeavour to preserve a proper and sufficient head of game, and to protect the same, and the young and eggs thereof; and will pay all expenses of and incident to such preservation and protection; AND also will, during the said term, pay and satisfy all reasonable claims of the tenants or occupiers of the said lands mentioned in the schedule hereunder written, for compensation for damage or injury to the banks, hedges, or fences of the said lands, or for damage to the crops grown thereon, by reason of or incident to the exercise of the rights hereby demised by the said [*lessee*], or his friends or servants, or by game preserved by the said [*lessee*] on the said lands (all such claims to be settled by arbitration in the usual manner); AND will keep the said [*lessor*] well and sufficiently indemnified in respect of all such claims; AND that he the said [*lessee*] will not assign, underlet, or otherwise part with the possession of the premises hereby demised, or any of them, or any part thereof respectively, without the previous consent in writing of the said [*lessor*]; AND also that he the said [*lessee*] will, at the end or sooner determination of the said term, leave on the said lands a proper and sufficient head of game, and particularly not less than

Lessee's covenants;

to pay rent and rates.

to keep up the shooting, &c.;

preservation and protection;

to indemnify lessor against claims for damages to fences and crops;

not to assign or underlet;

to deliver up at end of term;

(*m*) By the Rating Act, 1874 (37 & 38 Vict. c. 54), sect. 6, sub-sect. 2, it is enacted that, "Where any right of sporting, when severed from the occupation of the land, is let, either the owner or the lessee thereof, according as the persons making the rate determine, may be rated as the occupier thereof." Rating of sporting rights.

XLIX. **Lease of a Right of Shooting.**

—— hen pheasants (*n*), and will deliver up to the said [*lessor*] the said cottage, with the outbuildings and appurtenances thereof, in good and tenantable repair and condition: AND THE SAID [*lessor*] HEREBY COVENANTS with the said [*lessee*] that the said [*lessee*], paying the said rent hereby reserved, and observing and performing the covenants on his part herein contained, may peaceably enjoy the rights and liberties and all other the premises hereby demised, without any interruption or disturbance from or by the said [*lessor*], or any person or persons claiming under, through, or in trust for him; AND also that the said [*lessor*] will at all times during the said term, upon the request in writing of the said [*lessee*], bring and take all such actions and legal proceedings against trespassers and poachers as shall be reasonably required by the said [*lessee*], upon being indemnified by the said [*lessee*] against costs and expenses, and sign and cause to be served notices to trespassers to keep off the lands mentioned in the schedule hereunder written; AND ALSO that if this demise shall be determined by reason of the death of the said [*lessee*] at any time between the 2nd day of February and the 1st day of September in any year of the said term, then he the said [*lessor*] will repay or allow to the executors or administrators of the said [*lessee*] all expenses incurred by the said [*lessee*] as from the end of the preceding season up to the death of the said [*lessee*] of and incident to the preservation and protection and rearing of game on the lands aforesaid, the amount to be so repaid or allowed to be settled (in case of dispute) by arbitration in the usual manner: PROVIDED ALWAYS, that if any half-yearly payment of the said rent hereby reserved, or any part thereof, shall be unpaid by the space of —— days after the same shall have become due, whether the same shall have been formally or legally demanded or not, or if there shall be

Lessor's covenants; for quiet enjoyment;

to prevent trespass;

to allow proportion of expenses in case of lessor's death during term.

Proviso for lesser of term.

Covenant to leave land at end of term stocked with game.

(*n*) Where a demise by deed of an exclusive right and licence to kill game contained a covenant by the lessee "at the end of the term to leave the estate as well stocked with game as the same was when he entered upon the enjoyment of the estate, it was held that the demise was not a mere licence, but a grant of an incorporeal hereditament, and that the covenant touched and concerned the hereditament demised, and that it ran with the land, so that the assignees of the reversion could sue upon the covenant: *Hooper* v. *Clarke*, L. R. 2 Q. B. 200; see also *Martyn* v. *Williams*, 1 H. & N. 817.

any breach by the said [*lessee*] of any of the covenants on his part herein contained, then and in any such case the demise hereby made and the said term of —— years shall forthwith absolutely cease and determine. In witness, &c. XLIX. **Lease of a Right of Shooting.**

The Schedule above referred to.

L. *LEASE by* reference *to an* expired Lease *or to a* subsisting Lease *of* other Lands (*o*).

THIS INDENTURE, made the —— day of ——, 18—, Between [*lessor*], of &c. (who and his heirs, &c.), of the one part; And [*lessee*], of &c. (who and his executors, &c.), of the other part: WITNESSETH that in consideration of the rent hereby reserved, and of the covenants on the part of the lessee hereinafter contained or referred to, the lessor demises unto the lessee, All, &c. [*parcels*]: To hold the premises unto the lessee from the —— day of ——, 18—, for the term of —— years, at the yearly rent of £——, payable quarterly, on, &c., the first of such quarterly payments to be made on the —— day of ——, 18—, without deduction on account of any taxes, rates, or charges; But upon such terms [except as to the amount of the said occupation rent], and subject to such [penal and other] reservations, provisoes for re-entry and other provisoes, covenants, and clauses, on the part of the landlord and tenant respectively, as in an indenture of lease dated the —— day of ——, 18—, and expressed to be made between, &c., are expressed and contained concerning the tenancy thereby created, so far as the same can be applied to the tenancy hereby created, and are consistent herewith: And

Parties. *Testatum.* Demise. *Habendum.* *Reddendum.* Reference to old lease.

(*o*) This deed will require an *ad valorem* stamp on the rent reserved. The lease referred to will also require a stamp of 10*s.* as a schedule: see Stamp Act, 1870. If so stamped, it will be admissible, though not properly stamped as a lease: *Duck* v. *Braddyl*, 13 Pri. 455; *S. C.*, M'Cl. 217. A deed properly stamped will be admissible *quantum valeat*, though it refers to an unstamped schedule: *Sneezum* v. *Marshall*, 7 M. & W. 417. Stamp.

L. Lease by Reference to another Lease.

THE LESSEE HEREBY COVENANTS with the lessor, that he the lessee will, during the said term hereby granted, pay the said rent hereby reserved on the days and in manner hereinbefore appointed for payment of the same: AND each of the said parties hereto covenants with the other of them respectively, that the said covenanting party, his heirs, executors, administrators, and assigns, will observe and perform such of the aforesaid conditions, covenants, and clauses, contained in the said indenture of lease of the —— day of ——, 18—, as ought to be observed and performed on his and their parts: AND also [*Add any new stipulations*]. IN WITNESS, &c.

Mutual covenants.

LI. *CONFIRMATION of a* LEASE *by* ONE *of* THREE TRUSTEES *of a Will, Two only of them having granted with his concurrence a Lease; by Indorsement on the Lease.*

Exordium.

TO ALL TO WHOM THESE PRESENTS SHALL COME (*p*), [*confirmor*], of &c., sends greeting.

Recital of bequests of leaseholds to three, upon trust, to underlease; two of whom only are parties to the within-written lease.

WHEREAS the within-named [*testator*], by his will, dated &c., gave and bequeathed ALL his leasehold lands, held by virtue of leases from [*ground landlord*], of &c., and situated in ——, unto the within-named [*lessors*] and the said [*confirmor*], their executors and administrators, for all such estate and interest as he, the said [*testator*], had therein, UPON TRUST, as soon as conveniently might be, to let or demise the said lands, and such parts thereof as he the said testator should not have so let or demised before his death, in such parts, shares, and proportions as they might think proper, as therein mentioned; AND THE SAID testator appointed the said [*lessors*] and [*confirmor*] executors of the same will; AND WHEREAS the said [*testator*] died on or about the —— day of ——, 18—, without having altered or revoked his said will; AND the said [*lessors*] and [*confirmor*], on or about the —— day of ——, duly proved

Death of testator,

proof of his will;

Stamp.

(*p*) The lease having been duly stamped as such, this instrument will apparently require a deed stamp of 10*s*.

LI. Confirmation by One of Three Trustees, where Two only had been Parties to a Lease.

the same will in the —— District Registry at —— of Her Majesty's High Court of Justice, Probate Division; AND WHEREAS doubts have arisen whether the said [*lessors*] were alone competent to make the lease contained in the within-written indenture, without the concurrence of the said [*confirmor*]; and the said [*confirmor*], has consented to execute the lease or confirmation hereinafter contained: NOW KNOW YE, AND THESE PRESENTS WITNESS, that for obviating all doubts of the validity of the within-written indenture of lease, for want of his concurrence in the same, and for the considerations expressed in the within-written indenture, and for supplying the defects, if any, in the same indenture, or the lease thereby made, for want of the concurrence of the said [*confirmor*] in the same; the said [*confirmor*] by way of further assurance, and as far as he lawfully may or can, hereby as trustee demises and confirms unto the within-named [*lessee*] ALL THOSE the lands, messuages or tenements, hereditaments and premises, comprised in the within-written indenture, and intended to be thereby demised to the said [*lessee*] (EXCEPT as in the same indenture of lease is excepted): TO HOLD the premises (except as aforesaid), unto the said [*lessee*], henceforth, for and during all the residue of the within-mentioned term of eighty years, which is now unexpired; in confirmation, and for the purpose of giving effect to the same term; and also for supplying any defect in the same term, or in the within written indenture of lease, for want of the concurrence of the said [*confirmor*] therein, as one of the granting or leasing parties jointly with the said [*lessors*]; SUBJECT NEVERTHELESS to the rents reserved, and to the covenants, conditions, and agreements contained in the said indenture, and on the part of the lessee to be paid, observed, and performed: AND THE SAID [*lessee*] hereby covenants with the said [*confirmor*], that the rents reserved in the within-written indenture shall henceforth be duly paid at the time and in manner mentioned in the within-written indenture; AND that the covenants, conditions, and agreements therein contained shall be observed and performed in the same or the like manner as if the said [*confirmor*] had joined in the within-written indenture, and the demise thereby made, and the covenants, conditions, and agreements therein contained on the part of the lessee had been entered into, to, and with the said [*lessors*] and [*confirmor*]; AND THE SAID [*lessee*] hereby

doubts whether the two were competent to lease.

Testatum.

Parcels:

Habendum for the residue of the within-mentioned term;

subject to the rents, &c.

Covenant by lessee to pay, &c.

LI. Confirmation by One of Three Trustees, where Two only had been Parties to a Lease.

covenants with the said [*confirmor*], that he the said [*lessee*] will pay the said rent, and observe and perform the said covenants, conditions, and agreements accordingly. IN WITNESS, &c.

LII. *CONFIRMATION of a* LEASE *assigned without Licence to the* ASSIGNEE *thereof.*

Recital of lease.

THIS INDENTURE, made &c., BETWEEN [*lessor*], of &c. of the one part, and [*assignee*], of &c., of the other part. WHEREAS, by indenture, dated the —— day of ——, and made between &c.: ALL &c., with the appurtenances, were demised by the said [*lessor*], unto the said [*lessee*], from the —— day of ——, for the term of —— years, thence next ensuing, at the rent, and subject to the covenants and conditions therein respectively reserved and contained: AND WHEREAS the said [*lessee*] has assigned the same premises unto the said [*assignee*], for the residue of the said term of ——: AND WHEREAS the said [*lessor*] has agreed to confirm the said lease unto the said [*assignee*]. NOW

Testatum.

THIS INDENTURE WITNESSETH, that, in consideration of the premises, the said [*lessor*] hereby confirms unto the said [*assignee*], the said indenture of lease, and the said premises intended to be thereby demised as aforesaid, with the appurtenances, and all the said term, estate, and interest therein, which was granted as aforesaid; subject, nevertheless, to the reservations, covenants, conditions, and agreements, in the said indenture of lease contained, and on the part of the [*lessee*], his executors, administrators, and assigns, to be observed, performed, fulfilled, and kept; AND the said [*assignee*] hereby covenants with the said [*lessor*], that he, the said [*assignee*], his executors or administrators, will from time to time, and at all times hereafter, during the residue of the said term of —— years, or which shall first happen, until he or they shall have assigned the said premises,

Covenant by assignee to pay rent;

Stamp.

(*q*) Stamp, see note (*p*) on p. 612.

with such licence and consent as aforesaid, pay the said yearly rent by the said indenture reserved, on the days, and in manner thereby appointed for payment thereof; AND will observe and perform, all and singular the covenants and agreements, in the said indenture contained, and which on the part of the lessee are to be observed and performed (*r*). IN WITNESS, &c.

LII. Confirmation of a Lease Assigned without Licence.

and observe covenants of lease.

LIII. *SURRENDER of a* LEASE *with a view to the granting of a new Lease, by a Tenant for Life under a Will: by Indorsement* (*s*).

THIS INDENTURE (*t*), made the —— day of ——, 18—, BETWEEN the within-named [*lessee*], of the one part, and [*tenant for life*], of &c., of the other part: WHEREAS the within-named [*lessor*], made and executed his will, dated &c., and thereby gave and devised all his real estate whatsoever and wheresoever unto the said [*tenant for life*], for his life with divers remainders over: AND WHEREAS the said [*lessor*] died on the —— day of ——, and his will (with a codicil thereto in nowise relating to his real estate) was duly proved in the Principal Registry of the Probate Division of Her Majesty's High Court of Justice: AND WHEREAS it has been agreed between the parties hereto that the said [*lessee*] shall surrender the premises demised to him by the within-written indenture and that the said [*tenant for life*] shall, in exercise

Parties.

Recitals.

Will of lessor.

Death of lessor.

Agreement for surrender and new lease.

(*r*) A defeazance to revive the condition of re-entry is no longer necessary: see stat. 22 & 23 Vict. c. 35, s. 1.

(*s*) Where a surrender is intended to be made with a view to granting a new lease, a formal surrender is frequently dispensed with; and the new lease is expressed to be granted "in consideration of the surrender of a hitherto subsisting lease of the premises dated," &c. Sometimes, however, it is desired that there should be a formal surrender by a separate deed. As to the powers of limited owners to accept surrenders of leases, see the Settled Land Act, 1882 (45 & 46 Vict. c. 38), sects. 13 and 31 (iv.), *ante*, p. 36. For other forms of surrenders of leases, see *post*, tit. PURCHASE DEEDS.

(*t*) Stamp, 10*s.*: see schedule to the Stamp Act, 1870, tit. SURRENDER.

LIII. **Surrender.**

of his statutory powers as tenant for life of the settled lands devised by the said will, thereupon grant to him a new lease of the same premises for the further term of —— years: NOW

Witnesseth.

THIS INDENTURE WITNESSETH, that in part performance of the said agreement, and in consideration of the premises the said [*lessee*] hereby assigns and surrenders unto the said [*tenant for life*] ALL the hereditaments and premises comprised in the within-written indenture: TO THE INTENT that the term of —— years created by the within written indenture may merge and be extinguished in the freehold reversion and inheritance of the premises. IN WITNESS, &c.

Surrender.

Parcels.

To merge in reversion.

LICENCES.

PRELIMINARY REMARKS.

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Nature of Licences.

Nature of Licences.]—A licence, in the proper acceptation of the term, passes no interest or estate, but is merely a permission to do that which, in the absence of any permission, would not be lawful: thus, a licence by parol will excuse a trespass: Com. Dig. *Trespass* (D.); *Thomas* v. *Sorrell*, Vaugh. 351; *Wallis* v. *Harrison*, 4 M. & W. at p. 544; *Winter* v. *Brockwell*, 8 East, 308; *Taylor* v. *Waters*, 7 Taun. 374. A licence properly so called may therefore take any form which convenience may suggest; may be by parol or by deed; is purely personal to the licensee; and may be revoked at the will of the licensor. It is however laid down that a licence must be pursued in accordance with its exact terms; see Com. Dig. *Chase* (*H*, 2.). As examples of licences of this class may be quoted licences to enter a man's house, to use a way or any other easement, and licences granted by a lord of a manor or by a lessor to demise.

Definition of licence.

Terms of licence must be strictly observed.

It usually, however, happens that a licence is in intimate connection with or includes a grant of some right, estate, or interest, in addition to the permission to do an otherwise unlawful act. Thus a grant of a right to take and kill game, or to cut timber, or to dig for minerals, upon the property of the licensor, necessarily implies a licence to enter upon his land,

Licence often confers an interest.

Nature of Licences.

to commit what, in the absence of the licence, would amount to a trespass, and also a grant of such game, timber, or minerals, as the licensee should, under the terms of the licence, succeed in appropriating. See *Thomas* v. *Sorrell*, Vaugh. 351 ; *Wood* v. *Leadbitter*, 13 M. & W. at p. 845 ; *Webber* v. *Lee*, 9 Q. B. D. 315.

The properties of licences of this nature depend entirely upon the nature of the interest or estate with which they deal. The purpose for which the licence is given is of no moment, *e.g.*, there is no distinction between a licence granted for profit and a licence for pleasure : *Webb* v. *Paternoster*, Palm. 71 ; *S. C.*, Poph. 151.

Distinction between licence to use and grant of easement.

A distinction must be carefully drawn between a licence to use an easement and a grant of an easement. An easement can be validly created only by deed, and any grant purporting to create an easement, unless by deed, amounts, as a general rule, to a personal licence only, revocable at will and unassignable by the grantee. Thus it has been held very frequently that a parol licence to use a way, or to open a drain, or enjoy any other easement in the licensor's land, is revocable at the will of the licensor, and that the licensor is not bound to give any notice of the fact that he has revoked the licence, or to refund any expense at which the licensee may have been in consequence of the grant of the licence : *Godley* v. *Frith*, 4 East, 107 ; *Hewlins* v. *Shippam*, 5 Bol. 221 ; *Hyde* v. *Graham*, 1 H. & C. 593 ; *Roberts* v. *Rose*, 3 H. & C. 165 ; *Trustees of British Museum* v. *Finnis*, 5 Car. & P. 465 ; *Barraclough* v. *Johnson*, 8 A. & E. 99 ; *Cocker* v. *Cooper*, 1 Cr. M. & R. 418. In the last of these cases it is said that "the mere entry into the close of another and cutting a drain there" (acts which in the absence of the licence would have been unlawful) "cannot confer a title."

But under certain circumstances of unfair dealing, a licensor may be compelled by the Court to give effect to his licence, even though it be technically invalid, as purporting to create an easement without deed. See *East India Company* v. *Vincent*, 2 Atk.

83; *Duke of Devonshire* v. *Eglin*, 14 Beav. 530: *Powell* v. *Thomas*, 6 Hare, 300; *Laird* v. *Birkenhead Railway Company*, John, 500; *Hyde* v. *Graham*, 1 H. & C. 593; *Bankart* v. *Tennant*, L. R. 10 Eq. 141. Nature of Licences.

It has been said that a licence may ensue as a lease: Shep. Touchst. 272; but this seems to be merely a particular example of the general rule that no special words are necessary to a valid demise, *ante*, tit. LEASES, pp. 99 and 129: so that if a licence is sufficiently explicit in its terms to indicate an intention that the licensee shall have the exclusive possession of the land, it is to all intents and purposes a lease, and that whether it be at will, or for years: 1 Rol. Abr. 858, pl. 1; Bro. Abr. tit. *Licence*, pl. 19; *Wood* v. *Lake*, 13 M. & W. 849 n.; *Right* d. *Green* v. *Proctor*, 4 Burr. 2,209. But where the terms of the grant do not imply a right to the exclusive enjoyment of the property, it is a licence only and not a lease: *Taylor* v. *Ashe*, 1 Roll. Abr. 859, pl. 4. The question whether a licence does or does not amount to a lease has been frequently raised with regard to the rateability of the licensee, and other kindred points. See and consider *Norway* v. *Rowe*, 19 Ves. 143, 158; *Chetham* v. *Williamson*, 4 East, 469; *Newby* v. *Harrison*, 1 J. & H. 393; *Electric Telegraph Co.* v. *Salford*, 11 Ex. 181; *Watkins* v. *Milton-next-Gravesend*, L. R. 3 Q. B. 350; *Grant* v. *Oxford*, L. R. 4 Q. B. 9; *Cory* v. *Greenwich*, L. R. 7 C. P. 499; *The London and North-Western Railway Co.* v. *Buckmaster*, L. R. 10 Q. B. 70; *Cory* v. *Bristow*, 2 App. Cas. 262; *Smith & Son* v. *Lambeth*, 10 Q. B. D. 327; *Cie. Française, &c.* v. *Razame*, 12 Q. B. D. 552; *The Lancashire, &c., Co.* v. *Manchester*, 13 Q. B. D. 700. When a licence amounts to a demise.

If a licence to dig for minerals be exclusive, the licensee appears to be practically in the position of a lessee of the mine comprised in the licence: he can maintain an action for trespass upon the mine; *Harker* v. *Birkbeck*, 3 Burr. 1556; *Muskett* v. *Hill*, 5 Bing. N. C. 694; and a person who had taken possession under such a licence, has been held liable to an action for use and occupation; *Jones* v. *Reynolds*,

Nature of Licences.

7 C. & P. 335; and also to an action for ejectment; *Doe* d. *Earl of Falmouth* v. *Alderson*, 1 M. & W. 210.

Licence coupled with an interest.

The most frequent licences, which carry an interest or right, are those connected with mining rights. The custom of granting licences to search for mines and minerals is common in certain parts of the country; and the rights of the vendor of land, who reserves to himself the right of searching for minerals, stand upon the same footing as those of a licensee. Licences of this kind differ in no way from other licences, which are connected with grants of interests or rights: and the decisions upon them are equally applicable to licences dealing with other matter.

If the interest or estate dealt with by the licence be validly granted (compare *Rumsey* v. *Morton*, 1 Vent. 25; *Roffey* v. *Henderson*, 17 Q. B. 574; *Wood* v. *Leadbitter*, 13 M. & W. at p. 845; and other cases cited, *infra*), the grantor cannot derogate from his grant: *Newmarch* v. *Brandling*, 3 Swan. 991. It follows therefore, in the first place, that a licence coupled with an interest is irrevocable: *Doe* d. *Handley* v. *Wood*, 2 B. & Al. 714; *cf. Smart* v. *Sandars*, 5 C. B. 895; *Taplin* v. *Florence*, 10 C. B. 744; *Wood* v. *Manley*, 11 A. & E. 34; and *Williams* v. *Morris*, 3 M. & W. 488. In the second place, if the licence amount to a grant of an exclusive right, the licensor cannot either by himself or by any other person intrude upon the licensee, though if the grant be not of an exclusive right, the licensor may either exercise the same right himself or license others to do so: *Lord Mountjoy and Earl of Huntingdon's Case*, Godb. 17, *S. C.* 4 Leon. 147; *Doe* d. *Hanley* v. *Wood*, 2 B. & C. 724; *Chetham* v. *Williamson*, 4 East, 469; *Newby* v. *Harrison*, 1 J. & H. 393; *Wood* v. *Leadbitter*, at p. 845; *Carr* v. *Benson*, L. R. 3 Ch. A. 524; and lastly such a licence is assignable by the licensee: *Lord Mountjoy and Earl of Huntingdon's Case*, Godb. 17; (where however it was laid down that the assignees, if more than one, must work together, and not separately); *Muskett* v. *Hill*, 5 Bing. N. C. 694; *The Earl of Cardigan* v. *Armitage*, 2 B. & C. 197.

Revocation of Licence.

A mere licence is revocable.

Revocation of Licence.]—A licence, however, which is not connected with, or does not involve the grant of an interest or estate, is revocable at the will of the grantor, unless it has been executed. Thus if a man gives me licence to enter his house, and I enter, and he afterwards discharges the licence, I must go out of his house: Bro. Ab. tit. *Licence*, pl. 15. Accordingly, even though payment has been made for the permission to enter, it lies in the option of the owner for the time being of a theatre or similar place, at any time to withdraw the permission, and thereupon the licensee becomes a trespasser. *Wood* v. *Leadbitter*, 13 M. & W. 838; *Coleman* v. *Foster*, 1 H. & N. 37; the case of *Taylor* v. *Waters*, 7 Taun. 374, being practically over-ruled: see also *Hyde* v. *Graham*, 1 H. & C. 393; *Hewlins* v. *Shippam*, 5 B. & C. 221; *Wallis* v. *Harrison*, 4 M. & W. 538.

The form of the licence is not material in considering the question of its revocability. "A licence under seal—provided it be a mere licence—is as revocable as a licence by parol:" *Wood* v. *Leadbitter*, 13 M. & W. at p. 845; *Williams* v. *Jones*, 3 H. & C. 256.

If it be borne in mind that a licence merely excuses a trespass, the various cases seem easily reconcilable: and the rule just stated appears applicable with the qualification that the licensor will not be permitted to revoke his licence in such a way as to damnify the licensee. Thus, where the owner of a close gave leave to another to stack hay thereon until he should be conveniently able to sell it, and subsequently leased the close to a third party, whose cattle eat the hay, it was held that the licensee was entitled to notice of the subsequent lease, and that the licensor, having failed to give such notice, was liable for the value of the hay: *Webb* v. *Paternoster*, Palm. 71, *S. C.* Poph. 151. See also *Wood* v. *Lake*, Sayer, 3, *S. C.* 13 M. & W. 849 n.; *Parker* v. *Staniland*, 11 East, 362; *Mellor* v. *Watkins*, L. R. 9 Q. B. 400. With these cases may be compared *Winter* v. *Brockwell*, 8 East, 308; in which case the licensor was entitled to an easement over the land of the licensee, and granted him by parol the right to erect

Revocation of Licence.

a structure which interrupted the easement: and it was held that the licensor was not entitled, the licence having been executed, to revoke his licence and compel the licensee to remove the structure except upon the terms of recouping the expense to which he had been put. So also in *Liggins* v. *Juge*, 7 Bing. 682, when a man who was entitled to the flow of water along a mill-stream gave a licence to another to lower the dam, and the licence being executed claimed to revoke his licence: the licensee declined to reinstate the dam, and it was held that no action would lie for the refusal. See also *Salter* v. *Woollams*, 2 M. & Gr. 657.

When a licence is revocable, it will be determined by any act on the part of the grantor which is tantamount to a revocation. For instance, "a licence executory is a simple authority excusing trespasses on the close of the grantor so long as it is his, and the licence is uncountermanded: but ceases the moment the property passes to another:" and that without notice to the licensee: *Plummer* v. *Webb*, Noy. 98; *Wallis* v. *Harrison*, 4 M. & W. at p. 544; *Gaussen* v. *Morton*, 10 Q. B. 731; *Perry* v. *Fitzhowe*, 8 Q. B. 757; *Roffey* v. *Henderson*, 17 Q. B. 574; *Coleman* v. *Foster*, 1 H. & N. 37. So also, such a licence will not bind the devisee of the property; *Wakley* v. *Froggatt*, 2 H. & C. 669. Nor will any right not ordinarily incident to property bind any person other than the grantor and grantee of such right: *Ackroyd* v. *Smith*, 10 C. B. 164; *Hill* v. *Tupper*, 2 H. & C. 121; *The Stockport Waterworks Co.* v. *Potter*, 3 H. & C. 300.

Assignment of Licence.]—A licence properly so called is not assignable. If A licence B to do an act, B cannot grant that licence to another: Bro. Abr. tit. *Licence*, pl. 25. But a licence coupled with a grant is, as has been seen, assignable.

Form of Licence.]—A mere licence may be by parol or by writing in any form. But where a licence deals with an interest or estate in land, it must comply with the requirements of the Statute

Form of Licence.

of Frauds; and if it purports to create an easement, it must be by deed.

As to what amounts to an interest in land sufficient to make it needful that the licence should be in writing, see *Waddington* v. *Bristow*, 2 Bos. & P. 452; *Evans* v. *Roberts*, 5 B. & C. 829; *Brosby* v. *Wordsworth*, 6 East, 602; *Jones* v. *Flint*, 10 A. & E. 753; *Wright* v. *Stevens*, 2 E. & E. 721; and see *Winter* v. *Brockwell*, 8 East, 310.

But where the intention of the licence is to affect a freehold interest in land, it must be by deed: Shep. Touchst. p. 231; *Monk* v. *Butler*, Cro. Jac. 574; (from which distinguish *Rumsey* v. *Rawson*, 1 Vent. 25); *Harrison* v. *Parker*, 6 East, 154; *Perry* v. *Fitzhowe*, 8 Q. B. 757; *Adams* v. *Andrews*, 15 Q. B. 284; *Wood* v. *Leadbitter*, 13 M. & W. at p. 543. And if it be desired to create an easement a deed is necessary; for otherwise the licence will operate as a mere personal licence, revocable at will, notwithstanding outlay by the licensee: *Godley* v. *Frith*, Yelv. 159; *Fentiman* v. *Smith*, 4 East, 107; *Hewlins* v. *Shippam*, 5 B. & C. 221; *Hyde* v. *Graham*, 1 H. & C. 593; *Roberts* v. *Rose*, 3 H. & C. 162; *Cocker* v. *Cooper*, 1 Cr. M. & R. 418.

Moreover, where a licence is granted under any power contained in a deed, it must comply with the requirements of the power: *Mease* v. *Mease*, Cowp. 47; *Richardson* v. *Evans*, Madd. 218; *Roe* v. *Harrison*, 2 T. R. 425; *Littler* v. *Holland*, 3 T. R. 590; *Weatherhead* v. *Curwood*, 2 Har. & W. 140.

Licence to assign.]—A licence to assign or to underlet is necessary in all cases of leaseholds where the lessee is under covenant not to assign or underlet without licence. As to the nature and effect of such covenants see *ante*, tit. Leases, p. 205.

The operation of licences to assign is now governed by sects. 1 & 2 of Lord St. Leonards' Act (22 & 23 Vict. c. 35), whereby it is provided that a licence to do an act which without such licence would create a forfeiture of the lease, shall extend only to the permission actually given, and that a licence to one of several lessees to assign his share, or to assign part

Licences to Assign, &c.

of the lands leased, shall not extinguish the lessor's right in the event of an assignment of the other shares or parts (*a*).

A licence to commit a breach of a covenant must be by deed, as it amounts to a discharge of the covenant, which before breach, must be by deed: see *Sellers* v. *Bickford*, 8 Taun. 31; *Cordment* v. *Hunt*, 8 Taun. 596; *West* v. *Blakeway*, 3 M. & Gr. 729.

Copyholds.]—Licences are required by a copyholder to do various acts which otherwise would work a forfeiture of his estate: *e.g.*, to exchange (*Earl of Carlisle* v. *Armstrong*, 1 Burr. 333); to lease for a longer term than the custom allows; to fell timber, to open mines, to take stone, to build houses and other erections on the waste (*R.* v. *Horndon on the Hill*, 4 Man. & S. 562). The lord's licence operates, of course, only on his own estate; for instance, a licence by a lord who is a tenant for life, to lease for a long term of years would not formerly have been good as against the lord in remainder: 1 Roll. Abr. 211 (*a*); no fine is payable by the lessee on the death of the lord, the lessee not being the lord's tenant: 1 Watk. 363; a licence to fell timber appears to be good as against the remainderman, whose remedy is against the lord who granted the licence: see *Wentworth* v. *Turner*, 3 Ves. jun. 3.

The power of a lord to grant licences to tenants to alienate part of his copyhold by demise, sale, exchange or mortgage, and to apportion rents, rests upon the Copyhold Act, 1841 (4 & 5 Vict. c. 35, sect. 92). And by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), sect. 14 (*b*), tenants for life of settled manors are empowered to grant to tenants of copyhold and customary lands of such manors, licences "to make any such leases as a tenant for life is by this Act empowered to make of freehold land."

It is not clear if the lord can be compelled to grant a licence to demise. *R.* v. *Hall*, 1 Per. & D. 293.

(*a*) See these sections set out, *ante*, p. 210.

(*b*) See the sections set forth, *ante*, p. 85; and see further as to leases by copyholders, *ibid.*

Licences to Assign, &c.

The copyholder must not exceed the terms of his licence: *Neale* v. *Jackson*, Cro. Eliz. 395; but he may lease for a less term; *Worledge* v. *Benbury*, Cro. Jac. 436.

A lord cannot grant a licence to create a lease for life, Godb. 171.

As to whether a licence to demise runs with the land so as to validate leases by a deviser of the copyholder, see *Whitton* v. *Peacock*, 3 My. & K. 325.

The lord cannot grant a licence to demise to a person having only an equitable interest in copyhold or customary lands, inasmuch as there is no privity of estate between them, the person having the legal estate being the tenant.

Licence to kill Game.]—A licence to shoot over land, must, in accordance with the Statute of Frauds, be in writing: *Webber* v. *Lee*, 9 Q. B. D. 316; and the grant and demise of an exclusive right and licence to take and kill game, with the use of a cottage, was held not to be a mere licence, but a grant of an incorporeal hereditament: *Hooper* v. *Clark*, L. R. 2 Q. B. 200; *cf. Wickham* v. *Hawker*, 7 M. & W. 63.

Patents, Copyright, &c.]—Licences to use patents, copyrights, and other rights which are protected by legislation, are governed by special legislation, the effect of which will be considered hereafter sub. tit. Patent and Copyright.

It may here be noted that a licensee of a patent is practically in the position of a lessee during the continuance of his lease, and cannot question the validity of the patent: *Norton* v. *Brooks*, 7 H. & N. 499; *Crossley* v. *Dixon*, 10 H. & C. 293; *Clark* v. *Adie*, 2 App. Cas. 435.

Stamps.]—The Stamp Act, 1870, 33 & 34 Vict. c. 97, makes no mention of stamps on licences. But where a licence must be by deed, it should bear a 10*s.* stamp.

PRECEDENTS.

I. *LICENCE to* DEMISE COPYHOLDS.

Manor of ——, in the county of ——. } BE IT REMEMBERED (*c*) that, at a court holden on the —— day of ——, 18—, the lord of this manor did by [*steward*], of &c., his steward, give and grant unto [*copyholder*], of &c., one of the copyhold tenants of this manor, full licence, power, and authority to demise and lease unto any person or persons whatsoever, ALL and singular or any of the hereditaments holden of this manor, and to which the said [*copyholder*] stands admitted tenant, for any term of years not exceeding —— years, to be computed from the —— day of ——, 18—, SAVING ALWAYS unto the lord or lords, lady or ladies, of this manor for the time being, ALL and all manner of fines, heriots, rents, customs, and services therefor due and of right accustomed. And for this licence the said [*copyholder*] has paid for a fine the sum of £—— [according to the custom of the said manor (*d*)].

AS WITNESS, &c.

II. *LICENCE by a* TENANT FOR LIFE *of a* SETTLED MANOR *to* DEMISE COPYHOLDS. PROVISO *for Assessment of* FINES *during the Term* (*e*).

Manor of ——, in the county of ——. } BE IT REMEMBERED (*c*) that, on the —— day of ——, 18— [*tenant for life*], of &c., as lord of this manor, and tenant for life

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(*c*) This licence will not require a stamp.

(*d*) If the fine is not settled by the custom of the manor, but arbitrary, the words in brackets will be omitted.

(*e*) This licence must be entered on the Court rolls of the manor, of which entry the steward's certificate is to be sufficient evidence: see *ante*, p. 37. An attested or authenticated copy of an entry on Court rolls bears a maximum stamp of one shilling: see the Schedule to the Stamp Act, 1870.

II. To Demise Copyholds by Tenant for Life.

thereof under or by virtue of an indenture of settlement dated the —— day of ——, 18—, and made between [*parties*] did, out of court, by [*steward*], of &c., his steward duly authorized in this behalf, and in exercise of the power in this behalf given to or vested in him by the Settled Land Act, 1882, and of every other power (if any) him hereunto enabling, give and grant unto [*copyholder*], of &c., one of the copyhold tenants of this manor, full licence, power, and authority, to demise unto [*intended lessee*], of &c., ALL THAT piece of ground, &c. [*describe parcels*], to which (together with other hereditaments) the said [*copyholder*] stands admitted tenant, for the term of —— years, to be computed from the —— day of ——, 18—; BUT so that, during the said term, the annual value whereon the fines payable to the lord or lords, or lady or ladies, for the time being of this manor, or the admission of a new tenant to the said piece of ground and premises are to be assessed, shall be fixed and considered as the sum of £——: SAVING NEVERTHELESS unto the lord or lords, or lady or ladies, for the time being of this manor, ALL and all manner of fines, heriots, rents, customs, and services due and of right accustomed. And for this licence the said [*copyholder*] has paid for a fine the sum of £——, according to the custom of this manor (*ff*).

AS WITNESS, &c.

III. *LICENCE to* DIG *for* BRICK EARTH, *&c., on* COPYHOLD LANDS.

Manor of ——, in the county of ——. } BE IT REMEMBERED (*f*), that at a court holden on the —— day of ——, 18—, the lord of the manor did by [*steward*], of &c., his steward, give and grant to [*copyholder*], of &c., a copyhold tenant of this manor, and his under-tenants, licence during

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(*f*) No stamp is required.

(*ff*) The question whether the fine is capital or income will depend on the same principles which apply to fines in the case of leases: as to which see *ante*, p. 31, n. If the license is in accordance with the custom, the fine will be a casual profit belonging to the tenant for life: see *Brigstocke* v. *Brigstocke*, 8 Ch. D. 357. Fine, capital or income.

III. To Dig Brick-earth, &c., on Copyholds.

such time as he shall remain a copyhold tenant of this manor, and shall pay the royalty or rent hereinafter mentioned, to dig brick earth, clay, sand, and gravel on the lands holden by copy of court roll of this manor, and to which he stands admitted tenant, and to manufacture the same into bricks, tiles, or pottery ware, and to sell the same in such manufactured state from off the said land, he the said [*copyholder*] paying unto the lord of this manor, his heirs and assigns, the royalty or rent of 6*d.* for every cart-load or cubic yard of brick earth, clay, sand, gravel, or soil, which he shall so dig out and remove from off the said land, or manufacture thereon, and delivering half-yearly, on the —— day of —— and the —— day of —— in every year, a correct account of the quantity so removed or manufactured, and also on the said days paying the amount then due by way of such royalty or rent as aforesaid: But so that the said [*copyholder*] or his under-tenants shall replace the growing soil upon the parts of the said land from which any brick-earth, clay, sand, or gravel shall be dug out or excavated under or by virtue of this licence. And for this licence, &c.

As witness, &c.

IV. *LICENCE to* assign Leaseholds (*g*).

I [*lessor*], of &c., being the landlord of the —— hereditaments hereinafter mentioned, hereby consent to an assignment by [*lessee*], of &c., the present tenant of the said

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Form of licence to assign, &c.

(*g*) A licence to assign or underlet may be given by a note indorsed upon or written in the margin of the assignment or underlease, or may be simply as follows:—

"I hereby consent to this assignment [*or* underlease]."

[*Signature of lessor.*]

The consent need not be made under seal unless so required by the terms of the lease, as is sometimes, but not frequently, the case: see *Burke* v. *Prior*, 15 Ir. Ch. R. 106. In this case, the best course is for the landlord to be made a party to the assignment or underlease which will be expressed to be made "with the consent of the said [*lessor*]."

Stamp.

No stamp will be required unless the consent is required to be given by deed.

premises, to [*intended assignee*], of &c., ALL THAT messuage or dwelling house, &c. [*describe parcels*], comprised in an indenture of lease dated, &c., and made between [*parties*], for the residue now unexpired of the term of —— years thereby granted [PROVIDED ALWAYS that the consent hereby given shall not extend to any future assignment or underlease of, or other dealing with, the said premises or any part thereof (*h*)]. AS WITNESS, &c.

[*Signature of Lessor*].

Witness,
[*Signature of Witness*].

V. *LICENCE to* UNDERLET LEASEHOLDS (*i*).

I [*lessor*], of &c., being the landlord of the hereditaments hereinafter mentioned hereby consent to an underlease [by way of mortgage by [*lessee*], of &c., the present tenant of the said premises to [*intended under-lessee*], of ALL THAT &c., [*describe parcels*] comprised in an indenture of lease [or all that &c., *describe parcels*, being part of the hereditaments comprised in an indenture of lease], dated &c., and made between [*parties*], from the —— day of ——, 18—, for the term of —— years next ensuing [*or*, for the whole residue now unexpired of the term of —— years, granted by the said indenture of lease], except the —— last days of the same term: PROVIDED ALWAYS, that such underlease shall contain nothing which may prejudice or affect any of the covenants, conditions, or provisoes contained in the said indenture of lease, and, on the part of the lessee, to be observed or performed, and also that the consent hereby given [*ut supra*]. AS WITNESS, &c.

[*Signature of Lessor*].

Witness,
[*Signature of Witness*].

(*h*) The proviso in brackets may be omitted if desired, as the licence will without it "extend only to the permission actually given:" see stat. 22 & 23 Vict. c. 35, sect. 1, *ante*, p. 210.

(*i*) No stamp will be required unless the consent is required to be by deed. Stamp.

VI. *LICENCE to* UNDERLET *part of Premises comprised in a Lease.*—PROVISO *that* UNDERLESSEE *shall* NOT ASSIGN OR UNDERLET *without* CONSENT *of Superior* LESSOR.—COVENANT *by* LESSEE *to* ENFORCE *the observance of such* RESTRICTION (*j*).

Parties.

THIS INDENTURE (*k*), made the —— day of ——, 18—, BETWEEN [*lessor*], of &c., of the one part, and [*lessee*], of &c., of the other part, AND SUPPLEMENTAL to an indenture of lease, dated, &c., and made between the said [*lessor*], of the one part, and the said [*lessee*], of the other part, hereinafter

Testatum.

referred to as the principal indenture; WITNESSETH that the said [*lessor*] hereby gives and grants full and free consent and licence unto the said [*lessee*] to demise or underlet unto [*intended under-lessee*], of &c., all those several closes or parcels of land, &c. [*describe parcels*], being part of the hereditaments comprised in the principal indenture, from the —— day of ——, 18—, for the term of —— years thence next ensuing; PROVIDED ALWAYS, that such demise or underlease shall contain nothing which may prejudice or affect any of the covenants, conditions, or provisoes contained in the principal indenture, and, on the part of the lessee, to be observed and performed, so far as such covenants, conditions, and provisions respectively relate to the premises to be comprised in such demise or underlease: PROVIDED ALSO, and the consent and licence hereby given is upon the express condition that the demise or underlease to be made under or by virtue thereof shall contain a covenant by the said [*under-lessee*], that he the said [*under-lessee*], his executors, administrators, and assigns, will not assign, underlet, or otherwise

Proviso that underlease shall contain covenant by underlessee not to assign, &c., without consent of superior lessor.

Assignments, &c., by underlessees.

(*j*) A licence to underlet in the ordinary form, providing merely that the consent shall not authorise any future assignment or underlease, will not prevent the under-lessee from dealing with the property, without the consent of the superior lessor, there being no privity between the parties: *Williamson* v. *Williamson*, L. R. 9 Ch. A. 729. If, therefore, the lessor desires to exercise a control over future assignments or underlettings by the underlessee, he can only do so by making his consent to the underlessee expressly conditional on the insertion in the underlease of provisions restricting the under-lessee from assigning, &c., without the consent of the superior lessor, and on the lessee binding himself to enforce the restriction.

Stamp.

(*k*) Stamp 10*s*.

VI. To Underlet Leaseholds, with Provisions as to Assignments, &c., by Underlessees.

part with the possession of the premises to be comprised in the said demise or underlease, or any part thereof, without the previous consent in writing of the said [*lessor*], his heirs or assigns, and also a proviso for re-entry by the said [*lessee*], his executors, administrators, or assigns, in case the said [*under-lessee*], his executors, administrators, or assigns, shall commit any breach of such covenant: And the said [*lessee*] hereby covenants with the said [*lessor*] that the said [*lessee*], his executors, administrators, and assigns will not, without the previous consent or licence in writing of the said [*lessor*], his heirs or assigns, release or waive the said covenant against assigning, underletting, or otherwise parting with the possession of the premises to be comprised in the said demise or underlease, or any part thereof, but will in case of any breach of such covenant forthwith re-enter upon the same premises under the proviso in that behalf to be contained in the said demise or underlease as hereinbefore provided, unless the said [*lessor*], his heirs or assigns, shall otherwise direct in writing: Provided always, that the proviso for re-entry by the said [*lessor*], his heirs or assigns, contained in the principal indenture shall extend to and be exercisable in case of any breach by the said [*lessee*], his executors, administrators, or assigns of the covenant hereinafter contained, as well as the breach of any of the covenants contained in the principal indenture, and, on the part of the lessee, to be observed and performed: Provided lastly, that the consent and licence hereby given [*continue ut ante*, p. 629]. In witness, &c.

Covenant by lessee not to release or waive underlessee's covenant.

Proviso that condition of re-entry in lease shall extend to breach of this covenant.

VII. *LICENCE by* Lessor *to* carry on Profession *or* Business *forbidden by* Lease.

MEMORANDUM (*l*): Whereas by an indenture of lease, dated &c., the house situate &c., was demised to [*lessee*], of &c., for the term of —— years, from the —— day of ——, 18—; And in such indenture was contained a covenant by the said [*lessee*] [*set out covenant that no trade or business should be carried on without the leave of the lessor*] (*m*);

Recital of lease.

(*l*) No stamp will be required. Stamp.

(*m*) As, for instance, in the Precedents of Leases, *ante*, pp. 449, 453.

VII. To Exercise Profession Forbidden by Lease.

Grant of licence to exercise trade.

NOW THEREFORE, I [*lessor*], of &c., being the present landlord of the premises comprised in the said lease, hereby grant unto the said [*lessee*] full and free consent and licence to use, exercise, and carry on the trade or business of a [tailor], and for such purpose to convert the said premises into a shop or warehouse, for the custody and sale of goods and wares usually dealt in by [tailors], and to affix to or upon the principal door, or upon such conspicuous place or places of or upon the premises, such plate or other notice of the said trade or business as to the said [*lessee*] shall seem fit:

Proviso as to reconversion of premises at end of term.

PROVIDED ONLY that the said [*lessee*], his executors, administrators, or assigns, shall at his or their own expense, before the expiration or at the sooner determination of the term granted by the said lease, reconvert the said premises into a private dwelling, remove such plate or other notice as aforesaid, and leave the premises in such state and condition as is required by the conditions of the said lease in all respects as if this licence had never been given, and that the said [*lessee*], his executors, administrators, and assigns shall so use and carry on the said trade or business as not to cause any nuisance or annoyance of any kind to any person whatsoever (*n*);

Covenants of lease to apply to converted premises.

PROVIDED ALSO, that all and every the covenants and conditions contained in the said lease, and, on the lessee's part, to be observed and performed (except the covenant hereinbefore recited, so far as the said [*lessee*] is released therefrom by these presents), shall be applicable to the said premises as so converted as aforesaid. AS WITNESS, &c.

VIII. *LICENCE to* OPEN COMMUNICATION *between two Leasehold Houses held under different Leases.*

Parties.

THIS INDENTURE (*o*), made the —— day of ——, 18—, BETWEEN [*lessor*] of &c. (who is hereinafter called the lessor) of the one part, and [*lessee*] of &c. (who is hereinafter called the lessee) of the other part; WHEREAS by an

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Nuisance.

(*n*) It appears that a licensor is liable if his licensee in pursuance of his licence create a nuisance: see *White* v. *Jameson*, L. R. 18 Eq. 303, and cases there cited.

Stamp.

(*o*) Stamp, 10*s*.

VIII. To Open Communication between two Houses.

Indenture of Lease dated the —— day of ——, 18—, made between the lessor of the one part and [*A.B.*] of the other part, the said lessor demised certain premises now known as No. 100, —— Street, in the parish of —— in the county of —— unto the said [*A.B.*] for the term of —— years from the —— day of —— at the rent and subject to the covenants by the lessee and conditions by and in the same indenture of lease reserved and contained; And whereas by another Indenture of Lease dated —— day of ——, 18—, and made between the lessor of the one part, and [*C.D.*] of the other part, the lessor demised a certain warehouse and premises situate in the rear of premises known as No. 101, —— Street aforesaid, and adjoining the first-mentioned premises unto the said [*C.D.*] for a term of —— years from the —— day of ——, 18—, at the rent and subject to the covenants by the lessee and conditions by and in the indenture now in recital reserved and contained; And by the said indenture now in recital the said [*C.D.*] covenanted with the lessor that he the said [*C.D.*], his executors, administrators, or assigns, would at his or their own cost upon receiving —— calendar months' notice in writing, and to the satisfaction of the lessor, his heirs or assigns, brick up the opening or doorway in the side wall of the warehouse thereby demised, and make good all works in connection therewith; And whereas by divers mesne assignments, and acts in the law, and ultimately by two indentures of assignment, one of which is dated the —— day of ——, 18—, and made between [*parties*], and the other of which is dated the —— day of ——, 18—, and made between [*parties*], all the said premises comprised in the two hereinbefore recited indentures of lease are now vested in the lessee for the residue of the several terms granted by the same indentures of lease respectively, and subject to the rents, covenants, and conditions, thereby and therein reserved and contained respectively and on the part of the lessee to be paid, performed, and observed respectively; And whereas the lessee has requested the lessor to grant to him the lessee such licences as are hereinafter expressed for the alteration and works hereinafter specified in the said premises respectively, which the lessor has agreed to grant, subject to the provisions and upon having the indemnity hereinafter expressed and contained; NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement,

Recitals of: of lease of No. 100, —— Street;

of lease of No. 101, —— Street;

of assignments or premises to lessee;

of agreement for licence.

Testatum.

VIII. To Open Communication between two Houses.

and in consideration of the covenants by the lessee hereinafter contained, he the lessor, so far as he lawfully can and may by virtue of the hereinbefore recited leases, or either of them, but not further or otherwise, and subject to the rights of all other persons, and subject also as is hereinafter expressed, hereby grants unto the lessee, his executors, administrators, and assigns, and to all others interested in the said premises under the hereinbefore recited indentures of lease, or either of them, the leave and licence (notwithstanding anything in the same indentures of lease respectively contained) of him the lessor within two calendar months from the date hereof to make an opening of about —— feet in height and about —— feet in width in the party wall separating the said premises known as No. 100, —— Street aforesaid from the premises known as No. 101, —— Street aforesaid, in the position shown on the plan drawn in the margin of these presents, and on such plan marked with the letter Z, or near thereto, so nevertheless that the opened party wall shall be reinstated upon notice, or previously, in accordance with the covenant in that behalf hereinafter contained; And also liberty upon such notice or previously to reinstate the opened party wall in accordance with such last-mentioned covenant; And also the like licence to open a cellar-flap into the yard at the rear of the said premises —— at the place shown on the said plan by the letter Y, and to stop up the entrance heretofore existing from the said yard into the ground floor of the same premises near the last-mentioned place, and the internal entrance heretofore existing from the ground floor of the same premises, into the cellar under the same, but so nevertheless that such cellar-flap be blocked up on notice in accordance with the covenant in that behalf hereinafter contained; And also liberty to block up such cellar-flap on notice in accordance with such mentioned covenant; And also the like licence in case the lessee, his executors, administrators, or assigns, shall so desire, in consequence of the blocking up of the said cellar-flap in accordance with the covenant in that behalf hereinafter contained, to re-open the said internal entrance to the said cellar from the ground floor above the same cellar, so nevertheless that such re-opening shall be done, and all works in connection therewith made good in strict accordance with the covenant in that behalf hereinafter contained; And also the like licence to make such further alterations as are shown

Grant of licence to make communication.

To open cellar flap;

to make other alterations.

on the said plan; PROVIDED ALWAYS that all the licences hereby granted are upon this express condition, that each and every of the said alterations and works be effected under the superintendence and to the satisfaction in all respects of the surveyor of the lessor, his heirs or assigns, and be fully completed in respect of time and otherwise in accordance with the provisions of these presents, at the expense in all things (including the charges of the said surveyor for his superintendence) of the lessee, his executors, administrators, or assigns; AND that the consent of the insurance company or companies with whom the said premises are or shall respectively be insured, be obtained for such alterations and works respectively, previously to the commencement thereof respectively, and that nothing hereinbefore contained shall authorize anything forbidden by or under the Metropolitan Building Act, 1855, or any Act or Acts amending the same; AND THE LESSEE HEREBY, as well on behalf of himself and his assigns as also on behalf of all and every other persons and person interested under the hereinbefore recited lease of the —— day of ——, 18—, in the premises therein comprised severally and respectively, covenants with the lessor that the lessee, his executors, administrators, or assigns will, at any time during the continuance of the said term thereby granted, upon six calendar months' notice in writing being given by or on behalf of the lessor, his heirs or assigns, requiring the same (such notice not to be given before the —— day of ——, 18—), or if the lessee, his executors, administrators, or assigns, shall so desire, previously to such notice being given, brick up the said opening so to be made in the said party-wall, and restore the said wall, and make good all works in connection therewith, to the satisfaction in all respects of the lessor, his heirs or assigns (the due performance of all such last-mentioned operations being hereinbefore referred to and intended by the expressions referring to reinstating the opened party-wall): AND THE LESSEE HEREBY, as well on behalf of himself and his assigns as also on behalf of all and every other persons or person interested under the hereinbefore recited lease of the —— day of ——, 18—, in the said premises therein comprised, covenants with the lessor that he the lessee, his executors, administrators, or assigns will, at any time during the continuance of the said term thereby granted, upon three calendar months' notice being

VIII. **To Open Communication between two Houses.**

Proviso that alterations shall be carried out under superintendence of lessor's surveyor, &c.;

that consent of insurance company be obtained.

VIII. To Open Communication between two Houses.

given by or on behalf of the lessor, his heirs or assigns, block up the said cellar flap so to be opened as aforesaid, and make good all works in connection therewith, to the satisfaction in all respects of the lessor, his heirs and assigns (the due performance of all the last-mentioned operations being hereinbefore referred to and intended by expressions referring to the blocking up the said cellar-flap): And that if, in consequence of the blocking up of the said cellar-flap in manner aforesaid, the lessee, his executors, administrators, or assigns, shall reopen the said internal entrance to the said cellar from the ground-floor above the same cellar, in pursuance of the licence in that behalf hereinbefore contained, such reopening shall be done, and all works in connection therewith shall be made good, under the superintendence and to the satisfaction in all respects of the surveyor for the time being of the lessor, his heirs or assigns, and shall not be commenced until after one week's previous notice in writing shall have been given to the lessor, his heirs or assigns: Provided always, that any notice to be given by or on behalf of the lessor, his heirs or assigns, for the purposes of these presents, shall be in writing, but shall be sufficient, though not addressed to any person or persons in particular by name or designation, and shall be sufficiently given by being affixed, and left affixed, on some conspicuous part of the premises comprised in the hereinbefore recited indentures of lease: And the lessee, on behalf as well of himself and his assigns as of all and every person or persons interested in the said premises respectively under the hereinbefore recited indentures of lease respectively hereby grants and covenants to and with the lessor, his heirs and assigns, that after the aforesaid alterations hereby licensed to be effected within two months from the date hereof shall have been respectively effected, all the covenants by the lessees and conditions in the said respective indentures of lease contained, shall be applicable to the same premises respectively as so altered, and as if such last-mentioned alterations had been effected according to the provisions hereinbefore contained previously to the execution of the same indentures respectively (but subject, nevertheless, to the powers hereinbefore contained for restoring and reinstating the same respectively); and that after any such reinstatement, all the covenants by the lessee, and conditions in the said respective indentures of lease contained, shall be applicable to the same

Proviso as to form of notices.

Covenant by lessee that lessee's covenants in lease shall apply to premises as altered.

premises respectively so reinstated, as if such reinstatement had been effected according to the provisions in that behalf hereinbefore contained previously to the execution of the same indentures respectively: PROVIDED ALWAYS, and it is hereby expressly declared, that no licence hereinbefore expressed to be hereby granted shall enure for the benefit of or operate to relieve or release from the covenants and conditions, or any of them, in the same indentures of lease respectively contained, any person or company not a party hereto who shall not adopt, undertake, ratify, and submit to be bound by these presents in their entirety, and particularly by the last preceding clause hereof, as if such person or company had entered into the covenants and made the grant hereinbefore contained (other than the grant by the lessor), so far as such covenants and grant relate to the premises in which such person or company shall be interested: AND IT IS HEREBY DECLARED, that nothing hereinbefore contained shall be taken by any implication or otherwise as a warranty or undertaking by the lessee that he now has power to bind by the covenants and grant hereinbefore contained any person or company other than himself and his own executors, administrators, and assigns: AND THE LESSEE HEREBY COVENANTS with the lessor, that he the lessee will pay the costs of the lessor incurred in and about the negotiating, preparing, and executing these presents, and will for ever hereafter indemnify and keep indemnified the lessor, his heirs, or assigns, from all actions, suits, costs, losses, damages, claims, demands, and liability under the hereinbefore recited indentures of lease, or either of them, by reason of the granting by the lessor of the licences hereinbefore expressed to be hereby granted by them, or by reason of their executing these presents. IN WITNESS, &c.

VIII. To Open Communication between two Houses.

Proviso that licences shall not relieve parties not adopting the same from obligations.

Proviso that licences shall not imply any warranty that lessees are able to bind third parties.

Covenant by lessee to pay costs of licence, and indemnify lessor.

IX. To Maintain Alterations made in Breach of Lessee's Covenant.

IX. *LICENCE to* MAINTAIN ALTERATIONS *in the structure of a House made by the Lessee in* BREACH *of* COVENANTS *in the Lease.*—RELEASE *by* LESSOR *of* RIGHT *of* ENTRY *for breach of Covenant.*

Parties.

THIS INDENTURE, (*p*) made the —— day of ——, 18—, BETWEEN [*lessor*], of &c., of the one part, and [*lessee*], of &c., of the other part, AND SUPPLEMENTAL to an indenture of lease, dated &c., and made between [*parties*], which is hereinafter

Recitals: of alterations;

referred to as the principal indenture; WHEREAS the said [*lessee*] some time past made certain alterations in the structure of the messuage and premises demised by the principal indenture by the works and erections following, that is to say, by pulling down and removing part of the external wall on the west side of the said premises, and erecting a bay window extending — feet, or thereabouts, beyond the former line of such external wall &c. [*specify alterations*]; AND

of admission by lessee of breach of covenant;

WHEREAS the said [*lessor*] asserts and the said [*lessee*] hereby admits that the said alterations were not authorized by but were in contravention to the covenants and conditions contained in the principal indenture, and, on the part of the

of agreement for waiver of lessor's right of entry and licence.

lessee, to be observed and performed: AND WHEREAS, at the request of the said [*lessee*], and for the consideration hereinafter mentioned, the said [*lessor*] has consented to waive his right of re-entry pursuant to the proviso in that behalf contained in the principal indenture in respect of the said alterations so made in contravention of the lessee's covenants contained in the same indenture as aforesaid, and has agreed to grant unto the said [*lessee*], his executors, administrators, and assigns, such licence and release as are hereinafter contained respectively: NOW THIS INDENTURE WIT-

Testatum: grant of licence.

NESSETH that, in pursuance of the said agreement, and in consideration of the sum of £——, upon the execution of these presents, paid by the said [*lessee*] to the said [*lessor*], the receipt whereof is hereby acknowledged, and in consideration of the covenants on the part of the said [*lessee*] hereinafter contained he the said [*lessor*] hereby grants unto the said [*lessee*], his executors, administrators, and assigns, full and free licence and authority henceforth during the residue of the term granted by the principal indenture to continue

Stamp.

(*p*) Stamp, 10*s*.

IX. To Maintain Alterations made in Breach of Lessee's Covenant.

and maintain in and upon the said premises the several alterations so made by him the said [*lessee*] as aforesaid; AND THIS INDENTURE ALSO WITNESSETH that in further pursuance of the said agreement, and for the considerations aforesaid he the said [*lessor*] hereby releases and waives all rights of re-entry and other rights, claims, and demands to or for damages and otherwise, which may have accrued to him under or by virtue of the principal indenture, for or by reason of the said several alterations so made by the said [*lessee*] as aforesaid, or for or by reason of any breach of any covenant or condition contained in the same indenture, which has or may have been committed by him by reason or in respect of any of such alterations; PROVIDED ALWAYS, and it is hereby expressly agreed that all and every the covenants and conditions contained in the principal indenture, and, on the part of the lessee, to be observed and performed, shall be applicable to the said premises as altered by the works and erections aforesaid, as if such alterations had been made previously to the execution of the principal indenture and had formed part of the premises thereby originally demised: PROVIDED ALSO, that neither the licence or authority hereby granted, nor the release or waiver hereinbefore contained shall extend to any future alteration in the structure of the said premises, or to any other breach of any of the covenants or conditions contained in the principal indenture, and, on the part of the lessee, to be observed and performed, which may at any time heretofore have been, or may at any time hereafter be committed or permitted in or upon the said premises by the said [*lessee*], or by any other person or persons by or with his authority, consent, or privity; AND THE SAID [*lessee*] HEREBY COVENANTS with the said [*lessor*] that he the said [*lessee*], his executors, administrators, or assigns will pay all costs of the said [*lessor*] incurred in and about the negotiating, preparing, and executing these presents, and will keep indemnified the said [*lessor*], his heirs and assigns, from all actions, costs, losses, damages, claims, demands, and liabilities, by reason of the granting to the said [*lessee*] the licence hereinbefore expressed to be granted to him or by reason of his executing these presents. IN WITNESS, &c.

Second *testatum*: release and waiver of right of entry.

Proviso that covenants of lease shall apply to premises as altered.

Licence and release not to extend to other breaches of covenant.

Covenant by lessee to pay costs of licence and indemnify lessor.

MORTGAGES.

PRELIMINARY DISSERTATION.

CHAPTER I.

LIEN.

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1. LIEN.

Lien.

Lien at common law.

THE common law right of lien attaches on personal property exclusively: *Oxenham* v. *Esdaile*, 2 Y. & J. 493; *Gladstone* v. *Birley*, 2 Mer. 404. "A lien is a right in one man to retain that which is in his possession belonging to another, till certain demands of him, the person in possession, are satisfied." Per *Grose*, J., in *Hammond* v. *Barclay*, 2 East, at p. 235. Lien arises at common law in three cases:—First, where the party claiming the lien has, by his labour or expense, improved or altered the chattel which he claims to retain: *Ex parte Ockenden*, 1 Atk. 235; *Franklin* v. *Hosier*, 4 B. & Al. 341; whether the price be fixed by contract or not: *Chase* v. *Westmore*, 5 M. & S. 180: see also *Bevan* v. *Waters*, 1 Mood. & M. 236: see also *Wallace* v. *Woodgate*, Ry. & M. 293; *Sanderson* v. *Bell*, 2 Cr. & M. 304: secondly, where the party is compellable to receive the chattel, or to perform the service, in

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respect of which the lien is claimed, as in the case of a carrier or an innkeeper: Bac. Abr. *Inn*, D.; *Skinner* v. *Upshaw*, 2 Ld. Raym. 752; *Rushforth* v. *Hadfield*, 6 East, 523; *Thompson* v. *Lacy*, 2 B. & Al. 283; and see Fisher, Mortg. 182 *et seq.*: and, lastly, where the party has saved the chattel from loss at sea, or capture by an enemy; he is entitled to retain it as a security for his claim for salvage: *Hartford* v. *Jones*, 1 Ld. Raym. 393; *Baring* v. *Day*, 8 East, 57 (*a*).

Chattel must have been improved or altered.

With respect to the first class of cases, the condition that the party who claims the lien must have improved or altered the chattel, by the labour or expense bestowed upon it, was well illustrated in a case in which it was decided that an auctioneer to whom a mortgage-deed had been delivered, to be shown to the mortgagors as an authority to receive the money due, had no right to retain the deed as a security for his remuneration and expenses, no work having been done on the instrument: *Landman* v. *Bell*, 2 Cr. & M. 311: see also *Scarfe* v. *Morgan*, 4 M. & W. 270. But a conveyancer has a lien on papers in his hands, so far as relates to his costs in the particular matter: *Hollis* v. *Claridge*, 4 Taunt. 807: see *infra*, p. 649.

Goods must be in possession of party.

A lien is a claim to *retain* goods already in the possession of the party, and therefore, a claim set up by an innkeeper of a right to take a coat from the person of his guest, as a security for his demand, was disallowed: *Sunbolf* v. *Alford*, 3 M. & W. 248. So also lien does not arise upon a possession obtained by misrepresentation: *Madden* v. *Kempster*, 1 Camp. 12; *Lempriere* v. *Pasley*, 2 T. R. 485.

In order to support a valid lien it is necessary that the work should have been done, or the expense incurred at the request or by the authority of the owner of the chattel: *Hollis* v. *Claridge*, 4 Taunt. 807; *Hiscox* v. *Greenwood*, 4 Esp. 174. No right of lien attaches until the work is completed: *Pinnock*

(*a*) The right to salvage is now regulated by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), as amended by the stats. 18 & 19 Vict. c. 91; 24 Vict. c. 10; and 25 & 26 Vict. c. 63.

Lien.

v. *Harrison*, 3 M. & W., at p. 535 : and see *Lilley* v. *Barnsley*, 1 Car. & K. 344.

Lien by agreement.

A lien may arise by special contract, in which case it is of course regulated entirely by the terms of the contract, and is enforceable against all parties who acquiesce in it : *Norris* v. *Williams*, 1 Cr. & M. 842 ; *Simond* v. *Hibbert*, 1 R. & M. 719 ; *Lumpston* v. *Haigh*, 2 Sc. 684. And where the common law, or the usage of trade, would of itself create a right of lien, that right may be enlarged or restricted by agreement, although, to restrain a common law right of lien, an express agreement must be proved : *Chase* v. *Westmore*, 5 M. & S. 180 : *Owenson* v. *Morse*, 7 T. R. 64.

Lien by implication.

An agreement creating a lien may be implied from the conduct of the parties ; and all persons dealing with the parties with notice of the agreement, will be held to have assented to it, and will be bound thereby : *Kirkman* v. *Shawcross*, 6 T. R. 14. See further as to lien by agreement, *Hawthorn* v. *Newcastle Rail. Co.*, 3 Q. B. 734 ; *Westfield* v. *Great Western Rail. Co.*, 52 L. J. Q. B. D. 276 ; *Re Bushell*, 22 Ch. D. 470.

Lien by usage.

General lien

The general usage of trade is sufficient either to establish a lien where none would have existed at common law, or to enlarge the common law right of *specific* lien into a right of *general* lien, that is to say, a right to retain the goods as a security, not merely for the sum due in respect of those particular goods, but for the entire balance due from the owner of the goods to the party claiming the lien, so far as it arises in respect of business done, or of loans, or other transactions in the regular course of trade (*b*) :

(*b*) The claim to general lien is against the common law, and proof of it is therefore to be regarded with jealousy. If usage of trade is relied on to support such a claim, strong evidence of the prevalence and notoriety of the usage must be adduced. "It is not for the convenience of the public that these liens should be extended further than they are already established by law. But if any particular inconvenience arise in the course of trade, the parties may, if they think proper, stipulate with their customers for the introduction of such a lien into their dealings." Per Lord Ellenborough, C. J., in *Rushforth* v. *Hadfield*, 7 East, 229 ; see

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Weldon v. *Gould,* 3 Esp. 268. The right of general lien by the usage of trade has been admitted in the case of a factor: *Godin* v. *London Assurance Co.,* 1 W. Bl. 104; *Cowell* v. *Simpson,* 16 Ves. 280: and his lien attaches, not only on the goods, but, after he has sold and parted with the possession of them, on the price; *Hudson* v. *Grainger,* 4 B. & Al. 27. The right of general lien has also been held to apply to wharfingers, *Speers* v. *Hartley,* 3 Esp. 81; *R.* v. *Humphrey,* 1 M'Cl. & Y. 173: packers, *Ex parte Deeze,* 1 Atk. 228; *Kruger* v. *Wilcox,* Amb. 252: calico printers, *Weldon* v. *Gould,* 3 Esp. 268: insurance brokers, *Levy* v. *Bernard,* 2 Moo. 34; *Man* v. *Shifner,* 2 East, 523: bankers, *Davis* v. *Bowsher,* 5 T. R. 488; *Brandao* v. *Barnett,* 12 Cl. & Fin. 797; *Misa* v. *Currie,* 1 App. Ca. 569; *New London and Brazilian Bank* v. *Brocklebank,* 21 Ch. D. 302: brokers, *Jones* v. *Peppercorne,* Joh. 430: solicitors, see *infra:* stereotype-printers, on the plates manufactured by them, *Bleaden* v. *Hancock,* Moo. & M. 465.

Lien, how lost.

The foundation of lien at common law being possession, it is, generally speaking, lost by abandonment of possession: *Sweet* v. *Pym,* 1 East, 4; *Hartly* v. *Hitchcock,* 1 Stark. 410; *Ex parte Bland,* 2 Rose, 91: although particular circumstances attending the delivery of possession may prevent that consequence: *Ex parte Meux,* 1 Gl. & J. 116; *Wilson* v. *Kymer,* 1 M. & S. 157; *Ex parte Chessman,* 2 Eden, 181. The town agent of a solicitor who parts with the papers by his own act, although by mistake, loses his lien, but not if they did not lawfully get out of his possession: *Dicas* v. *Stockley,* 7 Car. & P. 587. The case of an insurance broker has this peculiarity, that, although generally he has no lien upon a policy in the hands of a third person, yet if, having parted with it, he afterwards regain possession of the policy, his lien revives: *Whitehead* v. *Vaughan,* Cook, 547; *Levy* v. *Barnard,* 2 Moo. 35; *S. C.,* 8 Taunt. 149.

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also *Kirkman* v. *Shawcross,* 6 T. R. 14. The custom must be reasonable: *Lewcroft* v. *Cooper,* 3 Sc. 806.

It is by no means to be inferred from the existence and recognition of a usage of trade in one place, that the same exists in the same trade in a different place: *Holderness* v. *Collinson,* 7 B. & C. 212.

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The party who has a lien must state the grounds upon which he claims to retain the property, when applied to by the owner for delivery of it; otherwise he cannot afterwards insist upon it: *Boardman* v. *Stilt*, 1 Camp. 410 n.: see *White* v. *Garner*, 9 Moo. 41; *S. C.*, 2 Bing. 23; *Jones* v. *Cliff*, 5 Car. & P. 560; and *Scarfe* v. *Morgan*, 4 M. & W. 270. Lien at common law does not, as a general rule, confer any right of sale, and if a party who has a lien sell the subject of it without the owner's consent, he loses the lien upon the chattel, and has no right to retain the proceeds of the sale: *Clark* v. *Gilbert*, 2 Bing. N. C. 343; *Thames Iron Works* v. *Patent Derrick Co.*, 1 J. & H. 93. And this rule holds good even though the keeping of the subject of the lien involves expense: *Mulliner* v. *Florence*, 3 Q. B. D. 484. But a right to sell may exist by the usage of a particular trade or locality: *Ex parte Moffatt*, 1 M. D. & Deg. 282; as in the case of a factor: *Hudson* v. *Grainger*, 4 B. & Al. 27; or of an innkeeper (*c*) by the customs of London and some other places: *Jones* v. *Pearl*, 1 Str. 557.

Right of sale.

Any special agreement for postponing the time of paying the debt, puts an end to the lien, unless its continuance be provided for, and that whether the postponement is accompanied by any collateral security or not: *Cowell* v. *Simpson*, 16 Ves. 280; *Hewison* v. *Guthrie*, 3 Sc. 298; *S. C.*, 2 Bing. N. C. 755; *Spartali* v. *Benecke*, 19 L. J. C. P. 293; but a lien is not lost by part payment: *Hodgson* v. *Ward*, 7 T. R. 440. And the taking of further security for the debt does not of itself supersede the lien; thus, in the case of an innkeeper, the acceptance of security from a guest for the payment of hotel charges, does not put an end to the common law lien upon the goods of the guest, unless there is something in the nature of the security, or in the circumstances under which it is given, inconsistent with the existence or continuance of the lien: *Angus* v. *McLachlan*, 23 Ch. D. 330. So also, the lien of

(*c*) This customary rule is extended by the Innkeepers' Act, 1878 (41 & 42 Vict. c. 42), which enables innkeepers to sell goods deposited or left with them under certain restrictions.

a vendor of a chattel (as to which see *infra*, p. 651) is not satisfied by his taking the bill or promissory note of the purchaser: *Carridge* v. *Allenby*, 6 B. & C. 373; *Gunn* v. *Bolckow*, L. R. 10 Ch. A. 49; *Ex parte Willoughby*, 16 Ch. D. 604; but if the vendor negotiate the bill or note, his lien is gone: *Bunney* v. *Poyntz*, 1 N. & M. 229; *Horncastle* v. *Farran*, 3 B. & Al. 496; unless the bills are only for part of the price; in which case the lien will continue in respect of the unpaid part: *Ex parte Willoughby*, 16 Ch. D. 604. If a person, having a lien on goods, causes them to be taken in execution at his own suit, he thereby destroys his lien, although the goods remain on his own premises; the legal custody being transferred to the sheriff: *Jacobs* v. *Latour*, 5 Bing. 130; and, on the same principle, a replevin destroys the lien which has been acquired by the distress: *Bradyll* v. *Ball*, 1 Br. C. C. 427. As to pledges by a factor, see *infra*, chap. 2. Lien.

Tradesmen have a specific lien on goods sent to them for repair or alteration. This claim has been established in the case of coachmakers: *Houlditch* v. *Milne*, 3 Esp. 86; *Howes* v. *Bell*, 7 B. & C. 481: farriers and veterinary surgeons, as to horses or cattle sent to them to be shod or cured: *Lane* v. *Cotton*, 1 Salk. 18: millers on corn sent to them to be ground, and also on the sacks containing such corn: *Ex parte Oakenden*, 1 Atk. 235: tailors: *Hughes* v. *Leavy*, 5 M. & W. at p. 187: and marine engineers on ships sent to them to be supplied with machinery: *Ex parte Willoughby*, 16 Ch. D. 604. Dyers are also entitled to a specific lien: *Saville* v. *Brickard*, 4 Esp. 53, but apparently not to a general lien in the absence of a special custom: *Close* v. *Waterhouse*, 6 East, 523 n. So also fullers may have a right to general lien by local custom: *Sweet* v. *Pym*, 1 East, 4. As to a horse-trainer's lien see *Jacobs* v. *Latour*, 5 Bing. 130; *Tootle* v. *Simpson*, 13 Q. B. 681. An innkeeper has a lien on a horse for his keep: *Johnson* v. *Hill*, 3 Stark. 172; but a livery-stable keeper has not, for the owner has a right at any time to take away the horse for use, and besides, the stable-keeper is not compellable to receive the Specific lien.

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horse: *Judson* v. *Etheridge*, 1 Cr. & M. 743. The owner of a stallion is entitled to a specific lien on mares for the charge for covering them: *Scarfe* v. *Morgan*, 4 M. & W. 270. But an agister has no lien on milch cows taken in by him: *Chapman* v. *Allen*, Cro. Car. 271; *Jackson* v. *Cummins*, 5 M. & W. 342. Auctioneers have a lien as against purchasers of chattels for commission and expenses of sale: *Lane* v. *Trewson*, 12 A. & E. 116 n.; *Coppin* v. *Craig*, 7 Taun. 243.

Solicitor's lien.

A solicitor's lien on deeds and papers is general, and is not confined to the particular business in the conduct of which they come into his hands: *Ex parte Nesbitt*, 2 Sch. & L. 279; *Hollis* v. *Claridge*, 4 Taun. 807; *Re Moss*, L. R., 2 Eq. 345: unless they are deposited under a special agreement, or for a specific purpose: *Ex parte Fleming*, 16 Ves. 258: and even where deeds were originally deposited for a particular purpose, if they are allowed to remain after that purpose has failed, they become subject to the general lien: *Ex parte Pemberton*, 18 Ves. 282. But a solicitor's lien does not extend to an original will prepared by him, and which, therefore, he is not entitled to hold against the testator's representatives for monies due from such testator: *Georges* v. *Georges*, 18 Ves. 294; *Lord* v. *Wormleighton*, Jac. 580; *Tyler* v. *Drayton*, 2 S. & S. 309: nor, of course, does it extend beyond the client's interest in the subject-matter to which the deeds relate: *Ex parte Nesbitt*, 2 Sch. & L. 279; *Baker* v. *Henderson*, 4 Sim. 27; *Ogle* v. *Storey*, 4 B. & Ad. 735; *Pelly* v. *Walton*, 7 Ha. 351: nor to debts due to the solicitor, in any other than his professional character, as for a loan: see *Worrall* v. *Johnson*, 2 Jac. & W. at p. 218. A solicitor has no lien on documents deposited with him in the capacity of steward of a manor: *Champernowne* v. *Scott*, 6 Mad. 93; *Balch* v. *Symes*, 1 Turn. 87, *vide ante*, Vol. I., 811. The solicitor of a mortgagee is not entitled to a lien on the deeds of the intended mortgagor for the costs of investigating the title: *Pratt* v. *Vizard*, 5 B. & Ad. 808. A solicitor advancing money to his client has no lien on the mortgage deed for the costs of its preparation,

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or for any other costs due to him from the mortgagor: *Sheffield* v. *Eden*, 10 Ch. D. 291. Where the same solicitor acts for a mortgagee and mortgagor he thereby loses his lien on the title deeds in his possession for costs due to him from the mortgagor, unless such lien is expressly reserved: *Re Snell*, 6 Ch. D. 105; *Re Mason and Taylor*, 10 Ch. D. 729. No lien can be claimed on the books, &c., of a bankrupt as against the trustee in bankruptcy: see r. 259 of the Bankruptcy Rules, 1883. And a solicitor employed in a bankruptcy has no lien on the proceedings for his costs: Anon., 1 Rose, 207. The solicitor of the official liquidator of a joint stock company has no lien for his costs upon the winding up proceedings: *Re Union Cement, &c., Co.*, L. R., 4 Ch. A. 627.

Money belonging to the client in the hands of a solicitor is equally subject to his lien with deeds, papers, &c.: *Welsh* v. *Hole*, Doug. 238; *Wilkins* v. *Carmichael*, Id. 101. Where the plaintiff in the original cause had died, his solicitor was allowed to retain his costs out of the sum decreed to the plaintiff, in preference to a claim set up by the administratrix in behalf of specialty creditors of the deceased: *Turwin* v. *Gibson*, 3 Atk. 720.

Effect of taking security.

The taking security for costs does not necessarily destroy a solicitor's lien: *Stevenson* v. *Blakelock*, 1 M. & S. 535; but where a firm accepted bills at three years' date, for their bills of costs, Lord *Eldon* was of opinion, that the lien was impliedly abandoned, as it could not have been intended that the papers should be locked up from the client's use during so long a period: *Cowell* v. *Simpson*, 16 Ves. 275; see *Balch* v. *Symes*, T. & R. 92.

Solicitor's lien on fund in court.

A solicitor had also a lien on a fund in court in regard to costs of the particular action: *Worrall* v. *Johnson*, 2 J. & W. 214; *Lann* v. *Church*, 4 Mad. 391; *Lucas* v. *Peacock*, 9 Beav. 177: the lien is limited to the interest of his client in the action: *Hall* v. *Loom*, 1 Ha. 571; *Re Watson*, 32 W. R. 477: but he cannot oblige his client to proceed with the suit for the purpose of recovering the fund: *Merrywether* v. *Mellish*, 13 Ves. 162: the lien

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extends (after notice to the other party) to money awarded in favour of his client: *Ormerod* v. *Tate*, 1 East, 464: and to monies ordered to be paid to his client for costs: *Ex parte Bryant*, 2 Rose, 237; *Aspinall* v. *Stamp*, 4 D. & R. 716; *Smedley* v. *Philpot*, 3 M. & W. 585: and also it seems to other sums passing through his hands, as the payment of an annuity: *Skinner* v. *Sweet*, 3 Mad. 244: unless he receives them without authority, as where a receiver has been appointed: *Wickens* v. *Townshend*, 1 R. & M. 361. The lien on the fund in court cannot be defeated by the subsequent bankruptcy of the client: *Ex parte Moule*, 3 Mad. 462. Where there is a fund in court to resort to, the solicitor need not wait the result of proceedings to compel payment of the costs by the opposite party, but may avail himself at once of his lien against the fund: *Staines* v. *Maddon*, Mon. 319.

Loss of solicitor's lien.

A solicitor does not lose his lien by attaching his client for non-payment of his bill: *Davies* v. *Bush*, You. 358: nor by the death of the client: *Lloyd* v. *Mason*, 4 Ha. 132: nor by any assignment by the client even if the assignee takes out a stop order: *Haynes* v. *Cooper*, 33 Bea. 431: nor by a garnishee order for payment to a judgment creditor of the client, if the creditor has notice of the solicitor's claim: *Sympson* v. *Prothero*, 5 W. R. 814. Nor will a solicitor's lien be prejudiced by any right of set-off against the client claimed by persons against whom the client's right has been established: *Re Bank of Hindustan, Ex parte Smith*, L. R., 3 Ch. A. 125. As to set-off for damages or costs, notwithstanding the solicitor's lien for costs, see Rules of the Supreme Court, Ord. LXV. r. 14. As to a solicitor's lien for costs in respect of property recovered or preserved, see Stat. 23 & 24 Vict. c. 127, s. 28; and see Seton, pp. 643, *et seq.* (*c*).

Agent of.

The agent of an agent may claim a lien against

(*c*) The subject of solicitor's lien is of too extensive and complicated a nature to be considered here, otherwise than in a cursory manner; a full discussion of the subject will be found in Fisher Mortg. 196 *et seq.*, and in Coote Mortg. 688 *et seq.*

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the principal of both, to the extent of the sub-principal's lien; and, on the same principle, an agent for an attorney has, against the client, a right of lien upon the money recovered in a suit, to the extent of his demand as agent in that suit: *Moody* v. *Spencer*, 2 D. & R. 6; *White* v. *Royal Exchange Ass. Co.*, 1 Bing. 20. But see *Ward* v. *Hepple*, 15 Ves. 297; *Man* v. *Shifner*, 2 East, 533. A London agent has a lien as against the country solicitor so employing him on money and papers for the account of his agency bill in an action, and may avail himself of it by appropriating payments, not made to him specifically on account of that action, to the liquidation of other parts of his general balance: *Dicas* v. *Stockley*, 7 Car. & P. 587: but as between the agent and the client, the lien extends only to the costs of the particular action: *Lawrence* v. *Fletcher*, 12 Ch. D. 858. A solicitor, acting as a commissioner under the 3 & 4 Will. 4, c. 74, has a lien upon the acknowledgments and deeds in his possession for his fees: *Ex parte Grove*, 3 Sc. 671; see *Young* v. *Sutton*, 2 Ves. & B. 365. But the rules in favour of solicitors' liens do not apply to certificated conveyancers, who cannot, therefore, retain papers intrusted to them in a particular matter, as a security for a general balance: *Hollis* v. *Claridge*, 4 Taun. 807: though they are at liberty, in common with other persons, to detain any deeds or papers on account of any work or labour performed upon those particular instruments. Arbitrators have a lien on the award for their fees: *Reg.* v. *South Down Rail. Co.*, 15 Q. B. 1043; *Re Coombes*, 4 Ex. at p. 839. Also barristers on evidence taken by them under a commission: *Smith* v. *Hallen*, 2 Fo. & F. 678; *Peters* v. *Beer*, 14 Beav. 101.

Conveyancers, &c.

Client's right to delivery of papers and taxation of bill.

A solicitor will, on a summary application, be ordered to deliver up papers in his possession, on payment of his bill of costs; which is thereupon submitted to the taxation of the officer of the court: *Ex parte Earl of Uxbridge*, 6 Ves. 425. And the client's privilege to have the bill of costs taxed, applies, notwithstanding that it contains no items which would, in ordinary cases, subject the bill to

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taxation, being entirely for conveyancing or general business, and not in relation to suits :—the fact of the detention of the papers giving the Court jurisdiction over the bill even in such a case: *In re Murray,* 1 Russ. 519 ; *Re Rice,* 2 Keen, 181. See further, as to the power of the Courts and judges to order solicitors to deliver their bills for taxation and to deliver up documents or papers in their possession, sect. 37 of the Solicitors' Act, 1843 (6 & 7 Vict. c. 73).

Trustee's lien.

A trustee is allowed a lien upon the trust estate for his expenses : *Ex parte Swinburne,* M. & C. 119; *Ex parte Chippendale,* 4 De G. M. & G. 19 ; *Re Exhill Coal Co.,* 35 Beav. 449 ; *Re Layton's Policy,* W. N. 1873, p. 49 : but the solicitor, or other agent of a trustee has no such lien : *Worrall* v. *Harford,* 8 Ves. 4. See further as to the right of trustees to lien, Lewin on Trusts, pp. 548, *et seq.*

Equitable lien.

Non-possessory or Equitable Lien.]—The term lien has been applied by analogy to certain priorities which a creditor has over property not actually in his possession, or vested in him. Cases of this kind resolve themselves either into merely apparent exceptions to the general rule, requiring possession as the foundation of lien, or they are cases of *pledge* or *mortgage,* or they depend upon statutory enactment, of which last kind are judgments, liabilities to the crown, &c. Thus, in *Drinkwater* v. *Godwin,* 1 Cowp. 255, it was decided that a factor having sold the goods of his principal, who had in the interim become bankrupt, might afterwards receive the purchase-money from the buyer, by virtue of his original lien : see *Hammonds* v. *Barclay,* 2 East, 227. When goods have been expressly deposited by way of security (as for payment of a bill of exchange), the transaction is in the nature of a pledge, to the benefit of which a party who has not the possession (as an indorsee of the bill) may incidentally become entitled : *Ex parte Perfect,* 1 Mont. 25. See *Ex parte Waring,* 2 Rose, 182 ; *Ex parte Copeland,* 3 D. & C. 199 ; see also *Banner* v. *Johnston,* L. R. 5 H. L. 174 ; *Ex parte Smart,* L. R. 8 Ch. A. 220. The lien which is raised

against real or personal property, either by express contract, or by that tacit agreement which is implied from a deposit of title deeds, constitutes an equitable mortgage, and will be noticed hereafter. Lien.

Lien of Vendor.]—The vendor of a personal chattel has a lien upon the goods until the delivery of them to the purchaser has been completed: *Mackreth* v. *Symmons,* 15 Ves. 844; *Dixon* v. *Yates,* 5 B. & Ad. 568; *Grice* v. *Richardson,* 3 App. Ca. 319; *Swan* v. *Barber,* 5 Ex. D. 130. As to what constitutes a delivery, and the effect of delivering *part* of the goods, see *Hanson* v. *Meyer,* 6 East, 614; *Rugg* v. *Minett,* 11 East, 210; *Blake* v. *Nicholson,* 3 M. & Sel. 167; *Tansley* v. *Turner,* 2 Sc. 238; *Ex parte Gwynne,* 12 Ves. 383; *Crawshay* v. *Eades,* 1 B. & C. 181. The vendor's right will override any other lien which may exist against the purchaser or a sub-purchaser, even though the former may have received his money: *Dixon* v. *Yates,* 5 B. & Ad. 313. This species of lien carries with it the right to stop goods *in transitu* at any time before actual delivery to the purchaser, as to which see *Kemp* v. *Falk,* 7 App. Ca. 573; and see Fisher on Mortgages, pp. 789 *et seq.* Lien of vendor of chattels.

In equity, a vendor of land who has not received the purchase-money, or has received a part of it only, has a lien upon the land for the amount, although the conveyance to the purchaser has been completed, and a receipt for the purchase-money is indorsed: *Coppin* v. *Coppin,* 2 P. Wms. 291; *Wrout* v. *Dawes,* 25 Beav. 369. And this rule applies as well to copyholds: *Winter* v. *Lord Anson,* 3 Russ. 488; and to leaseholds: *Elliott* v. *Edwards,* 3 Bos. & P. 181; as to freeholds. An elaborate detail of the authorities upon this doctrine will be found in the judgment of Lord *Eldon* in *Mackreth* v. *Symmons,* 15 Ves. 336. And the rule is thus shortly stated by Sir T. Clarke:—"Where conveyance is made prematurely before money paid, the money is considered as a lien on the estate in the hands of the vendee; so, where money was paid prematurely, the money would be considered as a lien on the estate in the hands of the vendor for the personal repre- Lien on land for the purchase-money.

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sentatives of the purchaser:" *Burgess* v. *Wheate*, 1 W. Bl. 150. In confirmation of the latter point, that a purchaser who has paid his money (or part of it by way of deposit) before conveyance, where the contract goes off for defect of title or otherwise, has a lien on the estate for his money: see *Lacon* v. *Mertins*, 3 Atk. 4; *Oxenham* v. *Esdaile*, 3 Y. & J. 262; so also for his costs of resisting specific performance at the suit of the vendor: *Turner* v. *Marriott*, L. R. 3 Eq. 744.

Lands Clauses Act.

The vendor's right of lien arises where land is compulsorily taken under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and extends not only to the price of the land, but also to the compensation for severance; and the Court will refuse the lien by sale even though the railway has been completed and opened for public use: *Walker* v. *Ware, &c., Rail. Co.*, L. R. 1 Eq. 195. The rule will apply to cases where the consideration is a rent-charge: *Eyton* v. *Denbigh, &c., Rail. Co.*, L. R. 7 Eq. 439. See also *Bishop of Winchester* v. *Mid-Hants Rail. Co.*, L. R. 5 Eq. 17; *Wing* v. *Tottenham, &c., Rail. Co.*, L. R. 3 Ch. A. 740. But the right does not extend to the costs of the arbitration: *Earl Ferrers* v. *Stafford, &c., Rail. Co.*, L. R. 13 Eq., 524; nor to the statutory deposit under sect. 85 of the Act: see *Re Neath and Brecon Rail. Co.*, L. R. 9 Ch. A. 263.

Effect of postponing the time of payment—of taking purchaser's note bond, &c.

Whether the vendor loses his lien by taking any additional security for his purchase-money, has been the subject of considerable controversy: see *Mackreth* v. *Symmons*, 15 Ves. 336: see Sugd. Vend. 680; Coote on Mortgages, 684. The result appears to be, that a vendor does not waive his lien by receiving payment in bills: *Grant* v. *Mills*, 2 Ves. & B. 306; *Hughes* v. *Kearney*, 1 Sch. & L. 132; nor by taking the purchaser's note: *Ex parte Peake*, 1 Mad. 346; *Ex parte Loaring*, 2 Rose, 97; or his bond or covenant: *Blackburn* v. *Gregson*, 1 Br. C. C. 420; *Ex parte Parkes*, 1 Gl. & J. 230; and see *Saunders* v. *Leslie*, 2 B. & B. 514; *Davies* v. *Thomas*, 2 Y. & C. 234. In *Tardiffe* v. *Scrugham*, 1 Br. C. C. 423, the consideration was an annuity secured by a bond, which was held to attach from time to time as a lien upon

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the estate. It is said that this case was disapproved of by Lord *Eldon;* but the expressions used by his lordship in *Mackreth* v. *Symmons,* 15 Ves. 352, rather show that he wished to avoid giving an opinion against that authority, and thought the case before him distinguishable from it. In *Winter* v. *Lord Anson,* by the agreement the amount of the consideration money was to be secured by the purchaser's bond, with interest at four per cent., and remain so secured during the life of the vendor. The bond was given, and the conveyance expressed that the whole of the purchase-money had been paid; but the vendor's claim of lien was upheld: 3 Russ. 489. In *Clarke* v. *Royle,* 3 Sim. 499, a conveyance recited the consideration to be, the purchaser's entering into the covenants contained in the deed to pay an annuity of 60*l.* to the vendor during his life, and, in case the purchaser should marry, to pay a sum of 3,000*l.*: it was held that there was no lien on the purchased estates for the 3,000*l.* In this case, *Shadwell,* V.-C., expressed an opinion that Lord *Eldon* had in *Mackreth* v. *Symmons* (*supra*) overruled the decision in *Tardiffe* v. *Scrugham.* But in the subsequent case of *Buckland* v. *Bucknell,* 13 Sim. 406, the same eminent V.-C. said that, if rightly reported, he had spoken strongly on this point in *Clarke* v. *Royle.* And there can be no doubt that the decision in *Tardiffe* v. *Scrugham* (*supra*) is at the present time good law: *Matthew* v. *Bowles,* 6 Ha. 110. In *Parrott* v. *Sweetland,* 3 My. & K. 655, the same peculiarity of the addition of a contingent payment to the annuity occurred as in *Clarke* v. *Royle.* The facts of that case were shortly as follows:—J. P. was entitled to a life estate with remainder to his daughter, S. P., in fee; and in consideration of the sum of 3,000*l.* secured to the daughter upon the terms expressed in a bond of even date, she conveyed her remainder to J. P., his heirs and assigns; the following receipt was endorsed on the conveyance:—"Received on the day and year first within written, of and from the within-named J. P., a bond for the sum of 3000*l.*, being the full consideration within expressed to be given by him." The bond recited an agreement for

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payment by J. P. of an annuity of 100*l.* to the daughter's husband during his life, and to herself if she should survive her husband, and of a gross sum of 3,000*l.* in case there should be issue of the marriage living at the death of J. P.; and the bond was conditioned to be void in case J. P. should perform the agreement, or should make such a settlement by way of substitution as was therein mentioned; it was held that there was no lien on the estate for the purchase-money. The question in every case is one of intention whether the purchaser intended the security to be in substitution for the purchase-money or land or not, and depends on the circumstances of the particular case. See also *Gore and Durant's Case*, L. R. 2 Eq. 349; *Re Albert Life Ass. Co.*, L. R. 11 Eq. 164; *Re Brentwood Brick Co.*, 4 Ch. D. 462.

Effect of taking distinct security.

Thus, if the vendor takes a distinct and independent security for the purchase-money, the lien will generally be extinguished. In *Nairne* v. *Prowse*, 6 Ves. 752, the vendor took a certain amount of stock instead of the price, the purchaser agreeing to make it up a certain sum if it should not produce so much; and, the stock falling short of the sum named, it was held that the vendor had no lien on the estate for the difference. In the same case it was said, that the lien is lost if the vendor takes a mortgage of another estate for the purchase-money; and it has been decided that a mortgage of *part* of the estate itself discharges the remainder: *Capper* v. *Spottiswoode*, 1 Taml. 21: and a mortgage of the whole of the estate to secure *part* of the purchase-money has the same effect on the lien for the residue: *Bond* v. *Kent*, 2 Vern. 281. Where the security for part of purchase-money which was not paid, was two promissory notes of the purchaser, payable by instalments, and an assignment of a policy of insurance, it was held that the unpaid purchase-money continued to be a lien on the estates: *Ex parte Latey*, 2 M. & A. 609. A covenant between the vendor and purchaser, that the purchase-money should be repaid within two years after a re-sale, was held to have discharged the vendor's lien: *Ex parte Parkes*,

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1 Gl. & J. 228 : see *Cood* v. *Pollard,* 9 Pri. 104 ; 10 Pri. 109. Where, upon a purchase by trustees, the vendor knowing the estate was purchased with trust-money, signed a receipt for the full purchase-money, but allowed part of it to remain in the hands of one of the trustees without the concurrence of his co-trustees, or of the cestui que trust, the court refused to recognise that there was any lien : *White* v. *Wakefield,* 7 Sim. 401.

Who entitled to benefit of lien :

The general principle in equity with respect to marshalling assets is, that a party who has a claim which is available, as well against the real as against the personal estate of the deceased, shall not, by resorting to the personal estate in preference to the realty, disappoint legatees or creditors, whose remedy is against the personalty only : *Aldrich* v. *Cooper,* 8 Ves. 382. "The modern cases have decided that the purchased estate and the personal estate will be marshalled where the estate *descends* in favour of simple contract creditors, and also of legatees :" Sugd. Vend. 680 : see also *Trimmer* v. *Bayne,* 9 Ves. 209 ; *Sproule* v. *Prior,* 8 Sim. 189. The same rule will apply where the estate is *devised* in favour of simple contract creditors : *Selby* v. *Selby,* 4 Russ. 336. The question is not of any great importance to creditors since the Stat. 3 & 4 Will. 4, c. 104. The question whether legatees are entitled to the benefit of the rule when the estate is devised, has been the cause of a conflict of judicial opinion : see *Lord Lilford* v. *Powys Keck,* L. R. 1 Eq. 234 ; and *Hensman* v. *Fryer,* L. R. 3 Ch. A. 420 ; in which cases the claims of legatees to stand in the place of the vendor against an estate devised by the purchaser was maintained : and see *contra, Wyllie* v. *Henniker,* 2 My. & K. 635 ; *Collins* v. *Lewis,* L. R. 8 Eq. 708 ; *Dugdale* v. *Dugdale,* L. R. 14 Eq. 234 ; *Tomkins* v. *Colthurst,* 1 Ch. D. 626 ; *Farquharson* v. *Floyer,* 3 Ch. D. 109.

creditors ; legatees.

Who are bound by vendor's lien.

Lien prevails against the purchaser, his heir, or any claiming under him with notice of this equitable title : *Walker* v. *Preswick,* 2 Ves. sen. 622.

Creditors, purchasers.

Creditors, whether claiming under a conveyance for their benefit, or through the medium of the bank-

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rupt laws, are bound by an equitable as much as by a legal lien; and notice, from the nature of the case, can make no difference: *Fawell* v. *Heelis*, Amb. 724; *Blackburn* v. *Gregson*, 1 Bro. C. C. 420; *Bowles* v. *Rogers*, 6 Ves. 95 n. Purchasers for valuable consideration without notice (*d*) are not, of course, bound by the lien, if they have the legal estate to give the preponderance to their later equity: see *Mackreth* v. *Symmons*, 15 Ves. 349; *Frere* v. *Moore*, 8 Pri. 475: nor are they bound if they have a better equity: *Rice* v. *Rice*, 2 Drew, 85: or have secured possession of the title deeds: *Pease* v. *Jackson*, L. R. 3 Ch. A. 576. It may now be regarded as settled, after some difference of opinion, that a mortgagee having the legal estate will not be postponed in the absence of fraud or gross negligence, by the mere fact of his having omitted to possess himself of the title deeds: *Finch* v. *Shaw*, 5 H. L. Ca. 905.

Between equal equities the rule is, *qui prior est tempore, potior est jure;* and, therefore, a subsequent incumbrancer, who has not obtained the legal estate, cannot postpone the vendor's lien. Thus, in *Mackreth* v. *Symmons*, 15 Ves. 349, when the purchaser had contracted to execute a mortgage to the defendant, Lord *Eldon*, treating the equities of the vendor and the equitable mortgagee as equal, gave priority to the former. It does not appear whether, in that case, the title deeds had been deposited with the mortgagee. The case of *Stanhope* v. *Lord Verney*, Butl. Co. Lit. 290, b., n. (1), xv.; *S. C.*, 2 Ed. C. C. 81, may be regarded as establishing that a vendor's lien will not prevail against a subsequent mortgagee by deposit of deeds without notice: see Sugd. Vend. 682: and see *Nairne* v. *Prowse*, 2 V. & B. 149; *Ex parte Wright*, 3 M. & A. 49.

Refusal to complete contract.

A person who, having contracted to lay out money in making improvements on land, after spending

(*d*) As to what will amount to sufficient notice of a vendor's lien, see *Davies* v. *Thomas*, 2 Y. & C. 234; *West* v. *Reid*, 2 Ha. 260; *Butler* v. *Lord Portarlington*, 1 Drew. & W. 20; *Att.-Gen.* v. *Hall*, 16 Beav. 388.

part of the money, refuses to complete his contract, has no lien on the land for the money actually expended : *Wallis* v. *Smith*, 21 Ch. D. 243. Lien.

2. Judgments.

The remedy which a judgment creditor has against his debtor's lands is by statute. At common law, a subject could only levy the growing fruit of the land, while it continued in the debtor's hands, by writ of *levari facias*. A creditor by specialty had, in case of the death of the debtor, a remedy against the heir to the extent of the real assets descended; but this remedy was personal, and until execution issued, conferred no lien upon the descended estate in the hands of third persons, unless a case of fraud can be made out against them : *Spackman* v. *Timbrell*, 8 Sim. 253. Indeed, before the Stat. 3 & 4 W. & M. c. 14, the personal liability of the heir ceased if he aliened the lands before action brought. But while the lands remained in the heir, the specialty creditor might have had execution against the entirety : 3 Co. 12 a. The Statute of Westminster, 2nd (13 Edw. 1, c. 18), gave the remedy by elegit over half of the debtor's lands, now by the 1 & 2 Vict. c. 110, s. 11, extended to the whole.

The Statute of Frauds (29 Car. 2, c. 3), s. 10, enacts that :— Trust estates.

" It shall be lawful for every sheriff or other officer, to whom any writ or precept is or shall be directed at the suit of any person or persons, of, for, and upon any judgment, statute, or recognisance thereafter to be made or had, to do, make, and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, and hereditaments, as any other person or persons be, in any manner or wise, seised or possessed or thereafter shall be seised or possessed, in trust for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said person against whom execution thereafter should be so sued, had been seised of such land, &c., of such estate as they be seised of in trust for him *at the time of the said execution sued* (*e*); which lands, &c., by force and virtue

(*e*) These words refer to the seisin of the trustee : so that the

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of such execution, shall accordingly be held and enjoyed freed and discharged from all incumbrances of such person as shall be so seised or possessed in trust for the person against whom such execution shall be sued. And if any cestui que trust thereafter shall die, leaving a trust in fee simple to descend to his heir, then, and in every such case, such trust shall be deemed and taken assets by descent, and the heir shall be liable to, and chargeable with, the obligation of his ancestors for or by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession in like manner as the trust descended, any law, custom, or usage to the contrary in anywise notwithstanding."

Descended lands to be bound after execution sued.

Sect. 11. "No heir, that shall become chargeable by reason of any estate or trust made assets in his hands by the law, shall, by reason of any plea or confession of the action, or suffering judgment by *nient dedire*, or any other matter, be chargeable to pay the condemnation out of his own estates, *but execution shall be sued of the whole estate* so made assets in his hands by descent, in whose hands soever it shall come *after the writ purchased*, in the same manner as it is to be at and by the common law where the heir at law pleading a true plea, judgment is prayed against him thereupon."

The Statute 1 & 2 Vict. c. 110, has considerably enlarged the remedies of creditors against the property of their debtors. It is to be observed, that the statute does not repeal any of the preceding Acts relating to judgments; and therefore leaves the creditor at liberty to resort to his remedy by *elegit* under the old law, if he should find it more advantageous—a case of which the occurrence is by no means impossible (*f*). Sect. 11 of this Act empowers the sheriff to deliver execution of all lands, &c., to judgment creditors; and sect. 13 provides that judgments shall operate as equitable charges on real estate, and that the issue in tail and all other persons whom the debtor might, without the assent of any other person, cut off and debar from any remainder, reversion, or other interest in the land. These two sections are stated *ante*, tit. ABSTRACTS, Vol. I., p. 101, where the questions of the registration of

land cannot be taken after conveyance by the trustee: *Harris* v. *Pugh*, 4 Bing. 335.

(*f*) As to procedure under an *elegit*, see Coote, Mortg. p. 47.

judgments and the searches to be made by purchasers and mortgagees of land are considered at length.

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By sect. 12 it is enacted that :—

"By virtue of any writ of fieri facias to be sued out of any superior or inferior Court after the time appointed for the commencement of this Act, or any precept in pursuance thereof, the sheriff or other officer having the execution thereof may and shall seize and take any money or bank notes (whether of the Governor and Company of the Bank of England, or of any other bank or bankers), and any cheques, bills of exchange, promissory notes, bonds, specialties, *or other securities for money*, belonging to the person against whose effects such writ of fieri facias shall be sued out; and may and shall pay or deliver to the party suing out such execution any money or bank notes which shall be so seized, or a sufficient part thereof; and may and shall hold any such cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money as a security or securities for the amount by such writ of fieri facias directed to be levied, or so much thereof as shall not have been otherwise levied and raised; and may sue in the name of such sheriff or other officer for the recovery of the sum or sums secured thereby, if and when the time of payment thereof shall have arrived; and that the payment to such sheriff or other officer by the party liable on any such cheque, bill of exchange, promissory note, bond, specialty, or other security, with or without suit, or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment, or of such recovery and levy in execution, as the case may be, from his liability on any such cheque, bill of exchange, promissory note, bond, specialty, or other security; and such sheriff or other officer may and shall pay over to the party suing out such writ the money so to be recovered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied; and if, after satisfaction of the amount so to be levied, together with sheriff's poundage and expenses, any surplus shall remain in the hands of such sheriff or other officer, the same shall be paid to the party against whom such writ shall be so issued; Provided that no such sheriff or other officer shall be bound to sue any party liable upon any such cheque, bill of exchange, promissory note, bond, specialty, or other security, unless the party suing out such execution shall enter into a bond, with two sufficient securities, for indemnifying him from all costs and expenses to be incurred in the prosecution of such action, or to which he may become liable in consequence thereof, the expense of such bond to be deducted out of any money to be recovered in such action."

Sheriff empowered to seize money, bank notes, &c.;

and to pay money or bank notes to execution creditor;

and to sue for amount secured by bills of exchange and other securities.

Proviso as to indemnity for sheriff.

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Judgment debts to carry interest.

By sect. 17, "That every judgment debt shall carry interest at the rate of four pounds per centum per annum from the time of entering up the judgment, or from the time of the commencement of this Act in cases of judgments then entered up and not carrying interest until the same shall be satisfied; and such interest may be levied under a writ of execution on such judgment."

The stat. 2 & 3 Vict. c. 11, sect. 3, enacts that:—

"In addition to the entry by the said last mentioned Act (1 & 2 Vict. c. 110) or by this Act required to be made in a book by the senior master, of the particulars to be contained in every memorandum or minute left with him, of any judgment, decree or order, rule or order, he shall insert in such book the year and the day of the month when every such memorandum or minute is so left with him."

By sect. 4 judgments, &c., of superior courts, after five years from entry, are to be void against purchasers, &c., unless a fresh memorandum is left within five years before right accrued; and by sect. 5 judgments, &c., are not to affect purchasers or mortgagees more extensively than judgments would have done before the stat. 1 & 2 Vict. c. 110. Sect. 6 provides that—

Acts not to revive judgments extinguished or barred, nor to affect judgment creditors' rights against the debtor and volunteers.

"Nothing in the said recited Act of her present Majesty, nor in this Act contained, shall extend to revive or restore any judgment which shall be extinguished or barred, nor shall the same extend to affect or prejudice any judgment as between the parties thereto, or their representatives, or those deriving as volunteers under them.

By sect. 7 purchasers and mortgagees are not to be affected by any *lis pendens*, unless a memorandum of the suit is duly registered.

The other provisions of this Act, which are still in force, are as follows:—

Inquisitions, accountantships, &c., not to affect purchasers unless duly registered.

33 Hen. 8, c. 39.

Sect. 8. "That no judgment, statute, or recognizance, which shall hereafter be obtained or entered into in the name or upon the proper account of her Majesty, her heirs or successors, or inquisition by which any debt shall be found due to her Majesty, her heirs or successors, or obligation or specialty which shall hereafter be made to her Majesty, her heirs or successors, in the manner directed by an Act passed in the thirty-third year of the reign of his late Majesty King Henry the Eighth, intituled, 'The erection of the Court of Surveyors of the king's

lands, and the names of the officers there, and their authority,' or any acceptance of office which shall hereafter be accepted by officers whose lands shall thereby become liable for the payment and satisfaction of arrearages under the provisions of the Act passed in the thirteenth year of the reign of her late Majesty Queen Elizabeth, intituled, 'An Act to make the lands, tenements, goods, and chattels of tellers, receivers, &c., liable to the payment of their debts,' shall affect any lands, tenements, or hereditaments, as to purchasers or mortgagees, unless and until a memorandum or minute, containing the name and the usual or last place of abode, and the title, trade, or profession, of the person whose estate is intended to be affected thereby; and also in the case of any judgment the Court and the title of the cause in which such judgment shall have been obtained, and the date of such judgment, and the amount of the debt, damages, and costs thereby recovered; and in the case of a statute or recognizance the sum for which the same was acknowledged, and before whom the same was acknowledged, and the date of the same; and also in the case of an inquisition the sum thereby found to be due, and the date of the same; and also in the case of an obligation or specialty the sum in which the obligee shall be bound, or for which the obligation or specialty shall be made; and the date of the same; and also in the case of acceptance of office, the name of the office and the time of the officer accepting the same shall be left with the senior master of the said Court of Common Pleas, who shall forthwith enter the same particulars in a book, to be intituled, 'The Index to Debtors and Accountants to the Crown,' in alphabetical order, by the name of the person whose estate is intended to be affected by such judgment, statute, or recognizance, inquisition, obligation, or specialty, or the acceptance of any office; and such officer shall be entitled for any such entry to the sum of two shillings and sixpence; and all persons shall be at liberty to search the same book, and also the other book to be kept according to the provisions of the said recited Act of the first and second years of the reign of her present Majesty, or either of the said books, on payment of the sum of one shilling, whether one only or both of the said books shall be searched, and no multiplication of books is to increase the fee."

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13 Eliz. c. 4.

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Statute or recognizance.

Inquisition.

Specialty.

Accountantship.

Registry to be open to inspection.

Sect. 9. "That whenever a *quietus* shall be obtained by a debtor or accountant to the crown, and an office copy thereof shall be left with the senior master of the said Court of Common Pleas, together with a certificate, signed by the Accountant-General, that the same may be registered, the said master shall forthwith enter the same in the said book of debtors and accountants to the crown,

Quietus to debtors or accountants to the crown to be registered.

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in alphabetical order, by the name of the person whose estate is intended to be discharged by such *quietus*, with the date, and shall for any such entry be entitled to a fee of two shillings and sixpence."

For discharge of the estates of debtors or accountants to the crown, in the hands of purchasers, mortgagees, and lessees, in certain cases.

Sect. 10. "And whereas it is expedient to make further provision for the discharge of an estate belonging to a debtor or accountant to the crown from the claim of the crown in the hands of a purchaser or mortgagee, although the debt or liability shall not be fully discharged: Be it therefore enacted, that it shall be lawful for the Commissioners of her Majesty's Treasury of the United Kingdom of Great Britain and Ireland for the time being, or any three of them, by writing under their hands, upon payment of such sums of money as they may think fit to require into the receipt of her Majesty's Exchequer, to be applied in liquidation of the debt or liability of any debtor or accountant to the crown, or upon such other terms as they may think proper, to certify that any lands, tenements, or hereditaments of any such crown debtor or accountant shall be held by the purchaser or mortgagee or intended purchaser or mortgagee thereof, his or their heirs, executors, administrators, and assigns, wholly exonerated and discharged from all further claims of her Majesty, her heirs or successors, for or in respect of any debt, claim, or liability, present or future, of the debtor or accountant to whom such lands, tenements, or hereditaments belonged, or, in cases of leases for fines, to certify that the lessees, their heirs, executors, administrators, and assigns, shall hold so exonerated and discharged, without prejudice to the rights and remedies of the crown against the reversion of the lands, tenements, or hereditaments comprised in any such leases, and the rents and covenants reserved and contained by and in the same; and thereupon the same lands, tenements, or hereditaments shall respectively be held accordingly wholly exonerated and discharged as aforesaid, but in cases of leases without prejudice as aforesaid."

Sect. 11. "That any such certificate, or the discharge of any such lands, tenements, or other hereditaments by virtue of this Act, shall in no wise impeach, lessen, or affect the right or power of her Majesty, her heirs or successors, to levy the whole of any debt or demand which may at any time be due from any such debtor or accountant to the crown out of or from any other lands, tenements, or hereditaments, which would have been liable thereto in case no such certificate had been granted and no such discharge had been obtained."

Sect. 14. "That this Act shall not extend to Ireland."

What pro-

Under an *elegit* was extendible every kind of real

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property producing profit, and capable of division, except the glebe and benefice of a parson or vicar: Bac. Ab. Execution, C. 2. Copyholds could not be extended: Coke, Cop. 149; 13 D. & R. 603. But lands in ancient demesne, rent, the lands of tenant for life, the lands of the wife which the husband has during the coverture, the estate-tail of the debtor during his life, and estates granted by the crown for the maintenance of dignities, could be taken in execution: Bac. Ab. Execution, C. 2; *Cox* v. *Barnsley*, Hob. 47; 1 *Walshall* v. *Heath*, Cro. Eliz. 656; *Ashburnham* v. *St. John*, Cro. Jac. 85; 1 *Davis* v. *Duke of Marlborough*, 2 Swanst. 122. A term of years could either be sold as part of the debtor's personal estate, or extended, or it might be sold under the extent, at the appraisement of the jury, to the creditor; but, by virtue of its condition as personalty, it was not bound by the judgment until execution sued out: *Fleetwood's Case*, 8 Co. 171; *Shirley* v. *Watts*, 3 Atk. 200. By the 16th sect. of the Statute of Frauds, no writ of execution shall bind the property of *goods* (including chattel interests in land), but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroner, to be executed; and such time is to be indorsed by them upon the writ: *Jeanes* v. *Wilkins*, 1 Ves. sen. 196; *Burdon* v. *Kennedy*, 3 Atk. 738; *Causton* v. *Macklew*, 2 Sim. 242; *Williams* v. *Craddock*, 4 Sim. 313. The king's rights are not affected by this statute, and a crown execution still binds the goods of the debtor from the *teste* of the writ.

perty form bound by *elegit*.

Terms of years and goods bound only from the delivery of the writ.

Impropriate tithes were, it should seem, extendible: Co. Litt. 179 a.; and lands of a bishop: Bac. Ab. Execution, C. 2; but an advowson was and is not; because, although susceptible of sale, and therefore liable as assets, it cannot be divided, nor does it yield any pecuniary fruit: Bac. Ab. Execution, C. 2; *Robinson* v. *Tonge*, 3 P. Wms. 398; but, under sect. 13 of the stat. 1 & 2 Vict. c. 110, a creditor may obtain a sale in equity. Upon a return by the sheriff of *nulla bona*, and that the defendant had no lay fee, the profits of a benefice

Sequestration of ecclesiastical benefice.

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could be sequestered at the suit of the judgment creditor, by writ of *fieri facias de bonis ecclesiasticis*, directed to the bishop of the diocese: Tidd, 9th ed. 1023; see *Rex* v. *Armstrong*, 2 C. M. & R. 205; *Rex* v. *Powell*, 1 M. & W. 321. The writ of sequestration binds only the future profits of the living; the judgment constituting no lien upon the glebe, which is bound only from the delivery of the writ to the bishop: *Cottle* v. *Warrington*, 2 Nev. & M. 227; *White* v. *Bishop*, 1 C. M. & R. 507; and, consequently, to affect a living in a register county, the judgment need not be registered.

Execution on trust estates.

The legal remedy against trust estates, given by the Statute of Frauds, did not extend to trusts of chattels real, nor to equities of redemption: *Lyster* v. *Dolland*, 3 B. C. C. 478; *Scott* v. *Scholey*, 8 East, 467; *Plunkett* v. *Penson*, 2 Atk. 290; *Burden* v. *Kennedy*, 3 Atk. 739; *Doe* d. *Westmoreland* v. *Smith*, 1 M. & Ry. 137; *Franco* v. *Franco*, 4 Ves. 528; *Causton* v. *Macklew*, 2 Sim. 242: see *Doe* d. *Phillips* v. *Evans*, 1 Cr. & M. 455, as to attendant terms; and the statute did not extend to trusts in which other persons than the judgment debtor have any interest: *Doe* v. *Greenhill*, 3 B. & Al. 684; *Harris* v. *Baker*, 12 Moo. 283; *Frith* v. *Duke of Norfolk*, 4 Madd. 504. Neither did the Act affect any trust but such as the debtor had at the time of the execution sued: *Hunt* v. *Coles*, Com. 226; *Harris* v. *Pugh*, 12 Moo. 577.

Judgment creditor's equitable remedy.

Equity assisted a judgment creditor who was prevented from obtaining the benefit of his security at law; or, where it was selling or administering the estate, would pay off the judgment debt: see Coote, Mortg. 53; see *Neate* v. *Duke of Marlborough*, 3 My. & C. 407. On the equitable relief, see *Churchill* v. *Grove*, Nels. Ch. Rep. 89; 1 Ch. Ca. 35; *Pit* v. *Hunt*, 2 Ch. Ca. 73; *Balch* v. *Wastall*, 1 P. Wms. 445; *O'Gorman* v. *Comyn*, 2 Sch. & Lef. 137.

Equity aided execution at law.

The remedy which equity affords to a judgment creditor, is either to prevent an outstanding legal estate being used in bar of execution, to appoint a receiver, or to allow the creditor his due priority where, by the death of the debtor or otherwise, the

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lands are sold and subjected to administration in equity: *Plaskett* v. *Dillon*, 1 Hog. 324; *S. C.* 2 Bl. N. S. 239; *Silver* v. *Bishop of Norwich*, 2 Swanst. 112, n.; *White* v. *Bishop of Peterborough*, Id. 109. Where the object was merely to remove a difficulty in the way of an execution, it was an essential preliminary, that the *elegit* should have been sued out: *Neate* v. *Duke of Marlborough*, 3 My. & Cr. 407; unless the interest which it was sought to attach, was not in its nature liable to legal execution, as in the case of an equity of redemption: *Tunstall* v. *Trappes*, 3 Sim. 298; or unless the application was for administration of the assets, after the death of the judgment debtor, or where, under any other circumstances, a sale of the land became necessary: *Barnewall* v. *Barnewall*, 3 Ridg. P. C. 24.

Where equity required an *elegit* to have been sued out.

In order to proceed in equity under the stat. 1 & 2 Vict. c. 110, it was not necessary to sue out an *elegit*, but a creditor could not formerly proceed to realise his implied charge until after the expiration of a year from the time of entering up his judgment. Now, however, by the stat. 23 & 24 Vict. c. 38, a creditor can issue execution on his judgment forthwith.

Equitable remedies of judgment creditor under 1 & 2 Vict. c. 110.

Sect. 13 of the stat. 1 & 2 Vict. c. 110, gives to a judgment, &c., the effect of a charge (binding on the issue in tail) by the debtor, of the judgment debt and interest, upon the entirety of the debtor's real estates of every description, as well such as are subjected to the *elegit* by the 11th section, as also reversionary and other interests which cannot be extended, such as advowsons, equities of redemption, property in expectancy, and shares in trust property: Prid. Judg. 73; *Lord Leigh* v. *Lord Ashburton*, 11 Beav. 470. A judgment is thus a lien upon all real property which the debtor owns, or over which he has a power of disposal.

Judgment a charge in equity on real estate.

Formerly a person claiming by appointment from the debtor, and therefore being in immediately under the deed creating the power, was entitled to hold the lands unaffected by judgments against the donee of the power, the appointee's title being paramount to that of the judgment creditor: *Doe* d. *Wigan* v. *Jones*, 10 B. & C. 459. But now, if a

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debtor has a sole power of appointment over property which he may exercise for his own benefit, a judgment becomes an immediate lien upon the lands subject to the power: see Coote, Mortg. 62.

Effect of trust for conversion in regard to judgments.

Where the real estate had been conveyed in trust for sale, by which means it became impressed with the qualities of personalty, it was not liable to judgments entered up against the grantor, subsequently to the conveyance, unless the conveyance was made with a fraudulent intent: *Lodge* v. *Lyseley*, 4 Sim. 70; *Foster* v. *Blackstone*, 1 M. & K. 297 (*g*). And as a contract for sale effects a similar constructive conversion, or rather, as it transfers the equitable ownership to the purchaser, he was secure against judgments entered up subsequently to the contract, so far as he had paid his purchase-money, although he might not have taken a conveyance: *Finch* v. *Earl of Winchelsea*, 1 P. W. 282; *Frith* v. *Duke of Norfolk*, 4 Madd. 503; 1 Sugd. Vend. 540. It is remarked, however, by Mr. Preston, that "all judgments obtained against the vendor, subsequent to the date of the contract, and prior to the completion of the purchase, are in practice considered as liens, of which it is incumbent on the vendor to procure discharges by release or satisfaction, for the security of the purchaser, so far as any part of the purchase-money may remain unpaid, after the judgment and notice thereof." 3 Prest. Abstr. 329. This seems to be a proper precaution, because the judgment is a lien on the unpaid purchase-money. On the same principle, if a vendor, subsequently to the contract, were to make a mortgage, of which the purchaser has notice, he would be bound to see the money remaining unpaid applied in its liquidation. In *Lodge* v. *Lyseley*, 4 Sim. 70; trustees upon trust for sale, by the terms of which trust the trustees were authorized to give discharges to purchasers, contracted to sell part of the property, after which judg-

Judgments after contract.

(*g*) A judgment will have priority over an assignment for the benefit of creditors if completed before the execution of the deed by any of the creditors, though after the date of the deed: *Langborne* v. *Harland*, 4 W. R. 96.

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ments were entered up against a beneficiary, which the purchaser required should be satisfied: but his objection was overruled, on the ground that the judgments could not affect the property.

Whole of debtor's lands now extendible.

The stat. 1 & 2 Vict. c. 110, enables the judgment creditor to extend the whole of the lands which the debtor, or any person in trust for him, shall have been seised or possessed of at the time of entering up the judgment, or at any time afterwards, including rectories, tithes, and copyholds, and customary lands. The judgment binds estates tail, and estates in joint tenancy. Terms of years in gross, as well equitable as legal, it should seem, continue to be unaffected by the *judgment* before execution, the enactment being for this purpose worded in the same manner as that of the Statute of Frauds, which was held not to include chattel interests: *Lyster* v. *Dolland*, 1 Ves. jun. 431; 3 B. C. C. 478; *Scott* v. *Scholey*, 8 East, 486. The equitable freehold is now bound at law, from the date of the judgment; and it is clear, that a purchaser without notice cannot avail himself of an outstanding legal estate of freehold against a judgment creditor coming in under the Act.

Judgment may be defeated by appointment under a *joint* power.

A power of appointment, to be executed by the debtor jointly with, or with the consent of, another person, is not within the 11th section; and an appointment under such a power, created before the date of the judgment, was held to defeat the creditor's execution: *Doe* v. *Jones*, 10 B. & C. 459; and also in equity, even with notice: *Skeeles* v. *Shearley*, 3 My. & C. 112; see also *Goodright* v. *Cator*, 2 Doug. 477; *Eaton* v. *Sangster*, 6 Sim. 517.

Whether a power to appoint *by will* is within the 11th section is at least doubtful: such a power can scarcely be said to be exercisable for the donee's *own benefit*. See Dart, V. & P. 463.

Possession under execution on elegit.

In early times, the sheriff gave actual possession of the lands; but he now delivers legal possession only: Bac. Ab. Ex. c. 2; see *Rogers* v. *Pitcher*, 6 Taunt. 202; *Harris* v. *Booker*, 4 Bing. 96; *Hatton* v. *Heywood*, L. R. 9 Ch. A. 229.

The creditor is entitled to hold the lands until he has received the amount of the debt and damages, but not any costs: *Fleetwood's Case*, 4 Rep. 67;

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Jarrold v. *Rowe,* 8 Price, 582; *Berrington* v. *Evans,* 1 Younge, 276; and the amount which the creditor has received being estimated according to the value appraised by inquisition, the time is certain and the debtor may re-enter without any *scire facias:* 2 Inst. 396; *Doughty* v. *Finch,* 2 Vent. 45. But if, before the expiration of the time, the debtor tender what remains due, or can show that by some special and casual profit the debt has become satisfied, he may recover possession by means of a *scire facias: Price* v. *Varney,* 3 B. & C. 733.

Liability of tenant by *elegit* to account. Interest.

At law, the creditor was not accountable for more than the appraised value; and if the debtor sought an account in equity, he could not have it without paying interest upon the debt. *Godfrey* v. *Watson,* 3 Atk. 517; *Owen* v. *Griffith,* Ambl. 520. But now the creditor, in all cases, may recover interest at four per cent., (and, in the case of copyholds, also the customary fines, &c., which he has disbursed), and is accountable for the surplus profits in the court in which the judgment, &c., was obtained: see stat. 1 & 2 Vict. c. 110, sect. 17, *ante,* p. 660.

Time from which judgments take effect.

By a fiction of law, a term was considered to constitute but a single day; and accordingly the stat. 29 Car. 2, c. 3, sects. 14 and 15, enacted that any judge or officer signing any judgments, should set down the day of the month and year of his so doing upon the paper, book, docket, or record which he should sign; which date should be also entered upon the margin of the roll of the record where the said judgment shall be entered; and that such judgments, as against purchasers *bonâ fide* for valuable consideration of lands, &c., should be judgments only from such time as they should be so signed, and should not relate to the first day of the term whereof they were entered.

Docketing.

And by the stat. 4 & 5 Will. & M. c. 20, (made perpetual by the stat. 7 & 8 Will. 3, c. 36), judgments were required to be docketed alphabetically in the defendants' names, those of Trinity, Michaelmas, and Hilary terms before the last day of the ensuing terms respectively and those of Easter term before the last day of Michaelmas term. Any informality as to docketing invalidated the judgment. Docketing the issue merely was not sufficient to bind a purchaser

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or mortgagee: *Braithwaite* v. *Arnotts*, 2 Cr. & Jerv. 318; 4 Tyr. 293; *Hopwood* v. *Watts*, 3 Nev. & M. 146; 5 B. & Ad. 1056.

A judgment docketed (*h*) after the time prescribed by 4 & 5 Will. & M. c. 20, did not bind a purchaser without notice: *Forshall* v. *Coles*, 7 Vin. Ab. 54; *Davies* v. *Strathmore*, 16 Ves. 419; but no time is fixed for the registration under the stat. 1 & 2 Vict. c. 110, which merely provided that the judgment, &c., is not to take effect under it against purchasers, &c., "unless and until" the memorandum is delivered to the master.

Notice of judgments.

Notwithstanding the provisions of the stats. 1 & 2 Vict. c. 110, sect. 13, and 2 & 3 Vict. c. 11, sect. 5, a purchaser was bound, in the same manner as under the former enactments as to docketing, by notice of an undocketed or unregistered judgment: *Le Neve* v. *Le Neve*, 3 Atk. 646: *Tunstall* v. *Trappes*, 3 Sim. 386. But, the stat. 3 & 4 Vict. c. 82, (as amended by the stat. 18 & 19 Vict. c. 15), provided that no judgment should affect lands, &c., as against purchasers, mortgagees, or creditors, even with notice, until the judgment had been registered with the proper officer of the courts. And now by the stat. 27 & 28 Vict. c. 112, sect. 1, no judgment entered up after the 29th of July, 1864, is to affect land of any tenure until such land shall have been actually delivered in execution by virtue of a writ of elegit, or other lawful authority in pursuance of such judgment; and by sect. 3 of the same Act the execution is to be registered in the name of the debtor in the Central Office. As regards judgments entered up after this Act, the question of notice is of no importance.

By sect. 2 of the Conveyancing Act, 1882, (45 & 46 Vict. c. 39), purchasers, &c., may obtain official certificates of searches for judgments, &c., which as against persons interested under the judgments are to be conclusive affirmatively or negatively, as the case may be. See further as to search for judgments, *ante*, tit. Abstracts, Vol. I., p. 100, *et seq.*

(*h*) The dockets were finally closed by stat. 2 & 3 Vict. c. 11, sects. 1, 2.

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Seizure of money and securities in execution.

It may be observed, that although the 12th sect. applies only to money, &c., belonging to the debtor, in his own hands (*Robinson* v. *Pearse*, 7 Dowl. 93), policies of insurance are "securities" within the meaning of the section: *Low* v. *London, &c., Life Policy Co.*, 1 K. & J. 223; *Robson* v. *M'Creight*, 25 Beav. 272; *Stokoe* v. *Cowan*, 29 Beav. 637. See further as to the effect of this section, Coote, Mortg. 148.

Priority of judgment debts in the administration of assets.

Judgment debts have a priority in the administration of assets over all specialty or simple contract debts, including prior statutes and recognizances: *Pemberton* v. *Barham*, 4 Co. 59 b.; 5 Co. 29 a. There is no difference, in respect of priority, between a judgment confessed and a judgment obtained adversely: *Holbird* v. *Anderson*, 5 T. R. 325; *Doe* v. *Carter*, 8 T. R. 61.

Contribution in respect of judgment debt.

A question sometimes arises, when the lands of a judgment debtor have got into several hands, and a part in the hands of one person is extended, whether the other shall contribute. It was early decided that the debtor, or his heir, has no right to contribution against a purchaser of part of the lands, whether he has paid a strictly adequate consideration or not. But if the creditor extend that portion of the land only which is in the hands of a purchaser, the debtor, his heir, or even purchasers of the other portions of the land, shall contribute: Sir *W. Herbert's Case*, 3 Co. 12 b; *Blakeson* v. *Martyn*, 1 W. Jones, 90; *Harvey* v. *Woodhouse*, Sel. Ch. Ca. 80; 2 Eq. Ca. Ab. 223. In *Averal* v. *Wade*, Ll. & G. 252, the question of contribution arose between two judgment creditors, the debtor having settled a part of his estates (and covenanted against incumbrances) in the interval between acknowledging the first and the second judgments; and *Sugden*, C., decided that the unsettled estates should bear all the burden, and that the later creditor could not throw the earlier judgment upon the settled estate.

Satisfaction and release of judgment.

A judgment is discharged by entering up satisfaction (*i*) on the record, or by a release of the judg-

(*i*) As to entry of satisfaction on judgments, see stat. 23 & 24 Vict. c. 115, sect. 2.

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ment. A release by the creditor of all his right and interest in his debtor's lands, or in any particular lands, did not prevent his subsequently suing out execution against them: *Barrow* v. *Gray*, Cro. El. 552. But the release, it seems, would have supported a writ of *audita querela*, to annul the execution: Bac. Ab. Ex. 707. These writs are now abolished, and relief is obtained by application to the Court or a judge, Ord. XLII., r. 27. A release after execution, though of part of the land only, formerly operated as a release of the execution, and discharged the whole: 5 Bac. Ab. 713. But now, by the stat. 22 & 23 Vict. c. 35, s. 11, the release of part of the lands charged is not to affect the validity of the judgment as to the lands remaining unreleased: see *ante*, Vol. I., p. 107, tit. ABSTRACTS, where the section is set out. Of course, a release of all *suits* discharges the judgment: 8 Rep. 153 *b*.

Former procedure in *scire facias* to revive judgment.

The statute West. 1 Ed. c. 45, enacted, that if the plaintiff come into court within a year, he shall have a writ of execution forthwith; and if he come after the year, a *scire facias* shall issue, to warn the defendant to appear and show cause why the said matter inrolled shall not be executed; and in case of the death of either the plaintiff or defendant within the year, a *scire facias* is necessary. But the parties might, by agreement, dispense with the necessity of reviving the judgment by *scire facias*, after the expiration of the year: *Morris* v. *Jones*, 2 B. & C. 242; *Powis* v. *Powis*, 6 Moo. 507; *Hiscocks* v. *Kemp*, 3 A. & E. 676; see *Jones* v. *Jones*, 1 D. & R. 558; *Simpson* v. *Heath*, 5 M. & W. 631.

Effect of death of parties.

In *Heath* v. *Brindley*, 2 A. & E. 368, in which a judgment which had been entered up upon a warrant of attorney, and after the death of the *defendant*, was set aside, notwithstanding an agreement in the defeasance to the warrant, that judgment might be entered up after the expiration of the year, or death of the party, without the leave of the Court. The death of the plaintiff *would not set aside* the judgment if the executors were authorized by the warrant to enter up judgment: *Henshall* v. *Mathew*, 7 Bing. 337; *Harden* v. *Forsyth*, 1 Q. B. 177.

Judgments.

The writ of *scire facias* now lies only against members of a joint stock company, and in respect of breaches after judgment for a parol sum under the Statute 8 & 9 Will. 3, c. 11, s. 8, and in a few other cases: see Coote, Mortg., 149. Generally speaking, however, it is superseded by application to the Court to issue execution under the Rules of the Supreme Court, Ord. XLII., r. 23.

Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 40.

The statute 3 & 4 Will. 4, c. 27, s. 40, barred the remedy for money secured by any *mortgage, judgment, lien, or charge* upon land or rent, after twenty years from the accruer of the right, or acknowledgment of it in writing. This section is now repealed, and by sect. 8 of the Real Property Limitation Act, 1874, no action or other proceeding is to be brought to recover any money secured by any judgment but within twelve years after the right to receive the same shall have accrued: see *Berrington* v. *Evans*, 1 Y. & C. 434. In a case decided under the former Act, upon a bill filed before the above statute came into operation, after a lapse of twenty-eight years, the Court refused relief upon a judgment, notwithstanding proof of the insolvency of the debtor during the greater part of the time, requiring positive evidence that the judgment had not been satisfied: *Grenfell* v. *Girdlestone*, 2 Y. & C. 662. The period of limitation begins to run from the last revival of the judgment: *Kealy* v. *Bodkin*, 1 S. & Sc. 211.

3. Crown Debts.

Statute staple.

By the stat. 33 Hen. 8, c. 39, s. 50, bond debts to the crown are placed on the footing of a statute staple, the nature of which it will therefore be necessary to understand, although the security itself is now disused. The statute staple was given by the 27 Edw. 3, st. 2, c. 9, and is a bond of record, acknowledged before the mayor of the staple in the presence of the constables of the staple or one of them, and sealed with the seal of the staple (*j*).

(*j*) Upon the statute staple, or the recognizances in the nature

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Lien created by statute staple.

This security binds the lands from the time of making it, and an alienee, or co-heir, has a remedy for contribution against a partial extent, as in the case of an *elegit: Herbert's Case,* 3 Co. 12; 2 Inst. 396; Bac. Ab. Ex. 696. The debtor could formerly only recover his lands, after satisfaction, by *scire facias,* Co. Litt. 42, a., and is entitled to an account in equity: 2 Vent. 338. Lands in ancient demesne may be taken under a statute staple: 2 Inst. 397; 4 Inst. 270; but not copyholds: 3 Co. 80.

Bonds to the crown to have the effect of a statute staple.

By the 33 Hen. 8, c. 39, s. 50, all obligations and specialties made for any cause touching the King's majesty, or his heirs, or to his or their use, are to be of the same nature and effect as statutes of the staple against any lay person. Sect. 75 enacted that "all manors, &c., in the seisin of any person to whom the same manors, &c., shall descend, revert, or remain in fee-simple, or in fee tail general or special, by, from, and after the death of any his ancestor, as heir, or by gift of his ancestor, whose heir he is, which said ancestor shall be indebted to the king by judgment, recognizance, obligation, or other specialty, the debt whereof shall not be paid, that then the same manors, &c., shall be and stand charged with and chargeable to and for the payment of the same debt." See *Lord Anderson's Case,* 7 Co. 21. Section 80 provides in effect for contribution for the benefit of purchasers, enacting, that if any manor, &c., shall be charged or chargeable with the debt of the king, and shall be in the seisin of divers and sundry persons other than the obligee or obligors, that then all and singular the said manors, &c., and every parcel of

Issue in tail bound by ancestor's obligation to the crown.

Contribution.

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of a statute staple, if the conusor cannot be found within the staple, nor his goods to the value of the debt, the mayor is to certify the recognizance into Chancery under his seal. The sheriff is next directed to take the body, goods, and lands of the debtor all in one writ, which is returnable in Chancery, and upon which the proceeding is similar to that upon an *elegit,* except that the whole of the lands may be extended. But the sheriff cannot deliver the lands to the conusee, but seizes them in the King's hands, and the conusee, to obtain them, must sue out a writ of *liberate,* upon which the sheriff delivers legal possession as upon an *elegit.* 2 Saund. 70, c. n.

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them, shall be wholly and entirely, and in no wise severally, liable and chargeable to and with the payment of the said debt. The obligee of a bond to the crown upon condition is not a bond debtor of the crown until breach of the condition. *Rex* v. *Tarleton*, 9 Price, 647 ; 1 M'Clel. & Y. 250, n. ; and see *Rex* v. *March*, 1 M'Clel. 688 ; 13 Price, 826.

Lands of accountants to the crown bound by debt as if secured by bond at the time of becoming accountants.

By the stat. 13 Eliz. c. 4, all lands and hereditaments, which any accountant to the Crown shall have, whilst he shall remain accountable, shall, for the payment and satisfaction unto the Queen's Majesty, her heirs and successors, of his arrearages, be liable to the payment thereof, and be put and had in execution for such arrearages, in like manner as if he had the day he became first officer or accountant stood bound by writing obligatory having the effect of a statute of the staple to her Majesty, her heirs or successors, for the true payment of the same arrearages. Sect. 2 authorizes the Queen to sell the accountant's lands under her letters patent, which sale by sect. 4 is to be good against the Queen and the accountant. By sect. 5, if such accountant or debtor purchase lands in other names in trust for his use, that being found by office or inquisition, those lands shall also be liable to satisfy the debt in such manner as before is expressed. Sects. 10, 11, 12, and 13 except accountants whose yearly or total receipts do not exceed 300*l*.

Trust estates bound.

Accountants excepted.

The liens which arise in respect of different offices are distinct, so that land sold by an officer accountant, who then accepts a second accountable office, will be bound by debts incurred in respect of the first office only : Moore, 12, 127. The lien attaches immediately upon the acceptance of the office : *Nicholls* v. *How*, 2 Vern. 389 ; *King* v. *Bishop of Sarum*, Moore, 126.

A debt to the crown constitutes no lien upon the debtor's land until it becomes a debt upon record ; but, as we have seen, by the operation of the statutes of 33 Hen. 8, c. 39, and the 13 Eliz., bond debts to the crown, and the simple contract debts of accountants to the crown, have the force of debts upon record. Other debts become debts of record, either

Simple contract debts to

Crown Debts.

the crown a lien on the debtor's land when found by inquisition.

upon being found by inquisition (of which the record was called formerly an *office*, now a *ministerial* record), or in the ordinary course by the judgment of the Court (when the record is called a judicial record): Mann. Exch. 1, 2nd ed. As the crown cannot be guilty of *laches*, no *scire facias* seems to have been requisite upon a judicial record, even before the Judicature Acts. The baron's *fiat* is the commencement of the king's suit: 2 Saund. 70.

Under an extent may be taken trust estates, an equity of redemption, lands of which the debtor can revoke the uses, lands held *jure uxoris* during the coverture, estates tail, unless alienated *bonâ fide* by the issue, rents, impropriate tithes (but not tithes in the hands of ecclesiastical persons), and lands in ancient demesne: Mann. Exch. 41; 33 Hen. 8, c. 39, s. 75. Copyholds are not generally extendible by crown: 8 Ves. 394; but the lien will attach to a lease of copyholds granted by licence of the lord: Walk. Cop. 190 n. A joint estate is not bound in the hands of the survivor, if the debtor die before execution, the lien effecting no severance of the estate: Co. Lit. 185 a.

The lien of a crown debtor is not to be charged if the executor has sufficient assets; nor a purchaser from the debtor, if there are sufficient assets in the hands of either the executor or him: Dy. 67 b.

Chattels bound only from the teste of the writ.

Chattels real may be either extended or sold as part of the debtor's goods and chattels; but they are not bound until the *teste* of the writ: *Fleetwood's Case*, 8 Co. 171; Wightw. 41.

Debtor's lands may be sold at suit of crown.

The stat. 25 Geo. 3, c. 35, authorises the sale of a crown debtor's lands returned upon an inquisition, upon motion by the Attorney-General in Court. The lands are directed to be conveyed by the king's remembrancer, or his deputy, to the purchaser, and from and after the making of such conveyance, and the enrolment thereof, the purchaser, his heirs, executors, administrators, or assigns, holds the lands, and hereditaments therein comprised, for his own benefit, not only against the extent of the crown, but also against the debtor, and all persons claiming under him, unless by a title

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paramount to and available in law against the extent: see *Rex* v. *Crawcroft*, M'Cl. & Y. 460; *Rex* v. *Blunt*, 2 Y. & J. 120. In the case of an equity of redemption notice must be given by the prosecutor to the mortgagee, and the sheriff under the order ought to sell the equity of redemption only. If the estate is sold without reference to the mortgage, the Court will not direct payment to the mortgagee out of the proceeds, unless the mortgagor consents: *Rex* v. *Coombes*, 1 Price, 207; Mann. Exch. 64.

Under this statute the interest of a crown debtor in leaseholds renewable on lives may be sold: *Reg.* v. *Lane*, 6 M. & W. 489; even though a new lease has been taken, after the crown debt accrued: *Futor* v. *Philpott*, 12 Pri. 197.

By sect. 50 of the Crown Suits Acts, 1864 (28 & 29 Vict. c. 104) the provisions of the stat. 25 Geo. 3, c. 35 are to apply in all cases of lands taken in execution by virtue of any writ or process issued by any court for enforcing payment of any sum due to the crown.

Crown debts by simple contract,

Bonâ fide purchasers for valuable consideration without notice are not liable to be affected by simple contract crown debts: *King* v. *Smith*, Wightw. 34; *Casberd* v. *Att.-Gen.*, 6 Pri. 474. And as a simple contract debt of itself does not constitute a lien on the debtor's lands, it would seem that notice of such a debt will not bind a purchaser or incumbrancer: see *Broughton* v. *Price*, 1 Pri. 216.

by specialty.

But, if the debt to the crown be secured by bond or other specialty, though not recorded, it becomes, by the stat. 33 Hen. 8, c. 39, a lien upon the land, and the lien attaches as well on equitable as on legal interests: see *Rex* v. *Hollier*, 2 Pri. 394. In *Wild* v. *Fish*, 4 Taunt. 334, a purchaser received back his deposit at law, on objections to the title, of which one was that the vendor was an accountant to the crown. A *bonâ fide* purchaser for valuable consideration without notice, after the lien of the crown has attached, is bound by it, and cannot even recover any sums he may have expended in improvements: *Rex* v. *Bailey*, 1816, Mann. Exch. 37 n. The crown is bound by an equitable mortgage by deposit made

Crown bound by equitable mortgage.

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before its lien has attached: *Casbert* v. *Ward and Att.-Gen.*, 6 Pri. 411; and, indeed, by any actual interest acquired in the land prior to the lien of the crown.

Condition.

The subject, it seems, may take advantage of a condition imposed before the right of the crown accrued, although not broken until afterwards: see *Rex* v. *Topping*, M'Cl. & Y. 544; *Davies* v. *Eyton*, 4 Moo. & P. 820.

Subject's lien upon chattels.

A lien upon chattels accompanied by possession is in general (*k*) to be preferred to the execution of the crown, if it attached before the *teste* of the writ, as in the case of the lien of a factor, *Rex* v. *Lee*, 6 Pri. 369; of a wharfinger, *Rex* v. *Humphrey*, 1 M'Cl. & Y. 173; or of a *bonâ fide* assignment in trust for creditors: *Rex* v. *Wilson*, West on Extents, 115. But the mere lien of the subject, unaccompanied by possession or an interest, is not of itself to be preferred to the process of the crown founded upon a lien of posterior date: 2 Salk. 495; Leon. 239: West on Ext. 154.

Priority when the executions of the crown and a subject come into conflict.

It has never been doubted that a sale of goods under a fi. fa. at the suit of a subject is good, if completed before the crown process comes into the hands of the sheriff: *Swin* v. *Morland*, 1 Br. & Bing. 370. But otherwise, with respect to lands, the crown lien will prevail even after the subject's execution is levied: *Giles* v. *Grover*, 9 Bingh. 128; 6 Bligh. N. S. 277 (overruling *Uppom* v. *Sumner*, 2 W. Bl. 1251, 1294); *Rooke* v. *Dayrell*, 4 T. R. 402; see *Re Henley & Co.*, 9 Ch. D. 469.

Lien on chattels against the crown.

Although the property of the goods is not taken out of the *owner* until sale, it is to be observed that the mere *custody* of the goods is taken out of a third person by the sheriff's seizure, so as to destroy any lien which he may have, notwithstanding the goods are not removed from his own premises, and the execution is at his own suit: *Jacobs* v. *Latour*, 5 Bing. 130. The extent of the crown in like manner binds

(*k*) By the stat. 4 & 5 Vict. c. 20, the lien of a factor or agent is postponed to the extent of the crown for excise duties, both already accrued and accruing, in respect not only of the particular goods, but in respect of all goods belonging to the same party.

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goods distrained for rent, if issued before the sale: *Rex* v. *Cotton*, 2 Ves. Sen. 288.

Bankruptcy as against the crown.

The crown is not bound by the bankrupt laws, and, therefore, there is no relation back of the trustee's title to the act of bankruptcy, as against the crown process: see *Re Bonham*, 10 Ch. D. 595; but the bankrupt's personal property is bound against an extent tested subsequently to the appointment of the trustee: *Att.-Gen.* v. *Ashton*, 2 Mod. 248; *Wydown's Case*, 14 Ves. 87; *Ex parte Russell*, 19 Ves. 165; *R.* v. *Mann*, 2 Str. 743.

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), sect. 30, it is enacted that:—

Effect of order of discharge.

(i.) "An order of discharge shall not release the bankrupt from any debt on a recognizance nor from any debt with which the bankrupt may be chargeable at the suit of the crown or of any person for any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff or other public officer on a bail bond entered for the appearance of any person prosecuted for any such offence. And he shall not be discharged from such excepted debts unless the Treasury certify in writing their consent to his being discharged therefrom."

And by sect. 150 of the same Act it is enacted that,—

"Save as herein provided the provisions of this Act relating to the remedies against the property of the debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge shall bind the crown."

Registry Acts.

It is to be observed that the Middlesex and Yorkshire Register Acts (stats. 5 & 6 Anne, c. 18; 6 Anne, c. 35; 7 Anne, c. 20; 8 Geo. 2, c. 6) do not extend to recognizances to the crown.

Extents in aid.

The writ of extent directs the sheriff to inquire concerning the debts due to the debtor, and to extend them. The sheriff's seizure of debts is merely nominal; but his return of them is the foundation of an inquisition concerning the debt, which, when it is returned, becomes a debt to the crown upon record, upon which, process by application to the Court in lieu of *scire facias* (see *ante*, p. 672), or by immediate extent, may be taken: Mann. Exch. 8.

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The debt is called, according to the number of obligations through which it becomes the debt of the crown, a debt of the first, second, or third degree :— thus, if C. owe a debt to B., who is the debtor of A., the crown debtor, C.'s debt is in the second degree. No debt beyond the third degree is liable to the crown. Parker, 16 ; 8 Price, 683. If the extent against B. is sued out *bonâ fide* for the benefit of the crown, it is called an extent in chief in the second degree ; but if it issue for the benefit of A., it is an extent in aid ; in either case B. may have an extent in aid against C.: Mann. Exch. 8.

Upon an extent in chief in the second degree, or an extent in aid, the lien is from the date of the inquisition (when the debt first becomes of record), unless the secondary debtor's liability be by judgment or recognisance, in which case the lien is from the docketing of the judgment or recognisance, so far as concerns property which is bound by such judgment or recognisance ; and judgments under the 1 & 2 Vict. c. 110, will bind every kind of property which can be taken under an extent, as well as copyholds, which could not be extended. The practice of using the process of an extent in aid for the private purposes of the chief debtor, has been checked by an enactment of the 57 Geo. 3, c. 117 : see Mann. Exch. 79. And by a general order of the Court of Exchequer, June 22, 1822, it was ordered that no *fiat* for an extent in aid should be granted, except on affidavit ; that unless the process of extent forthwith issued, the debt due to the crown from the party applying will be in danger of being lost to the crown : see Mann. Exch. 82, 313 ; *Rex* v. *Bingham*, 2 C. & J. 131 ; 1 C. & M. 862 ; *Pennell* v. *Thompson*, 1 C. & M. 857. An extent in chief, of whatever degree, has priority over an earlier extent in aid, with which it comes in conflict, in the same manner as it would have over an ordinary execution at the suit of a subject : *Rex* v. *Lacking*, 8 Price.

As to the registration of crown debts, see the stats. 2 & 3 Vict. c. 11, sect. 8 ; 22 & 23 Vict. c. 35, sect. 22 ; and 28 & 29 Vict. c. 104, sect. 48 : and as

Crown Debts. to the searches which a purchaser should make with regard to crown debts, see *ante*, tit. ABSTRACTS, Vol. I., p. 124, *et seq.*

4. MORTGAGES AND THEIR VARIETIES.

Mortgage without power of sale.

Mortgages generally.]—A mortgage is a security for a subsisting or a future debt, by a transfer of property, or of some interest in or power over property, redeemable at law (if the legal estate be transferred) by payment of the debt and interest, according to the condition of the instrument; and redeemable in equity according to certain rules observed in the Courts, without regard to any restrictions which the parties may attempt to impose on the power of redemption. A mortgage of freehold land, at common law, was a feoffment in fee upon condition to be void if the feoffor or his heirs should, on a fixed day (and if no day was fixed, then any time within the feoffor's life was understood, Co. Litt. 208. b.), pay the debt and interest agreed upon to the feoffee or his representatives; and at law, the effect of performing the condition by payment on the day appointed, was to defeat the feoffment and restore the mortgagor to his original estate; while non-payment on the day gave to the mortgagee an absolute estate in fee, for ever discharged from the condition.

Later it became usual to effect the security by a lease and release or bargain and sale, or by demising the land for a long term of years; and instead of a condition for making void the conveyance or demise on payment of the debt, an agreement was inserted, that the mortgagee should re-convey the estate on payment at the appointed time; and the condition for making the conveyance void, or the proviso for re-conveyance, was sometimes contained in a separate instrument. Whatever form the transaction assumed, the terms of redemption were strictly enforced at law; and if they were not complied with according to the very letter of the proviso, the estate of the mortgagee became indefeasible: Co. Litt. 210; 5 Co. 96, 115.

Mortgages and their Varieties.

Equity of redemption.

The equitable right of the mortgagor to redeem after the estate had become forfeited at law seems to have become settled about the commencement of the seventeenth century; and the principles upon which the doctrine of redemption in equity is founded were early established to the full extent in which they at present subsist. In equity, the mortgagor, immediately upon the execution of the mortgage, has an equitable interest co-extensive with the legal estate in the mortgagee, called his equity of redemption, which subsists notwithstanding the forfeiture at law; may be conveyed or settled, is subject to curtesy, to the dower of a widow married since the 1st of Jan. 1834, to *possessio fratris*, and can only be barred (unless under the 4 & 5 W. & M. c. 16, stated *post*) by lapse of time: *Spurgeon* v. *Collier*, 1 Ed. 235; *Goodman* v. *Grierson*, 2 Ball & B. 402.

Doctrine, *once a mortgage always a mortgage*, considered.

The right of redemption is an inseparable incident of a mortgage, and cannot be controlled or defeated by any agreement of the parties. Therefore, if an intention to make a mortgage *ab origine*, and not an absolute conveyance, can be collected from the instrument, any stipulation tending to fetter the right to redeem will be void (*l*): *Seton* v. *Slade*, 7 Ves. 273. And this principle applies whether the object of the restrictive clause be to confine the right of redemption to a particular class of the persons interested in the equitable ownership, or to restrain it to a particular period. In both cases the mortgagor or his representatives will be allowed to redeem at any time within the period prescribed by the general rule of the Court; *i.e.* within twelve years after any dealing between the parties with the estate, or recognition by the mortgagee of the instrument as a mortgage.

Thus, a proviso that the mortgagor shall redeem during his life, has been held not to exclude redemption by the heir: *Jason* v. *Eyres*, 2 Ch. Ca. 33; *Kilvington* v. *Gardiner*, cit. 1 Vern. 192; *Newcomb*

(*l*) The doctrine, and the grounds upon which it rests, are stated, with much perspicuity and precision, in Coote on Mortgages, p. 16 *et seq.*

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v. *Bonham*, 1 Vern. 8. And where the right of redemption was limited to the mortgagor and the heirs male of his body, and the mortgagor expressly covenanted that no other person should be permitted to redeem, redemption was decreed at the suit of a jointress (the mortgagor having died without issue), the reason alleged being that "an estate cannot at one time be a mortgage, and at another time cease to be so, by one and the same deed:" *Howard* v. *Harris*, 1 Vern. 33, 193; *S. C.*, 2 Ch. Ca. 147; 2 Eq. Ca. Ab. 594. And the same rule applies where the defeasance is contained in a separate deed, which was formerly a common mode of mortgaging: *Manlove* v. *Bale*, 2 Vern. 84; *Bowen* v. *Edwards*, 1 Ch. Rep. 117; *Ord* v. *Smith*, Sel. C. C. 9; *Spurgeon* v. *Collier*, 1 Ed. 55; *Baker* v. *Wind*, 1 Ves. sen. 160.

Parol evidence of the nature of the transaction admitted.

And where the mortgagee refused to execute the defeasance as stipulated, after the absolute conveyance had been executed by the mortgagor, the Court admitted parol evidence of the intention of the parties, and decreed a redemption in the same manner as if the defeasance had been duly made: *Maxwell* v. *Lady Mountacute*, Prec. Ch. 526: see also *Walker* v. *Walker*, 2 Atk. 99; *Young* v. *Peachy*, Id. 257; *Franklyn* v. *Fern*, Barnard, 30; *England* v. *Codrington*, 1 Ed. 169; *Dixon* v. *Parker*, 2 Ves. sen. 225; *Lincoln* v. *Wright*, 4 Dr. G. & J. 16; *Haigh* v. *Kaye*, L. R. 7 Ch. A. 469; *Booth* v. *Turle*, L. R. 16 Eq. 182. The same rule will operate in favour of the creditors of a mortgagor. *Exton* v. *Greaves*, 1 Vern. 138, was the case of a creditor, claiming under a second mortgage for payment of debts, who, upon a bill of foreclosure by the first mortgagee, paid him off, and agreed with the other creditors, that if they would pay his money on a certain day, they should redeem him, otherwise he should have the lands absolutely. The other creditors were allowed to redeem after twenty years' possession and expensive improvements; and the mortgagee was allowed only necessary repairs and lasting improvements.

Collateral agreement.

And a collateral agreement, that in case of the non-payment of the mortgage-money by the mort-

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gagor, and on the payment of a further sum by the mortgagee, the latter shall become entitled, as purchaser, to the equity of redemption, will be inoperative to exclude the right to redeem on repayment of these sums: *Willett* v. *Winnell*, 1 Vern. 488; see also *Jennings* v. *Ward*, 2 Vern. 520.

It is clear that any collateral benefit reserved to the mortgagee as consequential on the non-payment of the money at the time appointed, would fall within the principle in question, though a further consideration were to move from the mortgagee, and a further act to be done by the mortgagor: see *Price* v. *Perrie*, 2 Freem. 258.

Right of pre-emption.

But an agreement giving to a mortgagee the advantage of pre-emption, in case of the mortgagor disposing of the property, would be sustained, as such an agreement has no compulsory operation in regard to the terms of the sale, or, indeed, in enforcing a sale at all; but leaves an option to the mortgagor whether to sell or not, and on what conditions: see *Orby* v. *Trigg*, 2 Eq. Ca. Ab. 599, pl. 24; 9 Mod. 2.

The doctrine under consideration seems to have been somewhat relaxed in certain instances, where there was ground to presume, from the relationship subsisting between the parties, that the grantor intended a benefit to the party advancing the money *ultra* the purpose of security; as where there is an intention to effect a settlement of the estates, besides the consideration of the money paid: *Bonham* v. *Newcomb*, 1 Vern. 7, 214, 232.

Conditional purchases to be distinguished from mortgages.

The cases in which the Courts of Equity have refused to give effect to an agreement for converting a mortgage transaction into a purchase on a given event or period, are to be distinguished from those of conditional or defeasible settlements or purchases, where the original and primary intention manifestly is that the property shall go according to the uses of the conveyance, with a reservation to the grantor of a power of defeating it on payment of a stipulated sum; for, if such be the clear *bonâ fide* intention of the parties, there is no principle of law or equity which prevents the grantor from requiring the strict

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performance of the proviso. The line of demarcation between mortgages and defeasible purchases certainly is not very broad; and in determining the actual nature and character of the transaction, it is often necessary, not only minutely to examine the contents of the instrument, but also to look to the conduct of the parties acting under it. In regard to the former, the circumstance of there being no covenant by the grantor for the repayment of the consideration-money, has always been considered as favouring the conclusion that a purchase and not a mortgage is intended, though this circumstance is by no means conclusive; as such a covenant, though usual, is not an essential part of a security for money. In regard to circumstances *dehors* the instrument, the fact of the consideration-money being equivalent to the value of the lands, and possession being delivered to the grantee at the execution of the conveyance, would be important, as characteristic of a purchase rather than a mortgage (see *Cotterell* v. *Purchase*, Cas. Temp. Talb. 63; *Sevier* v. *Greenway*, 19 Ves. 415), as immediate possession rarely accompanies a deed intended as a security only; and the circumstance that the expenses of the conveyance are borne by the grantee, seems open to the same reasoning.

Covenant to repay the consideration-money is material.

The following are the leading cases in which the instrument has been held to operate as an absolute conveyance or settlement with a clause of redemption, and not as a security merely. In *Endsworth* v. *Griffith*, 2 Eq. Ca. Ab. 595, pl. 6; *S. C.* 5 Bac. Ab. 9; 15 Vin. 468, pl. 8, lands in Wales were mortgaged for 400*l.*; afterwards the mortgagee brought an ejectment, got possession of the premises, and then obtained a release of the equity of redemption from the mortgagor, upon payment of 350*l.* more. A note was given at the time of executing the release that the releasee, on payment of the 750*l.*, and all charges of repairs, within a year, by the releasor, should reconvey to him the premises. Payment having been neglected for sixteen years, redemption was not allowed, the note being considered as an original agreement between the parties to sell and convey

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the premises upon the terms therein mentioned; and the decree was affirmed by the House of Lords, 5 Br. P. C. 184.

So, in *King* v. *Bromley*, 2 Eq. Ca. Ab. 595, pl. 8; *S. C.* 5 Bac. Ab. 10, where a man settled copyholds on his marriage with a condition that if he paid 50*l.* on a day specified then the whole settlement should be void, it was resolved that this was not designed for a mortgage, but left it in the election of the surrenderor either to perform the condition by paying the money, or to let the settlement stand.

Reference may also be made to *Tasbrugh* v. *Eshlin*, 2 Br. P. C. 265; but the circumstances of that case were so special that it cannot be regarded as of general application with regard to the point in question: see also *Goodman* v. *Grierson*, 2 Ba. & B. 274.

Effect of recognition of instrument as a mortgage.

But however strongly the contents of the instrument itself, or extrinsic facts, may favour the supposition that the parties had an actual purchase in contemplation, yet if in subsequent dealings between them, and particularly in a written document, the relationship of mortgagor and mortgagee has been treated as subsisting between the parties, this, of course, conclusively determines the character of the transaction, and precludes any other construction of the instrument: see *Sevier* v. *Greenway*, 19 Ves. 413; *Verner* v. *Winstanley*, 2 Sch. & Lef. 393; *Harris* v. *Horwell*, Gilb. Eq. Rep. 11; *Ord* v. *Smith*, Sel. Ch. Ca. 9; *Perry* v. *Marston*, 2 Br. C. C. 397.

If it be clear that the original transaction was an absolute sale, any subsequent agreement for re-purchase will, of course, be strictly observed, and cannot be insisted on as turning the transaction into a mortgage: *Barrell* v. *Sabine*, 1 Vern. 268. In *Perry* v. *Marston*, 2 B. C. C. 397, on the other hand, a surrender of mortgaged copyholds to the use of the mortgagor and wife for lives, remainder to the use of the mortgagee and his heirs, though in somewhat ambiguous terms, was held to have extinguished the equity of redemption. In *Davis* v. *Thomas*, 1 R. & M. 507, a mortgagor released his equity of redemption to the mortgagee, and subsequently the mortgagee demised

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the estate to the former mortgagor for 99 years, determinable on lives, at a rent; and on the lease was indorsed an agreement signed by the mortgagee, that if the lessee duly paid the rent he should be at liberty to re-purchase the premises at any time within five years; but if default was made in such payment of rent, the agreement was to be void. The lessee failed in payment of rent, but within the five years tendered the arrears and applied to re-purchase. His bill for that purpose, and for redemption, was dismissed, and the decision was confirmed on appeal. See also *Vernon* v. *Bethell*, 2 Ed. 110, and *Saint John* v. *Wareham*, cit. 3 Swanst. 631, where the circumstances seem to have been similar.

Alleged distinction in regard to rent-charges.

It remains to be observed that the doctrine "once a mortgage always a mortgage" (as it has been tersely expressed) has, in some early cases, been considered as applying with less force to the case of the mortgage of a rent-charge than in other cases: see *Floyer* v. *Lavington*, 1 P. W. 268; *Mellor* v. *Lees*, 2 Atk. 494. There seems, however, to be no very solid ground for distinguishing a mortgage of a rent-charge from that of land, in regard to the admissibility of restrictions on the power of redemption; and as in both the cases which are supposed to have turned upon this distinction, the lapse of time was such as, by the general rules of the Court, would have been a bar to the right of redemption, they are not to be relied upon as establishing any such distinction: see *Longuet* v. *Scawen*, 1 Ves. Sen. 404; *Floyers* v. *Sherard*, Amb. 18.

Whether mortgagor can pay off debt before the time named in the proviso for redemption.

It should seem, upon the general principles of law applicable to contracts, that a proviso for redemption postponing the payment of the principal money in a mortgage to a distant day, is binding as well on the mortgagor as on the mortgagee, so as to preclude the former from compelling the receipt, as well as the latter from enforcing payment, before the day appointed. A contrary doctrine was at one time considered to have been laid down in the case of *Talbot* v. *Braddyl*, 1 Vern. 183; but in that case the period for redemption had been fixed at thirty years distant from the date of the mortgage, and the value of the

property had meanwhile increased considerably, and the Court decreed redemption before the specified time on the ground of relief against an "intolerable bargain" (*m*). It may now be regarded as settled that a mortgagee cannot be compelled to allow the property to be redeemed till the time fixed has arrived, even though the mortgagor tender with the principal the full amount of interest up to the day fixed for redemption: *Brown* v. *Cole*, 14 Sim. 427; and see *Burrowes* v. *Molloy*, 2 J. & L. 521 (*n*).

Agreement restricting right of foreclosure.

Of course, by agreement between the parties, the mortgagee's right to foreclose may be restricted, and the right to redeem left unfettered, except by the equitable doctrine which requires six months' notice to the mortgagee, in order that he may have time to find another investment for his money; and even that may be dispensed with. This is the case of a Welsh mortgage, redeemable at any time, but not liable to foreclosure at all, which we have next to consider.

Welsh mortgages.

Welsh Mortgages.]—A Welsh mortgage is usually described as a conveyance of an estate, redeemable at any time on payment of the debt, without payment of interest by the borrower, or account of intermediate rents by the lender, who is let into possession from the beginning, and takes the rent in lieu of interest; and it is stated that there is no covenant by the mortgagor for payment of the debt: *Yates* v. *Hambley*, 2 Atk. 363; *Lawley* v. *Hooper*, 3 Atk. 280. But, if the value of the rents be excessive, the Court will decree an account: *Fulthorpe* v. *Foster*, 1 Vern. 476: see also *Webb* v. *Rooke*, 3 Sch. & L. 661; *Thoromy* v. *Dea*, Ba. & B. 109; *Alderson* v. *White*,

Welsh mortgagee liable to account.

(*m*) So, also, where the mortgagee was solicitor for the mortgagor, a restraint on redemption for twenty years was set aside as oppressive: *Cowdry* v. *Day*, 1 Gif. 316.

(*n*) The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), empowers promoters of undertakings immediately to redeem mortgages of lands compulsorily taken upon payment of principal interest, and costs up to the date of redemption, together with six months' additional interest, and, in some cases, also costs of reinvestment of the money paid off: see sects. 108—114.

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2 De G. & J. 197 ; *Balfe* v. *Lord*, 2 Dr. & W. 480. And probably an account against the mortgagee would now be observed, whether the value of the rents be excessive or not : see Coote, Mortg. 356.

Time begins to run against a Welsh mortgage only after debt is paid.

No time being fixed for redemption in a Welsh mortgage, the right to redeem cannot be barred (until the debt has been paid) by lapse of time, nor can the mortgagor be foreclosed : see *Talbot* v. *Braddyl*, 1 Vern. 395 ; *Yates* v. *Hambley*, 2 Atk. 360.

In *Orde* v. *Hemming*, 1 Vern. 418, a demurrer to a bill to redeem a mortgage sixty years old, the agreement in which was that the mortgagee should enter and hold till he was satisfied, was overruled : see also *Fenwick* v. *Reed*, 1 Mer. 114.

Every mortgage implies a personal debt.

The circumstance that there is or is not a personal agreement or covenant by the mortgagor to pay the debt appears to be quite unimportant in the constitution of a Welsh mortgage, the debt existing independently of any express covenant or agreement ; accordingly, under the old law, when there was no covenant to pay by the mortgagor, the heir was decreed relief against the mortgagor's personal estate : *Howel* v. *Price*, 1 P. Wms. 294 ; *King* v. *King*, 3 P. Wms. 358 ; see *Mellor* v. *Lees*, 2 Atk. 494. *King* v. *King* was a case of an ordinary mortgage without any covenant to pay the debt; and Lord Chancellor *Talbot* was of opinion that every mortgage implies a loan, and every loan implies a debt, and that though there were no covenant or bond, yet the personal estate of the borrower, of course, remained liable to pay off the mortgage, and that it was so in the case of Welsh mortgages, where no day certain is appointed for the payment, but the matter left at large. In *Teulon* v. *Curtis*, You. 610, A., being indebted to C., agreed to grant to him a lease for 500 years, of a reversionary estate of inheritance, to be void in the event of the money, with interest at five per cent., being paid, which A. covenanted to do on demand ; and it was provided that, until the money should be paid, T. might occupy the premises. Before the death of the tenant for life, T. filed a bill for foreclosure, which was dismissed, the security being regarded as being in the nature of a Welsh

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mortgage, under which the mortgagee was to hold the property till his debt should be paid (*o*).

It has been decided in an Irish case that a person empowered to raise money by mortgage may effect a Welsh mortgage: *Gorman* v. *Byrne*, 8 Ir. Com. L. 394. Such mortgages appear, however, to have been formerly very common in Ireland: see *Hartpole* v. *Walsh*, 5 Br. P. C. at p. 275.

Statutory powers of sale, &c., whether applicable to Welsh mortgages.

The continuing right of redemption incident to a Welsh mortgage would apparently be a sufficient expression of intention that the power of sale given to mortgagees by sect. 19, sub-sect. 1, of the Conveyancing and Law of Property Act, 1881, should not apply to such a security. Having regard to the fact that the definition of "mortgage" in sect. 2 of that Act includes "a charge," it would seem that such other powers and provisions of the Act relating to mortgages as are not inconsistent with the nature of Welsh mortgages, will be applicable thereto: see Fisher, Mortg. 5.

Mortgage with power of sale.

Mortgage with Power of Sale.]—Powers of sale were introduced into mortgages for the purpose of obviating the expense and delay attendant on the remedy by foreclosure, which were chiefly felt where that remedy was most often required to be put into operation—in cases of deficient security. The powers enable the mortgagees to sell the estate at any time after default, and that without the concurrence of the mortgagor, and even without notice to him (unless notice be made a condition, *Hawkins* v. *Ramsbottom*, 1 Price, 138), and operates, therefore, very materially to abridge the mortgagor's equitable right to redeem, for which reason the validity of such powers was formerly considered to be doubtful (see *Croft* v. *Powell*, Com. 603), but it is now firmly

(*o*) In *Hartpole* v. *Walsh*, 5 Br. P. C. 267, the mortgagor covenanted to pay the debt within eighteen months after demand; sixty years afterwards a bill to redeem was dismissed; but it would seem that the decree proceeded, and was affirmed on appeal, on the ground of the impossibility of taking long and complicated accounts at such a distance of time: see the observations of Lord *Lyndhurst* on this case in *Teulon* v. *Curtis*, *supra*.

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established: *Clay* v. *Sharpe*, 18 Ves. 346, n.; *S. C.*, Sugd. V. & P. App., No. XIII., p. 1096; *Alexander* v. *Crosbie*, 1 J. & L. 666; *Corder* v. *Morgan*, 18 Ves. 344.

These decisions have established the validity of these powers of sale; and they also shew that the concurrence of the owner of the estate cannot be required by a purchaser, where the estate is authorized to be sold without the assent of the owner, in case default is made in payment of the money on the day named, although there be an express covenant on his part to join in the sale; and that a purchaser is not entitled to require the owner to concur in the conveyance. And it may also be concluded from the case of *Corder* v. *Morgan*, *supra*, that if a purchaser should refuse to complete his sale, by reason of the owner of the estate not concurring in it, specific performance will be decreed against him, with costs.

Where the legal estate was outstanding, and the equitable owner appointed a new trustee for sale, in favour of certain objects, it was held that the trustee of the legal estate must convey to the new trustee without the concurrence of the *cestui que trust*: *Angier* v. *Stannard*, 3 My. & K. 566. Where a power of sale is vested in the mortgagee himself, he is, subject to the purpose of satisfying his own debt, a trustee for the mortgagor; but equity, it seems, will sometimes restrain a sale by a trustee, when it would not have prevented the mortgagee himself from proceeding to sell. Thus, where the power of sale was in a trustee, the Court granted an injunction to restrain the exercise of the power, it appearing that the trustee had not apprised the mortgagor of his intention to proceed to a sale, and it being his duty to attend equally to the interest of both *cestui que trusts*, and to apprise both of the intention of sale, so that each might take means to procure an advantageous sale: *Anon.*, 6 Madd. 10.

As to power of sale in mortgage deed being exercised by a transferee.

It is important that a power of sale in a mortgage deed should be reserved, in express terms, to the *assigns* of the person in whom the power is vested; for otherwise, the alienee of such person is unable to exercise the power, and the circumstance that the

"assigns" are empowered to give receipts to purchasers, does not, according to the rigid construction which has been applied to these powers, extend the power of sale to them: *Bradford* v. *Belfield*, 2 Sim. 264. So, where a power of sale was given to three trustees and their heirs, and the money to arise by the sale was directed to be paid to the trustees, and the survivors or survivor of them, one of the trustees died, and the power was exercised by the two survivors, the Court of King's Bench determined that it was not a good execution of the power: *Townsend* v. *Wilson*, 1 B. & Al. 608 (*p*). Care should be taken that the power to sell and the authority to give discharges to purchasers, are co-extensive, *i.e.*, are given to precisely the same persons; for a discrepancy between them raises the question as to how far the one is controlled by the other (*q*).

Power of sale does not prejudice right to foreclose.

The power of sale in a mortgage (*r*) forms an *additional* remedy in the hands of the mortgagee, and does not interfere with his right as mortgagee to foreclose the equity of redemption: *Ex parte Hodgson*, 1 Gl. & J. 12; *Ex parte Davis, re Hagley*, 3 D. & C. 504.

The necessity for the insertion of express powers of sale in mortgage deeds is now to a great extent superseded by the statutory powers of sale given to mortgagees by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sect. 19. See

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(*p*) But as to the exercise and performance of trusts and powers by surviving executors or trustees of instruments coming into operation since the 31st of December, 1881, see the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sect. 38.

(*q*) The statutory power of sale given by the Conveyancing and Law of Property Act, 1881, is exercisable "by any person for the time entitled to receive and give a discharge for the mortgage money": sect. 21 (4).

Mere trust to sell, not a mortgage.

(*r*) If the conveyance be made to the mortgagee in trust for the mortgagor until default, and then in trust to sell, the transaction does not constitute a mortgage properly so called, because the estate never vests absolutely in the mortgagee, and there is no forfeiture: see *Watson* v. *Waltham*, 2 A. & E. 485. Doubts, too, may arise how far some of the doctrines applicable to mortgages, in regard to tacking, &c., apply to such instruments; and for these reasons they appear not to present the most eligible form of security.

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further as to statutory and other powers of sale, *post*, Chap. IX. of this Dissertation.

Equitable mortgage.

Equitable Mortgages.]—An equitable mortgage may be constituted (i.) by a formal mortgage of the equity of redemption where the legal estate is vested in a prior mortgagee; (ii.) by any writing from which the intention to mortgage can be gathered with sufficient certainty, and an attempt to make a legal mortgage, which fails for want of some solemnity, as inrolment, or (formerly) presentment of a surrender of copyholds, &c., is valid in equity, and gives the mortgagee a right to a better assurance: *Mestaer* v. *Gillespie*, 11 Ves. 626; *Taylor* v. *Wheeler*, 2 Salk. 449; or (iii.) by a deposit of deeds, court-rolls, or other documents of title by way of security for the payment of money. These three classes of equitable mortgages will be here briefly considered (*r*).

Mortgage of equity of redemption.

(i.) When the legal estate is outstanding in a prior mortgagee, the equity of redemption may be mortgaged *toties quoties*, and in the event of more than one such subsequent mortgage the question of priority between the equitable mortgagees depends upon their respective better right to call for the legal estate: *Ex parte Knott*, 4 Ves. at p. 618. This right will, as a general rule, depend upon the priority of date of the several mortgages, according to the legal maxim, "*qui prior est tempore, potior est jure*": *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 491; *Wilmott* v. *Pike*, 5 Ha. 14; *Rospin* v. *Harrison*, 2 K. & J. 100. This rule is, however, qualified by another important principle, viz., that where equities are equal, the law must prevail: if, therefore, an equitable mortgagee, who has advanced his moneys without notice of a prior equitable mortgage, afterwards gets in the legal estate (even though he may then have notice of the prior charge), he will be entitled to the full benefit of the legal estate thus acquired, and will be entitled to claim payment in

(*r*) An equitable mortgagee may obtain *ex parte* an injunction restraining the mortgagor from parting with the legal estate, if not already outstanding: *London and County Bank* v. *Lewis*, 21 Ch. D. 490.

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preference to the prior mortgagee : *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 491 ; *Wortley* v. *Birkhead*, 2 Ves. S. 573 : unless, indeed, the subsequent mortgagee, at the time of getting in the legal estate, had notice of an express trust : *Saunders* v. *Deben*, 2 Vern. 271 ; *Allen* v. *Knight*, 5 Ha. 272 ; *Mumford* v. *Stohwassen*, L. R., 18 Eq. 536. This question will be hereafter more fully considered in the Chapter on Tacking, *post*, p. 937.

The advance of money on the security of a mortgage of the equity of redemption is also attended by the danger that the legal mortgagee may have made further advances on the security of his mortgage, before the date of the equitable mortgage, or that he may, thereafter (if without notice of the equitable mortgage), make such advances, all which further advances he will be entitled to tack to his original mortgage, and thus claim in respect of them in priority to the subsequent mortgagee. A person lending money on the security of an equity of redemption ought always, therefore, to inquire of the legal mortgagee as to the total amount actually claimed by him on the security thereof, and give him formal notice of the intended mortgage. The subsequent mortgagee can effectually protect himself against the possibility of further advances by an assignee of an original mortgage, who has no notice of the subsequent mortgage, by endorsing a notice of the subsequent mortgage on the original mortgage ; but this the first mortgagee will seldom permit.

The question of notice to trustees and debtors, &c., as affecting the priority of assignments of personal chattels and choses in action, will also be discussed hereafter.

Agreement for mortgages.

(ii.) A specific performance of an agreement for a future advance cannot be enforced against either the proposed borrower : *Rogers* v. *Challis*, 27 Beav. 175 ; *Chinnock* v. *Sainsbury*, 6 Jur. N. S. 1318 ; or against the proposed lender : *Sichel* v. *Mosenthal*, 30 Beav. 371 ; *Lariso* v. *Gurety*, L. R. 5 P. C. 346. But it seems that damages may be recovered for the breach of such an agreement to the extent of the expenses actually incurred in respect of the proposed security :

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Duckworth v. *Ewart*, 10 Jur. N. S. 214. An agreement to secure by mortgage, with an immediate power of sale, an advance made at the time of the agreement will, however, be specifically enforced: *Hermann* v. *Hodges*, L. R. 16 Eq. 18; so also an agreement to secure a past advance in consideration of forbearance to sue: *Alliance Bank* v. *Brown*, 2 Dr. & Sm. 289.

Agreements to pay costs, if matter falls through.

Agreements are sometimes entered into, upon the treaty for an intended loan, that the reasonable costs of the lender shall be paid, if the matter falls through: such an agreement will not entitle the lender to claim the banker's commission, or other costs of obtaining the money, nor, apparently, the costs of realizing securities for the purposes of the loan: *Re Blakesley*, 32 Beav. 379. Nor will it cover the interest of money lying idle during the negotiations: *Sweetland* v. *Smith*, 1 Cr. & M. 585.

Informal instruments.

Any instrument, however informal, from which it can be inferred that the parties intended that any property, real or personal, shall be a security for a debt, constitutes a charge on that property of the nature of an equitable mortgage. So where the plaintiff agreed to let premises to B. (which B. was to fit up as a restaurant at his own expense) at a premium of 1,000*l.*, and to lend or obtain that sum for B. at interest upon the security of the lease when granted; and B. became bankrupt before any lease was granted or money paid, and his assignee sold the fittings, &c., under an order of the Court; it was held that the agreement constituted an equitable contract between the plaintiff and B. that the premises, as fitted and licensed, should be a security for the premium, and consequently that he was entitled to an equitable mortgage thereon: *Tebb* v. *Hodge*, L. R. 5 C. P. 73. So also an authority to sell or mortgage property and to retain the amount of the debt out of the proceeds is an equitable mortgage: *Ex parte Hodgson*, 1 Gl. & J. 13; *Eyre* v. *McDowell*, 9 H. L. C. 620. So also in *Ex parte Wills*, 2 Cox, 233, a recital in an assignment of rent of leasehold premises that the intention of the parties was to make a security for money borrowed, was held to amount to an equitable mortgage of the lease: see *Dale*

Recitals.

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v. *Smithwick*, 2 Vern. 151; *Card* v. *Jeffrey*, 2 Sch. & L. 274; *Ludlow* v. *Grayall*, 11 Pri. 58. Similarly, where a wife *in extremis*, having just been delivered of a child, appointed by will real property to her husband in fee; and after her death the husband gave his bond to secure 3,000*l.* to the infant, which bond recited that he had upon the execution of the will given his wife a promise that he would make provision for the infant: it was held that the recital created a lien on the land for the 3,000*l.*: *Ex parte Atkins*, 2 Y. & C. Ex. 536.

Costs of perfecting security.

The mortgagor must bear the costs of perfecting the security by conveyance, or in the case of copyholds, by procuring himself admitted and surrendering to the mortgagee, including fines and fees: *Pryce* v. *Bury*, 18 Jur. 967; *S. C.*, cit. L. R. 16 Eq. 153 n.

Deposit of deeds operates as a mortgage in equity.

(iii.) A deposit of title-deeds by the owner of an estate with his creditor, whether for the purpose of securing a debt antecedently due, or a sum of money advanced at the time, operates as a mortgage in equity, by virtue of which the depositary acquires not merely the right of detaining the deeds until the debt is paid, but an equitable interest in the land itself; and a simple delivery of the deeds will have this operation, without any express agreement as to the object of the delivery; as the court would infer such to have been the purpose of the deposit, unless the contrary were shewn, from the relation of debtor and creditor subsisting between the parties: *Ex parte Wright*, 19 Ves. 258. And it has been decided that a deposit of copies of court roll has the same effect in regard to copyholds: *Ex parte Warner*, 19 Ves. 202; *Winter* v. *Lord Anson*, 3 Russ. 492; *Whitbread* v. *Jordan*, 1 Y. & C. 303 (*s*).

Deposit of copies of court roll

Doctrine disapproved of.

(*s*) The doctrine has been viewed with some disapprobation, as a direct infringement of the enactment of the Statute of Frauds, which declares that no interest in lands shall be granted or created without a note in writing; and Lord *Eldon* scarcely ever adverted to it in the numerous instances in which he had occasion to apply the principle without expressing his strong reprehension of it: 11 Ves. 403, 404; 14 Ves. 606; *Ex parte Kensington*, 2 Ves. & B. 83; *Ex parte Hooper*, 1 Mer. 9. It is observable, however, that in the stat. 9 Geo. 4, c. 14 (stated *ante*, Vol. I. p. 274), which was

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One of the first cases establishing the validity of mortgages by the deposit of deeds was *Russell* v. *Russell*, in 1783, 1 B. C. C. 269. And in *Featherstone* v. *Fenwick*, 1 Br. C. C. 270, n., and *Harford* v. *Carpenter*, Ib., Lord *Thurlow* held that the deposit of deeds entitled the holder to have a mortgage, and to have his lien effectuated, although there was no special agreement to assign, the deposit affording a presumption that such was the intent: see also *Hankey* v. *Vernon*, 2 Cox, 10; *Ex parte Coming*, 9 Ves. 115; *Ex parte Haig*, 11 Ves. 403; *Ex parte Mountfort*, 14 Ves. 606; *Monkhouse* v. *Corporation of Bedford*, 17 Ves. 380; *Casberd* v. *Ward*, 6 Pri. 411.

Deposit good against the crown.

In the last case, it was held that a deposit security was good against the crown, provided the deposit was *bona fide* made before the depositor became a debtor to the crown by record or specialty: see *Fector* v. *Philpott*, 12 Pri. 197. Where the legal estate was outstanding in a trustee, and the mortgagor had died without heirs, a sale was decreed at the suit of the depositee, and the crown was dismissed, it being held that there could be no escheat of an equity: *Prescott* v. *Tyler*, 1 Jur. 470.

Against voluntary settlement.

An equitable mortgage by deposit of deeds constitutes the mortgagee a purchaser for good consideration under the stat. 27 Eliz. c. 4, so as to avoid a prior voluntary settlement: *Lister* v. *Turner*, 5 Ha. 281.

Bankruptcy.

If an act of bankruptcy be committed by a mortgagor between the time of his depositing the title-deeds and executing a regular mortgage, as the beneficial interest passed to the mortgagee by the deposit, the validity of the security is not affected unless the deposit is made without pressure to secure an antecedent debt, and so near the act of bankruptcy in point of time as to constitute a fraudulent preference; in which case the depositary will be

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passed principally for the purpose of extending the provisions of the Statute of Frauds (29 Car. 2, c. 3, ss. 1 and 3), to cases to which it had been judicially determined not to apply, the doctrine in question remained untouched.

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ordered to deliver up the deeds: *Ex parte Ainsworth*, 3 Mont. & A. 451 : see also *Ex parte Hiern*, 13 Ves. 114. A deposit to secure a voluntary bond debt will be good notwithstanding subsequent bankruptcy of the obligor, in the absence of fraud, or unless the obligor was insolvent at the time of making the security : *Meggison* v. *Foster*, 2 Y. & C. C. C. 336.

Effect of deposit may be negatived by apparent intention.

But though a deposit of deeds without any express agreement is sufficient to create an equitable mortgage, yet, if the circumstances under which they are left raise an inference that such was not the purpose of the party delivering them, the deposit will not have this effect.

Thus, where A. applied to his bankers to advance money on a lease, which they declined, but he left it with them without making any declaration of his reasons for so doing, it was held that this gave the bankers no lien upon the lease for their debt : *Lucas* v. *Dorrien*, 1 Moo. 29 (*t*).

All property comprised in deeds is included.

A deposit of title-deeds *primâ facie* creates an equitable mortgage on the whole property comprised in them : *Ashton* v. *Dalton*, 2 Coll. 565 ; *Ex parte Bisdee*, 1 M. D. & De G. 333. But a contrary intention of the parties may be shown by the terms of the memorandum of deposit : *Ex parte Robinson*, 1 D. & C. 119 ; *Ex parte Heathcote*, 2 M. D. & De G. 711 ; or by other written evidence : *Ex parte Glyn*, 1 M. D. & De G. 29.

An oral agreement to deposit deeds without delivery creates no lien.

A parol agreement to deposit deeds (without an actual delivery) is void under the Statute of Frauds, and inoperative to create any lien upon the property. And therefore, where certain bankers advanced a sum of money on the deposit of a lease, and afterwards advanced the borrower further sums to enable him to renew the lease, which renewed lease was, when obtained, to be delivered to them ; it was held

(*t*) A statement in writing of the circumstances under which a deposit has been made cannot, it seems, be contradicted by oral testimony : *Ex parte Combe*, 17 Ves. 369. Although parol evidence is admissible to extend the lien evidenced by a written memorandum : *Ex parte Kensington*, 2 Ves. & B. 79.

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that the debtor becoming bankrupt before the lease was given up by the lessor's solicitor, the petitioners had no claim upon it: *Ex parte Combe*, 4 Mad. 249: see also *Ex parte Hooper*, 1 Mer. 7; *Ex parte Perry*, 3 M. D. & De G. 252; *Tebb* v. *Hodge*, L. R. 5 C. P. 73. A delivery of the deeds to the wife of the depositor, to be held between him and the creditor, has been decided not to be a deposit so as to create a lien, the possession of the wife being, in the construction of law, the possession of the husband: *Ex parte Coming*, 9 Ves. 115. Where deeds relating to freehold lands were intended to be deposited, together with deeds relating to leaseholds, and were included in the memorandum of deposit, though not deposited, the freeholds were held to be subject to the lien: *Ex parte Leathe*, 3 D. & C. 112. Where, however, a memorandum of deposit accompanied by delivery, has been given to secure a debt to a banking firm, the deposit may be extended beyond the original purpose to advances after an alteration in the firm without an actual re-delivery: *Ex parte Kensington*, 2 Ves. & B. 79; *Ede* v. *Knowles*, 2 Y. & C. C. C. 172. An agreement to deposit a lease when granted confers a lien upon the lease which is subsequently obtained: *Ex parte Orrett*, 3 Mont. & A. 153: see *Ex parte Edwards*, 1 D. 611; *Ex parte Jones*, 4 D. & C. 750. It seems from *Williams* v. *Medlicot*, 6 Price, 496, that parol evidence of the assent of a remainderman to a deposit of deeds by the tenant for life would be admissible to charge the remainder.

Delivery to wife of depositor.

Charge in writing retained by the debtor.

Deposit with A. not extended to advances by B.

A delivery of deeds to one person cannot be made by oral agreement to cover advances made by another, unless (as it would seem) the depositary is merely a trustee, and has not himself made any advance: *Ex parte Whitbread*, 19 Ves. 212. It is, perhaps, open to doubt whether the principle of the case of *Ex parte Whitbread* would apply, where the advances were made by the depositary partly out of his own moneys and partly out of the moneys of another; for though he cannot hold the deeds to secure advances made by himself and another, he may, it is apprehended, hold them to secure advances

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made by *himself* on his own behalf and that of another.

The practical result of this view of the question is that, as it has not been positively decided that a deposit of deeds with one person in trust even wholly for another is good, and inasmuch as it has been decided that such a deposit for the benefit of himself and another is *not* good, it is better to avoid all question, by placing the deeds in the hands of the person who is to take the beneficial interest in the security; and if the deposit is intended to operate for the benefit of any other person, this intention should be expressed in writing.

Order on bankers to hold deeds for creditor.

Where a debtor gave a written order to his bankers with whom his title-deeds were deposited for safe custody, to hold them for a creditor, it was held that this constituted an equitable mortgage by deposit: *Daw* v. *Terrall*, 33 Beav. 218.

A written agreement that bills should be paid at maturity, out of the proceeds of property of which the deeds were in the hands of a solicitor for sale; and if the property should not be then sold, the deeds should remain in the solicitor's hands as a security, to which agreement the solicitor was a party, was held to entitle the creditor to the usual order for sale in cases of equitable mortgage, but subject to the solicitor's lien: *Ex parte Greenhill*, 3 D. & C. 334; and in like manner an equitable mortgage may be made, subject to the lien of a prior depositary, by written agreement that he should hold the deeds for the second mortgagee: *Fector* v. *Phillpott*, 12 Pri. 197.

Deposit of deeds by a partial owner, *e.g.*, tenant for life.

A person who has a partial ownership in an estate can, of course, only charge the lands by a deposit of the deeds to the extent of that ownership. Thus, if a tenant for life deposit the title-deeds relating to the inheritance with a creditor, the estate for life only is charged: *Williams* v. *Medlicott*, 6 Pri. 495.

Deposit by husband;

By parity of reason, if a man deposit his wife's mortgage (over which he has, *jure mariti*, a power of disposition), to secure a debt of his own, this will be good against the wife surviving, as an alienation *pro tanto*: *Bates* v. *Dandy*, 2 Atk. 207.

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by mortgagee;

And if a person who is himself a mortgagee, deposit the deeds which he holds in that character with a third person, this will operate as good equitable transfer of the mortgage; and in the event of his bankruptcy, his assigns will be decreed to make a legal transfer accordingly: *Wallwyn* v. *Assignees of Shepherd*, 4 Ves. 119; *Ex parte Smith*, 2 D. & C. 271. So, if a deposit-creditor deliver over the deposit-deeds to a creditor of his own, the latter will be entitled to hold them against the original depositor: *Ex parte Smith*, 1 Ves. & B. 518. But in both these cases the sub-depositary of course can only stand in the place of the original depositary (*i.e.*, the *mesne* creditor); and must therefore deliver up the deeds on payment of the amount for which they were originally deposited, though a larger sum be due to himself. But if the mortgagee of a term deposit his mortgage and afterwards purchase the equity of redemption and reversion in fee, he and his assignees in bankruptcy are bound by the deposit to the full extent of his interest thus acquired; *Ex parte Tuffnell, re Watts*, 4 D. & C. 29. A vendor who retains the deeds can, by their deposit, confer a security only to the extent of his lien: *Hooper* v. *Ramsbottom*, 6 Taunt. 12.

by executor.

One of several co-executors may deposit deeds by way of security without the concurrence of the others: *Re Sheffield Union Banking Co.*, 13 L. T. N. S. 477.

If a person have no interest in deeds deposited with him, of course he can confer none; and therefore, where a person to whom deeds are delivered for a particular purpose, and not by way of lien, deposits them as a security with a third person, they may be recovered from such person by the owner, without paying the debt owing to his bailee: *Jackson* v. *Butler*, 2 Atk. 306; see also *Bell* v. *Taylor*, 8 Sim. 216.

A deposit of a bond as a security for a debt does not take the benefit of the obligation out of the reputed ownership of the depositor in case of bankruptcy, unless notice be given to the obligor: *Ex parte M'Turk, re North*, 2 Deac. 58. So notice must

be given to a company of the deposit of shares in it (being personal estate), or of a policy of insurance, &c. : *Ex parte Vallance, re Lashman,* 2 Deac. 354. See *post,* Chap. II.

Where the residue of a term in a house and the goodwill of a business were sold in a creditor's suit, with the consent of a mortgagee by deposit of the lease, and produced less than the amount of his debt, he was held to be entitled to the whole of the purchase-money : *Chissum* v. *Dewes,* 5 Russ. 29. As to the licence of a public-house, see *Manifold* v. *Morris,* 5 Bing. 420.

In the application of the doctrine regarding deposit-securities, three questions have arisen, requiring particular consideration :—

1st. Whether the deposit of title-deeds with a creditor, in order that a mortgage may be prepared, gives him an *immediate* lien ;

2nd. Whether a deposit can be made by an oral agreement to extend to *future* advances ;

3rd. Whether it is necessary that *all* the deeds should be deposited, and what is the effect of a delivery of some of the deeds to one creditor, and the rest to another.

1st. According to some cases at least, a delivery of deeds merely in order that a mortgage may be prepared, does *not* operate as an immediate deposit-security : see *Ex parte Bulteal,* 2 Cox, 243 ; *Norris* v. *Wilkinson,* 12 Ves. 192. But the case is otherwise where the deeds are delivered with a view to the preparation of a formal mortgage to secure an existing debt. Thus, in *Edge* v. *Worthington,* 1 Cox, 211, W. being pressed for payment of a sum due to E., the plaintiff, promised her a security on his real estate, and afterwards agreed to give her a mortgage on a certain house, and to send the title-deeds to her solicitor to enable him to prepare it. The deeds were sent and the mortgage prepared and executed ; but, before its execution, W. had, it was contended, committed an act of bankruptcy. Sir *L. Kenyon,* M.R., held that this was a valid mortgage from the time of the deposit. So in *Ex parte Bruce,* 1 Rose, 374, a petition for a sale was resisted

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by the assignees of the depositor, who had become bankrupt, on the ground that the deeds had been delivered to him not as the security, but in order that a legal mortgage might be prepared. Lord *Eldon* said, "The principle of equitable mortgage is, that the deposit of the deeds is evidence of the agreement; but if they are deposited for the express purpose of preparing the security of a legal mortgage, is not that stronger than an implied intention?" See *Ex parte Wright*, 19 Ves. 258. In *Hockley* v. *Bantock*, 1 Russ. 141, an agreement to secure a debt by a mortgage of freeholds accompanied by delivery of the title-deeds in order that a mortgage deed might be prepared, was held to constitute a valid equitable mortgage; and in *Keys* v. *Williams*, 3 Y. & C. 55, Lord *Abinger*, C.B., in the course of his judgment said, "Certainly, if before the money was advanced the deeds had been deposited with a view to prepare a future mortgage, such a transaction could not be considered as an equitable mortgage by deposit; but it is otherwise where there is a present advance, and the deeds are deposited under a promise to forbear suing, although they may be deposited only for the purpose of preparing a future mortgage. In such case, the deeds are given in part of the security, and become pledged, from the very nature of the transaction."

The charge will be strictly limited to the purposes specified by the memorandum of deposit, and all conditions therein contained must be duly complied with: *Burton* v. *Gray*, L. R. 8 Ch. A. 932.

Whether deposit-securities can be made to extend to future advances.

2nd. The next point to be considered, in regard to deposits of title-deeds, is, whether they can be made, by parol agreement, to cover future advances.

The affirmative seems to have been assumed in *Ex parte Mountfort*, 14 Ves. 606, where the question was, whether the security was not *confined* to the future debt, excluding the debt actually due; and Lord *Eldon* directed the commissioners (it being a case of bankruptcy) to inquire into the fact, and that the produce of the sale should be applied accordingly. See also *Mountford* v. *Scott*, 3 Madd. 34; *S. C.* Turn.

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& R. 274; in which the same question occurred. A doubt on the point seems to have been expressed in *Norris* v. *Wilkinson*, 12 Ves. 192. But numerous subsequent decisions have established the principle that though it is to be inferred that a deposit of deeds is confined to the debt then due, in the absence of any evidence on the subject, yet, if the creditor can show that at the time of the deposit or of the subsequent advance it was stipulated that the security should cover the future advances, his lien will extend to the sum so advanced, without any formal restoration and re-delivery of the deeds: *Ex parte Lloyd*, 1 Gl. & J. 389; *Ex parte Martin*, 4 D. & C. 457; *Ex parte Skinner*, 1 D. & C. 403; *Ex parte Langston*, 17 Ves. 277; *Ex parte Whitbread*, 18 Ves. 209.

And the circumstance of the deposit of the deeds being accompanied by a written memorandum, declaring it to be made to secure an existing debt, would seem not to exclude parol evidence extending it to future advances: see *Ex parte Kensington*, 2 Ves. & Bea. 79. But the rule extending deposit-securities to future advances upon oral agreements does not apply to creditors having *legal* mortgages: *Ex parte Hooper*, 1 Mer. 9. See also *Landerzee* v. *Willis*, 3 B. C. C. 21; *Ex parte Lloyd*, 1 Gl. & J. 386; *Ex parte Alexander*, Id. 409. A deposit-security for the payment of a bill of exchange is not discharged by the renewal of the bill: *Ex parte Skinner*, 1 D. & C. 403. As to deposit-securities to solicitors by their clients, see *post*, Chap. III.

Security for account.

It has been held that an account for beer, &c., cannot be tacked to a money deposit in a brewer's lease: *Chilton* v. *Carrington*, 1 Jur. N. S. 89.

Whether it is necessary that *all* the deeds should be deposited.

3rd. The other question to be considered in regard to deposit-securities is, whether it is necessary that *all* the deeds should be deposited. This was referred to as an undecided point by Lord *Eldon*, in *Ex parte Wetherell*, 11 Ves. 401, where there was an agreement for a security on the whole estate, but the deeds deposited related to a moiety only; his lordship, however, being of opinion that the effect of a

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memorandum which had been signed by the depositor, was to charge the entirety, the point did not call for adjudication. It was more directly raised, however, in the case of *Ex parte Pearse*, Buck. 525, accompanied by the additional circumstance of difficulty, that part of the deeds had been deposited with one creditor, and part with another. Lord *Eldon* was of opinion, that neither the one nor the other of the creditors had an equitable mortgage, on the ground that the circumstances of the case showed that it was not the intention of the one that he should have a mortgage till an actual one was executed to him, and that the other was not to have an equitable mortgage till he got possession of the whole of the deeds. It is, however, fully established that as a general rule an equitable mortgage may be created by a deposit of part of the deeds: *Ex parte Chippendale*, 1 Deac. 67; 2 Mont. & A. 229; *Ex parte Arkwright*, 3 M. D. & De G. 129.

In *Roberts* v. *Croft*, 2 De G. & J. 1, an equitable mortgage by deposit of part of the deeds was held to be good, though the absent deed was the conveyance: see also *Ex parte Pote*, 7 Jur. 159; *Ashton* v. *Dalton*, 10 Jur. 451; *Thorp* v. *Holdsworth*, L. R. 7 Eq. 147. And if some of the title-deeds are deposited with one creditor and the remainder with another, each creditor may have a valid security: *Roberts* v. *Croft*, 2 De G. & J. 1; unless the circumstances indicate a contrary intention: *Ex parte Pearse*, Buck. 525.

A valid equitable mortgage may be created by the deposit of a receipt for purchase-money, if there be no title-deeds in the depositor's possession: *Goodwin* v. *Waghorn*, 4 L. J. N. 5 Ch. 172; but not by the deposit of an attested copy of a deed: *Ex parte Broadbent*, 4 D. & C. 3.

General remark.

A cursory glance at the numerous preceding cases, which have arisen in regard to deposit-securities, will strongly demonstrate the inexpediency of relying upon this species of security, which ought never to be accepted, unless, perhaps, in the case of small temporary loans. It is not a little surprising, that some large banking and mercantile firms are in the habit

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of taking securities from their customers in this manner. They are always popular with borrowers, as avoiding the necessity of a formal deed of conveyance both on the occasion of the loan and of the repayment, and as leaving no trace of the transaction on the face of the title. The objection is not entirely removed by taking a memorandum in writing, though this is always to be preferred to a mere deposit. See *post*, Chap. VII., p. 957. One advantage attending a memorandum is, that, in case the mortgagor becomes bankrupt, and the depositary applies to the Court for an order for a sale, he is allowed his costs out of the estate, however informal may be the character of the writing, but not if he have a deposit of deeds without any writing: *Ex parte Brightwen*, 1 Swanst. 3; *Ex parte Sikes*, Buck, 349; *Ex parte Trew*, 3 Madd. 372; *Ex parte Robinson*, 1 D. & C. 119; *Ex parte Thorpe*, 3 Mont. & A. 441; *Ex parte Barclay*, 5 De G. M. & G. 403; *Ex parte Dingwall*, 6 L. T. N. S. 915: and a letter acknowledging the purpose of the deposit, and written some months after it was made is sufficient: *Ex parte Reynolds*, 4 D. & C. 278. But a memorandum drawn up by the mortgagee's clerk, and not signed by the mortgagor, does not constitute a writing within the rule: *Ex parte Emmerton*, 3 D. & C. 654. See, also, *Ex parte Reid*, 1 Mont. & M'A. 14; *Ex parte Pigeon*, 2 D. & C. 118.

Sale in bankruptcy.

A creditor holding deeds deposited with him by way of security, may, on the bankruptcy of the debtor, apply for an order for sale under rule 65 of the Bankruptcy Rules, 1883. In case the proceeds of the sale should be insufficient to satisfy the debt, the creditor may prove for the difference. If the creditor asserts, but the debtor denies, that the deposit was made as a security for future advances, an inquiry will be directed: *Shaw* v. *Foster*, L. R. 5 H. L. 321. It is now the established rule, that an equitable mortgagee is entitled to the rents from the time of the order for sale, because he might then have a receiver appointed the moment he asked it; and the order of sale, therefore, is considered as equivalent to the appointment of a receiver: *Ex*

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parte Bignold, 2 M. & A. 16; *Ex parte Carlon*, 3 M. & A. 328; 2 Dea. 333; *Ex parte Thorpe*, 4 D. & C. 85; 3 M. & A. 441. And notice to the tenants to pay their rents to the mortgagee makes no difference: *Ex parte Burrell*, 4 D. & C. 76; 3 M. & A. 439; *Ex parte Scott*, Id. 592. Under particular circumstances the mortgagee may become entitled to the rents before the order of sale: *Ex parte Bignold*, 4 D. & C. 259; 2 M. & A. 214. The rule, however, does not apply to a mortgagee having the legal estate, who, if he has neglected to enter, cannot claim the rents from the time of the order for sale, but is left to his legal rights: *Ex parte Living, re Tombs*, 1 Dea. 1; 2 M. & A. 223: see *Ex parte Barnes*, 3 Dea. 223; 3 M. & A. 501.

Equitable mortgagee's title to rents.

Though an equitable mortgagee, having no estate at law, has not a legal title to the rents, yet if they have been paid to him, the Court will so far recognise his equitable right, as not to compel him to refund. Thus, in the case of *Garry* v. *Sharratt*, 10 B. & C. 716, it was held, that the assignee of an insolvent debtor could not recover, from a creditor having a deposit security, rent received after the insolvency. See also *Sumpter* v. *Cooper*, 2 B. & Ad. 223. But the loan, it seems, is no defence to an action of trover for the deeds brought by the owner of the legal estate, unless he can be fixed with fraud: *Harrington* v. *Price*, 3 B. & Ad. 170. See also *Hooper* v. *Ramsbottom*, 6 Taun. 12; *Goode* v. *Burton*, L. R. 1 Ex. 189.

Sale where there is no bankruptcy.

The question whether, where there is no bankruptcy, the proper remedy of the holder of an equitable mortgage was by foreclosure or a sale, was formerly the subject of much conflict of judicial opinion. In *Pain* v. *Smith*, 2 My. & K. 417, the decree appears to have directed an *immediate sale;* which was done also in *Bayley* v. *Gould*, 2 Y. & C. 730; *Cox* v. *Toole*, 20 Beav. 145; *Redmayne* v. *Foster*, L. R. 2 Eq., and numerous other cases, most of which are collected in Coote, Mortg., p. 351, n. (*t*); but in *Parker* v. *Housefield*, 2 My. & K. 419, in which an immediate sale was asked for on the authority of *Pain* v. *Smith*, the decree was made for a foreclosure in default of payment within six months. And this

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course was followed in the cases of *Thorpe* v. *Gartside*, 2 Y. & C. 730; *Mellor* v. *Woods*, 1 Kee. 16; and *Carlon* v. *Farlar*, 8 Beav. 525. See also the cases collected in Coote, Mortg., p. 352, note (*u*).

It may, however, now be regarded as settled that the proper remedy of an equitable mortgagee by deposit of deeds is by foreclosure: *Pryce* v. *Bury*, 2 Drew. 41; *James* v. *James*, L. R. 16 Eq. 153. But see the provisions as to sale of mortgaged property contained in sect. 25 of the Conveyancing and Law of Property Act, 1881 (*post*, p. 911). A sale under this section may be directed at the instance of an equitable mortgagee by deposit: *Oldham* v. *Stringer*, 33 W. R. 251; 51 L. T. 895.

"When there is a deposit of title deeds, the Court treats that as an agreement to execute a legal mortgage, and therefore as carrying with it all the remedies incident to such a mortgage": per *Jessel*, M.R., in *Carter* v. *Wake*, 8 Ch. D. at p. 606.

The remedy where there is a mere charge or lien is sale: *Tennant* v. *Trenchard*, L. R. 4 Ch. A. 537. The remedy of a *puisné* mortgagee is foreclosure: *Richards* v. *Cooper*, 5 Beav. 304. A mortgagee of a reversion is entitled to an account, and in default of payment, to foreclosure: *Slade* v. *Rigg*, 3 Ha. 35; *Wayne* v. *Hanham*, 9 Ha. 62; but see *post*, p. 911.

Infants.

In *Scholefield* v. *Heafield*, 7 Sim. 669, the estate had descended upon an infant heir, and was directed to be sold at the suit of an equitable mortgagee, a sale appearing to the Court to be more beneficial to the infant than a foreclosure: see also *Lewis* v. *John*, 1 Coop. 8; *Price* v. *Carver*, 3 My. & C. 157. And this course would probably still be followed.

Liability of equitable mortgagee of lease to the rent and covenants.

It was formerly thought that a mortgagee, or other assignee of the legal estate in a lease, was liable to the rent and covenants, whether he had taken possession or not: *Williams* v. *Bosanquet*, 3 Moo. 500. And that under particular circumstances at least an equitable assignee of a lease, or even a mere depositary, who had taken possession of the premises, would be compelled to take an assignment to enable the lessor to sue him at law on the covenants of the lease: see *Lucas* v. *Comerford*, 1 Ves. jun. 235; *S. C.*

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3 Br. C. C. 166; *Flight* v. *Bentley*, 7 Sim. 149; *Jenkins* v. *Portman*, 1 Kee. 435. But these decisions have been expressly overruled in the case of *Moores* v. *Choat*, 8 Sim. 508, and it may now be regarded as settled, that a mere depositary of a lease is not responsible for payment of the rent or observance of the covenants of the lease, and that he cannot be compelled by either the lessor or the mortgagor to take an assignment even though he may have entered into possession and paid rent: see *Moore* v. *Greg*, 2 De G. & Sm. 304; *S. C.* 2 Ph. 717; *Walters* v. *The Northern Coal Co.*, 5 De G. M. & G. 629; *Newry Rail. Co.* v. *Moss*, 14 Beav. 64; *Wright* v. *Pitt*, L. R. 12 Eq. 408.

Deposit not a breach of condition against assignment.

So, also, it seems that a proviso to make void a lease or assignment by the lessee does not apply to a mere deposit of the lease any more than to an assignment by operation of law, unless it is expressly included in the proviso: *Doe* d. *Pitt* v. *Hogg*, 4 D. & R. 226; see also *Ex parte Drake*, 1 M. D. & De G. 36. And though the security might not be available in such a case directly against the lessor, yet, if his title were intercepted by the bankruptcy of the depositor, it seems that the mortgagee might insist on his security: *Ex parte Cocks*, 2 Deac. 14; see *Ex parte Sherman*, Buck, 462; *Ex parte Bagehole*, 1 Rose, 432; and as to disclaimer of a deposited lease by a trustee in bankruptcy, see *Ex parte Buxton*, 15 Ch. D. 289.

Assignment to pauper.

It is perfectly clear that an assignee of a lease, whether equitable or legal, may get rid of his liability by assigning to a pauper or any one who will take it, provided the assignment be made *bonâ fide*, and he retains no benefit to himself: *Fagg* v. *Dobie*, 3 Y. & C. 96; *Rowley* v. *Adams*, 14 Beav. 130.

Deposit of agreement for lease.

Where an agreement for a lease is deposited as security for an advance, and a lease is subsequently granted to the debtor upon terms not in accordance with the agreement, it seems that the deposit will not be affected by the variance: *Ex parte Reid*, 17 L. J. Bcy. 19. A renewed lease will be subject to a mortgage by deposit of the original lease: *Moody* v. *Matthews*, 7 Ves. 174; *Hughes* v. *Howard*, 25 Beav. 575.

CHAPTER II.

THE POWER TO MORTGAGE AND THE SUBJECT OF MORTGAGE.

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1. MORTGAGES UNDER CHARGES AND POWERS.

Mortgages under Charges and Powers.

Whether power to charge gives power to mortgage.

As to the Construction of Powers of Charging.]—It seems that a power to charge does not, *per se*, enable the donee to limit the estate by way of mortgage, but merely to create an equitable charge: *Jenkins* v. *Keymis*, 1 Lev. 150. However, a power to sell generally includes a power to mortgage, every mort-

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gage being a conditional sale: *Mills* v. *Banks*, 3 P. W. 9; *Ball* v. *Harris*, 4 My. & C. 276. See also *Ball* v. *Harris*, 4 My. & C. 276; *Page* v. *Cooper*, 16 Beav. 396. But a mortgage by trustees and executors, who were directed to sell and convert real and personal estate, and after payment of debts to invest the proceeds upon certain trusts, was set aside as unauthorized, the testator's intention having evidently been to effect a complete conversion: *Holdenby* v. *Spofforth*, 1 Beav. 390. That the converse of this proposition does not hold, see *Ridout* v. *Earl of Plymouth*, 2 Atk. 104. But where a tenant for life in a settlement had a general power to charge the estate to any amount, and by his will he directed the estate to be sold, a sale was decreed pursuant to this direction: *Long* v. *Long*, 5 Ves. 445; and see Sugd. Pow. 533. And a power to "raise" a sum of money has been held to authorize a sale: *Wareham* v. *Brown*, 2 Vern. 153; *Bateman* v. *Bateman*, 1 Atk. 421; and would, *à fortiori*, enable the donee also to mortgage. And a power to raise money by mortgage or *otherwise* will authorize a sale. So, in *Tasker* v. *Small*, 6 Sim. 625, a tenant in tail in remainder on his marriage settled the estate subject to his life interest therein, and to a power reserved to him for raising 15,000*l.* by mortgage or otherwise; it was held that the terms of the power authorized a sale. It is doubtful whether, under a trust to raise money by sale or mortgage, trustees can make a sale after having raised the money by mortgage; at all events the mortgagee cannot compel the trustees to sell: see *Palk* v. *Lord Clinton*, 12 Ves. 56. A power to charge an estate with a specific sum of money includes a power to charge with interest: *Lord Kilmurry* v. *Geery*, 2 Salk. 538; *Boycott* v. *Cotton*, 1 Atk. 552; *Hall* v. *Carter*, 2 Atk. 358; and the interest may be at 5*l.* per cent., the party empowered to charge not being confined to the rate of interest allowed by the Court: *Lewis* v. *Freeke*, 2 Ves. jun. 507. But this rule does not apply where trustees have not a power to charge, but merely a trust to raise a specific sum of money for certain purposes. In such a case the interest must be at the usual rate of 4*l.* per cent., or,

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in the case of Irish estates, 5*l.* per cent.: *Balfour* v. *Cooper*, 23 Ch. D. 473. A power to appoint the fee has been held to be well executed by an appointment to trustees for sale, with a direction to apply the produce for the benefit of the objects of the power: *Kenworthy* v. *Bate*, 6 Ves. 793; *Bullock* v. *Fludgate*, 1 Ves. & B. 478.

Whether power to mortgage authorizes a mortgage with power of sale (*a*).

It was formerly a prevailing opinion in the profession that a power to charge or mortgage simply would not authorize the insertion in a mortgage, made under such power, of a power to sell, on the principle that what the donee himself cannot do he cannot authorize another to do: see *Sanders* v. *Richards*, 2 Coll. 568; but this proposition may now be regarded as entirely overruled, and it is now settled that a power to mortgage authorizes a mortgage with a power of sale: *Russell* v. *Plaice*, 18 Beav. 21; *Bridges* v. *Longman*, 24 Beav. 27; *Cook* v. *Dawson*, 29 Beav. 128; *Re Chawner's Will*, L. R. 8 Eq. 569; *Cruikshank* v. *Duffin*, L. R. 13 Eq. 555.

Whether a general direction in a will to pay debts charges real estate devised.

Mortgage of Realty by Executors, &c., under the Old Law.]—Whether a general direction in a will to pay debts operates to charge the real estate subsequently devised was formerly (*b*) the subject of much conflict of opinion: see the cases stated 2 Pow. on Dev. 645 *et seq.* (Jarman's Edition), to which may now be added, *Roland* v. *Feltham*, 1 T. & R. 418; *Irving* v. *Ironmonger*, 2 Russ. & M. 531; *Douce* v. *Lady Torrington*, 2 My. & K. 600 (*c*); *Palmer* v. *Graves*,

(*a*) It would seem that a trustee taking a mortgage without a power of sale would not be guilty of a breach of trust: see *Farrar* v. *Barraclough*, 2 Sm. & G. 231; see also Lewin on Trusts, 331. And it has been expressly decided that a solicitor is not liable for negligence if he take such a mortgage: *Bailey* v. *Abraham*, 14 L. T. 219. Neither of these questions is likely now to occur frequently in practice, as in recent times most mortgages have, as a matter of course, contained powers of sale, and now such powers are implied in all mortgages, unless expressly excluded: see *post*, p. 918.

(*b*) As regards wills coming into operation after the 13th August, 1859, this question is settled by statutory enactment: see *post*, p. 716.

(*c*) See as to the report of this case, a note to *Shaw* v. *Borrer*, 1 Kee. 567.

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1 Kee. 545; *Braithwaite* v. *Britain*, Id. 206; *Graves* v. *Graves*, 8 Sim. 43; *Shaw* v. *Borrer*, 1 Kee. 567; *Withers* v. *Kennedy*, 2 My. & K. 607; *Wasse* v. *Heslington*, 3 My. & K. 495; *Taylor* v. *Taylor*, 6 Sim. 246; *King* v. *Shrives*, 10 Bing. 238; 5 Sim. 461; *Mirehouse* v. *Scaife*, 2 My. & Cr. 695 (*d*); *Asker* v. *Thompson*, 4 K. & J. 620; *Greetham* v. *Cotton*, 34 Beav. 615.

As the old law still holds good as regards wills, previous to the 13th of August, 1859, its leading principles will here be very briefly noticed. For a more full consideration of the subject see the last edition of this work, Vol. V., p. 140 *et seq.*; and Coote, Mortg. 317—320. The strong tendency of the more recent cases was in favour of the charge from general words; but the Stat. 3 & 4 Will. 4, c. 104, whereby the real estate of a person dying since the 29th of August, 1833, whether he was in trade or not, is liable to his simple contract debts, deprived the point of some of its importance; and now by the stat. 32 & 33 Vict. c. 46, sect. 1 (stated *ante*, Vol. II., p. 268, note (*a*)), in the administration of the estates of persons dying on and after the 1st day of January, 1870, creditors by specialty and simple contract stand upon an equal footing, whereas specialty creditors of persons who died before that date retain their priority over simple contract creditors. Neither class of claimants, however, has any lien on the estate in the hands of the alienee of the heir or devisee, but only a right of action against the latter. Thus, where the devisee of a testator, settled the devised estate on his marriage, it was held that the estate was effectually placed out of the reach of the creditors, who could only proceed against the devisee personally: *Spackman* v. *Timbrell*, 8 Sim. 260.

Where real estate is subject to a general charge of debts, purchasers and mortgagees are not bound to see to the application of the money: *Ithell* v.

(*d*) In the report of this case, the meaning of the judgment is entirely reversed by an error in printing *now* for *not* in the last line of p. 708.

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Beane, 1 Ves. sen. 215; which rule extends to legacies, where there is a general charge of debts, the assets being not applicable to the payment of the legacies until the debts are paid. Where, therefore, lands charged with debts and legacies, or with debts alone, are sold or mortgaged by the devisee, the purchaser or mortgagee is not liable to be affected by the charge, as it will be presumed (unless the contrary appear) that the money was raised and applied for the purposes of the charge: *Barker* v. *Duke of Devonshire*, 3 Mer. 310; see *Spalding* v. *Shalmer*, 1 Vern. 315. But a mere power to sell real estate, in case of the deficiency of the personal estate for payment of debts, or debts and legacies, does not arise unless there is a deficiency of the personal estate; and, therefore, a purchaser takes nothing if the personal estate is sufficient: *Dike* v. *Ricks*, Cro. Car. 335; Butl. Co. Lit. 390 b.; and see *Greetham* v. *Cotton*, 34 Beav. 615. See as to a *devise* of estates for payment of debts, to be sold in a particular order: *Pierce* v. *Scott*, 1 Y. & C. 257.

Mortgagees, &c., not bound to see charged debts paid.

Power to sell, in case the personal estate is deficient.

Real estate was not chargeable in respect of specialty debts in the hands of a purchaser from the heir or devisee (2 Anst. 515); and, therefore, a purchaser, not being bound to see to the payment of such debts, could not allege the possibility of their existence to excuse himself from seeing to the payment of legacies charged on the land. The stats. 3 & 4 Will. 4, c. 104, and 32 & 33 Vict. c. 46, constituting real estate assets for the payment of simple contract debts, to be administered in equity, it has been seen, impose no charge upon the land in the hands of purchasers; and, therefore, have no operation in exempting purchasers or mortgagees from looking to the application of their money in satisfaction of specific charges: *Horn* v. *Horn*, 2 S. & S. 448.

If (in the case of debts being charged on the estate) the circumstances of the transaction afford intrinsic evidence that the money was raised for another purpose, the estate will remain liable to the charge in the hands of the purchaser or mortgagee: *Watkins* v. *Cheek*, 2 Sim. & Stu. 199; see *Braithwaite* v. *Britain*, 1 Kee. 206. As to what circum-

Sale or mortgage made for other purposes than the payment of debts.

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stances will raise a presumption that the purchaser or mortgagee had knowledge that the money is not raised for the purpose of paying debts: *Johnson* v. *Kennett*, 3 My. & K. 630; *Rogers* v. *Rogers*, 6 Sim. 364; *Eland* v. *Eland*, 2 Jur. 852.

Claims of creditors by virtue of devises upon trust, when not barred by the Statute of Limitations.

It has been decided that the Statutes of Limitations cease, at the death of the testator, to run on debts for the payment of which the testator has created a trust fund out of real estate, upon the principle that "it is not to be inferred, that a man has no debt because he does not go to law to enforce payment, when he has a trustee to pay him:" *Hughes* v. *Wynne*, 1 T. & R. 307; *Braithwaite* v. *Britain*, 1 Kee. 206; *Hargreaves* v. *Michell*, 6 Mad. 326; *Rendell* v. *Carpenter*, 2 Y. & J. 484; *Piggott* v. *Jeffreson*, 12 Sim. 26. In *Scott* v. *Jones*, 4 Cl. & F. 382, it was decided that a trust for the payment of debts out of *personalty* would not exclude the Statute of Limitations: see *Evans* v. *Tweedy*, 1 Beav. 55; *Freake* v. *Cranefeldt*, 3 My. & C. 499; see *Williamson* v. *Naylor*, 3 Y. & C. 208. A charge of debts upon *real estate* excludes the operation of the statutes making real estate assets for the payment of simple contract debts. It is no objection, therefore, to the claim of a simple contract creditor upon such fund, that six years have elapsed since the testator's decease, without demand or acknowledgment (*e*); though equity would require that this, as in the case of all other claims, should be made in a reasonable time. In *Hughes* v. *Wynne*, 1 T. & R. 307, the devise was expressly upon trust to sell and pay debts; but the principle has been held to apply to a mere charge, such a charge being in equity, for most purposes, equivalent to a direct devise: *Hargreaves* v. *Michell*, 6 Mad. 326; see *Elliott* v. *Merryman*, Barn. 78. But a charge, or devise for payment of debts, does not revive a debt which was actually barred by the statute, at the testator's decease: *Burke* v. *Jones*, 2 Ves. & B. 275; *Hargreaves* v.

(*e*) An acknowledgment, to have the effect of taking a debt out of the statute, must now be in writing: see Lord *Tenterden's* Act, 9 Geo. 4, c. 14, stated *ante*, Vol. I. p. 274.

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Michell, 6 Mad. 326; nor does such a devise or charge make a debt carry interest: *Earl of Bath* v. *Earl of Bradford*, 2 Ves. sen. 363, 587; *Lloyd* v. *Williams*, 2 Atk. 110; *Shirley* v. *Earl Ferrers*, 1 B. C. C. 41; *Creuze* v. *Hunter*, 2 Ves. jun. 159: see also *Maxwell* v. *Wettenhall*, 2 P. W. 26, Cox's n.; unless where a testator charges debts not his own, as to which see *Short* v. *Westley*, 16 Ves. 393; *Askew* v. *Thompson*, 4 K. & J. 620.

A general charge of debts overreaches all subsequent dispositions, and authorizes an immediate sale, though there is a subsequent direction to sell part of the property for other purposes, at a future time: *Shaw* v. *Borrer*, 1 Kee. 559; *Ball* v. *Harris*, 8 Sim. 56.

Where lands are directed to be sold, but no person is appointed to sell, the person to whom the legal estate descends must sell, unless the proceeds are to be applied with the personalty in payment of debts or legacies, and then the executors have a power of sale: *Tylden* v. *Hyde*, 2 S. & S. 238. But if there is a mere direction that lands shall be sold, and the produce distributed among certain persons, the executors have no power to sell: *Bentham* v. *Wiltshire*, 4 Mad. 44; *Patton* v. *Randall*, 1 J. & W. 189.

When a power for executors to sell is implied.

By the statute 21 Hen. 8, c. 4, where lands are willed to be sold by executors, and part of them refuse to be executors, the executors who prove the will are empowered to sell: see *Bonifant* v. *Greenfield*, Cro. Eliz. 89; *Mackintosh* v. *Barber*, 1 Bing. 50. And where the power of sale is given to the executors by that description only, and not *nominatim*, the survivors in case of the death of one may sell: Co. Litt. 113, a. The rule is the same where the power of sale is implied: *Tylden* v. *Hyde*, *supra*. The executor of an executor may, it would seem, exercise the power of sale which his testator had: 1 Ch. Ca. 178; Sugd. Pow. 116. See further as to powers of sale in executors, Butl. Co. Litt. 113, a.; Sugd. Pow. 111, *et seq.*; Will. Exec. Vol. II. Ch. 3.

Powers of trustees and executors of

Powers of Executors, &c., over Real Estate under the Stat. 22 & 23 *Vict. c.* 35.]—As regards wills com-

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ing into operation since the 13th August, 1859, the powers of trustees and executors of wills, where a testator charges his real estate with debts to sell and mortgage, are regulated by the following provisions of the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35) :—

wills to sell and mortgage under 22 & 23 Vict. c. 35.

Devisee in trust may raise money by sale, notwithstanding want of express power in the will.

Sect. 14. "Where by any will which shall come into operation after the passing of this Act, the testator shall have charged his real estate or any specific portion thereof with the payment of his debts, or with the payment of any legacy or other specific sum of money, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy, or sum of money out of such estate, it shall be lawful for the said devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy or money as aforesaid, by a sale and absolute disposition by public auction or private contract of the said hereditaments or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other, and any deed or deeds of mortgage so executed may reserve such rate of interest and fix such period or periods of repayment as the person or persons executing the same shall think proper.

Powers given by last section extended to survivors, devisees, &c.

Sect. 15. "The powers conferred by the last section shall extend to all and every person or persons in whom the estate devised shall for the time being be vested by survivorship, descent or devise, or to any person or persons who may be appointed under any power in the will, or by the Court of Chancery, to succeed to the trusteeship vested in such devisee or devisees in trust as aforesaid.

Executors to have power of raising money, &c., where there is no sufficient devise.

Sect. 16. "If any testator who shall have created such a charge as is described in the fourteenth section shall not have devised the hereditaments charged as aforesaid in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being named in such will (if any), shall have the same or the like power of raising the said monies as is hereinbefore vested in the devisee or devisees in trust of the said hereditaments, and such power shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship shall for the time being be vested; but any sale or mortgage under this Act shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate.

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Sect. 17. "Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by sections fourteen, fifteen and sixteen of this Act, or either of them, shall have been duly and correctly exercised by the person or persons acting in virtue thereof.

Purchasers, &c., not bound to inquire as to powers.

Sect. 18. "The provisions contained in sections fourteen, fifteen and sixteen shall not in any way prejudice or affect any sale or mortgage already made or hereafter to be made, under or in pursuance of any will coming into operation before the passing of this Act, but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if this Act had not passed; and the said several sections shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do."

Sections 14, 15, and 16 not to affect certain sales, &c., nor to extend to devises in fee or in tail.

Effect of Statute.

The effect of the above enactments is that where a testator charges his real estate with payment of debts, and devises the estate so charged to trustees for the whole of his estate or in trust therein, such trustees, or other the trustees for the time being of the will, however appointed, can effectually convey to a purchaser or mortgagee and give valid receipts: and that where a testator charges his real estate with payment of his debts, but does not demise the estate to trustees for the whole of his estate or interest therein, the executors can effectually convey and give valid receipts: see Coote, Mortg. 322. A power of sale may be inserted in the mortgage, *ante*, p. 711.

When a direction to raise money out of the rents and profits authorizes a sale or mortgage.

Direction to pay debts, &c., out of rents and profits.—Lord *Hardwicke*, in *Green* v. *Belchier*, 1 Atk. 506 (see also *Gibson* v. *Rogers*, Ambl. 93; *Baines* v. *Dixon*, 1 Ves. sen. 42; *Lingard* v. *Earl of Derby*, 1 Br. C. C. 311; *Allan* v. *Backhouse*, Jac. 631), said that "in general, where money is directed to be raised by rents and profits, unless there are other words to restrain the meaning, and to confine it to the receipt of the rents and profits as they accrue, the Court, in order to obtain the end which the party intended by raising the money, has, by the liberal construction of these words, taken them to amount

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to a direction to sell." In *Booth* v. *Blundell*, 1 Mer. 232, Lord *Eldon* stated the rule to be, that where a term is created for the purpose of raising money out of the rents and profits, if the trusts require that a gross sum should be raised, the trustees are to raise it out of the estate itself by sale or mortgage: see also *Wilson* v. *Halliley*, 1 R. & My. 590; *Lord Londesborough* v. *Somerville*, 19 Beav. 295; *Metcalfe* v. *Hutchinson*, 1 Ch. D. 591; *Balfour* v. *Cooper*, 23 Ch. D. 472.

Where the estate subjected to the term or trust for raising portions out of the rents and profits belongs to an infant, the rents accumulated during his minority, up to the time for payment of the portions, are in the first place applicable for their payment, and the estate can be sold or mortgaged to raise the deficiency only: *Okeden* v. *Okeden*, 1 Atk. 550; *Water* v. *Hutchinson*, 1 S. & S. 276.

Instances where the literal meaning of the words "rents and profits" has been followed.

Where a trust was created for payment of debts, "by perception of rents and profits, or by leasing, or by mortgaging," to raise sufficient money for the payment of debts, it was held not to authorize a sale; if it had been a trust of the rents and profits, the term might have been sold: *Ridout* v. *Earl of Plymouth*, 2 Atk. 105. Again, it was held that a sale was not authorized where a testator having devised the rents of certain lands to his executors, in trust therewith to raise and pay all his debts, devised all his lands, subject to an annuity, to his sons, directing that neither of his sons should enter on, or receive to his own use, the rents of the premises to them respectively devised, *until* all the debts should be paid: *Small* v. *Wing*, 5 B. P. C. 66, ed. Toml.; and see *Harper* v. *Munday*, 7 De G. M. & G. 369. So where the money is to be raised "by and out of the rents and profits, and by leasing for three lives or twenty-one years;" or "out of the rents and profits, or by sale of a *moiety* of the land;" or by "rents, and other ways and means, except a sale;" or generally where an authority is superadded, less extensive than that of selling or mortgaging, the literal meaning of the words will be followed: *Ivy* v. *Gilbert*, 2 P. Wms. 13; *Mills* v.

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Banks, 3 P. Wms. 1; *Hall* v. *Carter*, 2 Atk. 358; *Bennett* v. *Wyndham*, 23 Beav. 521.

Though the Court will generally, in favour of creditors, consider a devise in trust for payment of debts out of rents and profits to be equivalent to a devise of the estate itself, so as to authorize a sale or mortgage thereof, where the remainderman is tenant in fee or in tail, and therefore liable to pay the debts, yet the case is different where the remainderman is tenant for life only, for it comes to be a question whether he shall pay the interest of the charge only, or whether he shall also pay the capital; this is strictly a question of intention to be collected from the language of the will with reference to the different provisions contained in it: see *Heneage* v. *Lord Andover*, 3 Y. & J. 260, in which case, upon the construction of the will, it was held that the testatrix did not intend that the debts should be raised out of the corpus of the estate, but only that the same should be discharged out of the rents and profits: see also *Wilson* v. *Halliley*, 1 R. & My. 590; *Playters* v. *Abbot*, 2 My. & K. 97.

When portions may be raised by a reversionary term in the lifetime of the tenant for life.

Where portions are secured by a term limited to commence after a life estate, and are made payable at twenty-one or marriage, or other period, without reference to the preceding life estate, it is settled, that, in the absence of any indication of a contrary intention, the portions are raiseable out of the reversionary term during the subsistence of the life estate: *Graves* v. *Madison*, T. Jones, 201; *Corbit* v. *Maidwell*, Salk. 159; *Sandys* v. *Sandys*, 1 P. Wms. 707; *Stanly* v. *Stanly*, 1 Atk. 549; *Hebblethwaite* v. *Cartwright*, Ca. t. T. 31. In *Codrington* v. *Lord Foley*, 6 Ves. 379, Lord *Eldon*, after reviewing the authorities, thus expressed himself:—"The rule, upon the whole, depends upon this; whether it was the intention of the parties to the instrument, attending to the whole of it, that the portion should or should not be raised in this manner; taking it *primâ facie* to be the intention, upon the general rule, if there is nothing more than a limitation to the parent for life, with a term to raise portions at the age of twenty-one or marriage; if there is nothing more, and the interests are vested, and the contingencies have hap-

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pened at which the portions are to be paid, the interest is payable, and the portions must be raised in the only manner in which they can be raised, that is, by mortgage or sale of the reversionary term." This rule is now fairly established: see *Smyth* v. *Foley*, 3 Y. & C. 142; see *Daly* v. *French*, 6 B. P. C. 55.

Rule excluded by contrary intention.

A direction to raise the portions "from and after the commencement" of the term has been held sufficient to exclude the rule: *Butler* v. *Duncomb*, 1 P. Wms. 448; *Churchman* v. *Harvey*, Amb. 335. In *Brome* v. *Berkley*, 2 P. Wms. 484; 6 Br. P. C. 108, the trustees were to raise portions payable at twenty-one or marriage, which should first happen, and also a yearly sum for maintenance, until the portions should be due, "the first payment of the maintenance-money to be made at such of the said half-yearly feasts as should next happen after the said estate so limited to the trustees as aforesaid should take effect in possession." It was held, that, as the maintenance must be intended to precede the payment of the portion, the maintenance must determine when the portion becomes payable. See *Cotton* v. *Cotton*, 3 Y. & C. 149; and Mr. *Melmoth's* MSS. in Lincoln's Inn library. But the Court will give effect to any clear and express declaration to the contrary: *Lyon* v. *Chandos*, 3 Atk. 416: see *Clinton* v. *Seymour*, 4 Ves. 464; *Lyddon* v. *Lyddon*, 14 Ves. 558. In *Stevens* v. *Dethick*, 3 Atk. 39, a sale of the reversionary term was refused, on the ground of a direction for maintenance, "and that the residuary rents and profits above such yearly maintenance should in the meantime, until the portions become payable, be received by the persons entitled to the reversion expectant on the determination of the term." The rule has also been held to be excluded by a general power, to revoke the uses of the settlement, and by a proviso for cesser of the term, in certain events: *Reresby* v. *Newland*, 2 P. Wms. 93; 2 B. P. C. 487. See also *Winter* v. *Bold*, 1 S. & S. 507.

Priority of jointure.

A jointure under a power posterior in point of position in the settlement to the term for raising portions, has priority over the term: *Hall* v. *Carter*, 2 Atk. 354.

As to raising all the portions as soon as one be-

comes payable, see *Gillibrand* v. *Goold*, 7 Sim. 149. A power to direct sums to be raised for maintenance, annexed to a power to appoint portions, implies that the donee cannot direct the portions to be raised during infancy: *Edgeworth* v. *Edgeworth*, 1 Beatt. 328; see also *Fenton* v. *Fenton*, 1 Dr. & W. 66, and Sugd. V. & P. 437.

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See further as to mortgages under trust terms to raise portions, &c., Coote, Mortg. 293 *et seq.*

As to exercise of powers of charging, &c., by tenant for life who has parted with his interest.]—Where property is settled on a person for life, with powers of leasing, sale, advancement, changing trustees, or varying securities, to be exercised by him or with his consent, it is often requisite to consider how far these powers are suspended by an alienation of the interest of the donee for life; and this, it will be evident, is a consideration of great importance to a purchaser or mortgagee; for, if these powers, to the exercise of which the act or assent of the tenant for life was made necessary for the protection of his interest, can be exercised after he has parted with such interest, it diminishes *pro tanto* the value of the purchase or security.

Whether tenant for life parting with his interest has precluded himself from concurring in powers of sale, advancement, &c.

In reading the cases upon this subject, it is necessary to bear in mind the distinction made between, 1st, Powers, which may take effect, either wholly or partially, in derogation of an estate or interest in the donee; 2nd, Powers which cannot so take effect, but at the creation of which the donee either already had, or then received some estate or interest in the subject of the power; and 3rd, Powers given to a person who was a perfect stranger in point of interest to the subject of the power at the time of its creation, and not to be exercised for his own benefit. A power to a stranger to be exercised for his own benefit is itself a species of interest, and therefore comes under the second division. These three kinds of power are distinguished by the not very appropriate designations of, 1st, Powers appendant; 2nd, Powers collateral, or in gross; and, 3rd, Powers *simply* collateral: 1 Sanders, 169; Sugd. Pow. 45.

Division of powers.

Powers simply collateral, once accepted, could not

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formerly be destroyed by any means whatever, short of their complete satisfaction by performance by the donee: Sugd. Pow. 47 *et seq.* But now, by sect. 52 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), it is enacted that:—

Releasable quality of powers.

Powers simply collateral.

Sect. 52.—"(1.) A person to whom any power, whether coupled with an interest or not, is given may by deed release, or contract not to exercise, the power.

"(2.) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act."

But a power coupled with a duty cannot be released: *Re Eyre,* W. N. 1883, p. 153.

Powers not simply collateral might always be released to the tenant for life, or to the remainderman; and a covenant not to exercise such a power was binding in equity against all persons having notice of it: *Hurst* v. *Hurst,* 16 Beav. 372; Sugd. Pow. 51. A power to appoint by will the trust of a fee-simple estate given to a married woman, who, under the same conveyance, took a life interest for her separate use, with remainder (in default of appointment) for her own right heirs, was held to be a power appendant, and destroyed by a mortgage for years and fine made and levied by the husband and wife: *Penn* v. *Peacock,* For. 41.

A power for a tenant for life to appoint the estate in remainder among his children is a power in gross and releasable: see *Smith* v. *Death,* 5 Mad. 371; *Horner* v. *Swan,* T. & R. 430; *West* v. *Berney,* 1 Russ. & M. 431; *Conyngham* v. *Thurlow,* Id. 436; *Bickley* v. *Guest,* Id. 440; *Godsall* v. *Webb,* 2 Kee. 99.

Charge or alienation of estate by donee of power.

A charge or alienation of his estate by the donee of a power, if made under the ownership, does not affect the power, provided the subsequent exercise of the power would not derogate from the interest previously granted; and where the exercise of the power might interfere with an interest granted by the donee, whether under his ownership or in part execution of the power, it is merely suspended, *quoad* the interest so granted; and even such suspension may be precluded by agreement, unless, by the terms

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in which the power was created, it appears to have been intended to be exercisable only while the donee is in possession of the estate : *Bullock* v. *Thorne*, 1 Moo. 615. If the interest is created under the ownership, the power may be executed immediately (unless it be a power to lease *in possession*, and the possession has been parted with : Sugd. Pow. 54 ; see *Shaw* v. *Simmons*, 2 Moo. 196) (*f*). But the execution is subject to the prior interest. That a tenant for life shall not defeat his grant of his life estate or any lesser interest, by exercising a subsequent power of revocation, is well settled : *Goodright* v. *Cator*, Doug. 477 ; Sugd. Pow. 5.

Conveyance of life estate to trustees to pay an annuity, does not destroy leasing power.

In *Renn* v. *Bulkeley*, Doug. 292, a tenant for life in possession, with power to lease, conveyed his life estate to trustees for ninety-nine years, if he should live so long, for payment of his debts, but with an express reservation as to all leases granted or to be granted. He afterwards granted a lease for twenty-one years under the power. It was held that the lease was good. Lord *Mansfield* said, "The creation, execution, and destruction of powers depend upon the substantial intention and purpose of the parties. It was said, 1st, that the grantee in this case was not in possession, and that it was necessary that he should be, to execute the power. But I think possession here means the receipt of the rents and profits, which were applied to his use. If *actual* possession were necessary, a leasing power could never be executed when the land is in the hands of a tenant. 2nd, It was contended, that, by granting away his life estate, he extinguished the power. Certainly, where the whole life estate is conveyed away by the intention of the parties, the power must be at an end, and cannot be afterwards exercised to the prejudice of the grantee. But the conveyance here was only to let in a particular charge, subject to which the rents and profits still belonged to A., *and the lease could not prejudice the security nor the remainderman*, for the best rent must be reserved. It would, therefore,

(*f*) A power to sell a settled reversionary fee, or to exchange it for other lands in fee *in possession*, may be exercised before the reversion falls into possession : *Clark* v. *Seymour*, 7 Sim. 67.

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be contrary to the intention of all the parties, to hold that the power was extinguished by the conveyance."

Case of *Long* v. *Rankin.*

The principle of the last-mentioned decision was confirmed by the House of Lords, in 1821, in the case of *Long* v. *Rankin*, (Sugd. Pow. 58, and App. at p. 895), where a tenant for life with power to grant leases at a rack rent conveyed his life estate to trustees to secure an annuity, the trusts being, out of the rents to pay the annuity, and then to pay the surplus to B.; by this deed it was stipulated, that, B. might demise the property for such term as he should think proper; the question was, whether the lease, being granted after the tenant for life had parted with his estate was good. In delivering the unanimous opinion of the judges, Lord *Tenterden* said, that it was true that the lessor could not, after having conveyed his life estate, derogate from the effect of that conveyance by an execution of his power. But here the lease was not in derogation of the estate granted to the annuitants, but rather in conformity to it. His lordship continued: "It is not necessary to say in the present case, that a leasing power may not, by the terms in which it is given, be so inseparably annexed to the estate of the tenant for life as to become void and inoperative if he part with his estate. This, probably, may be so, because he who gives the power may give it with what qualifications he pleases; but it is not essential to the validity of such a power that it should be appurtenant or annexed to any estate in land. It is also immaterial to the remainderman whether or not it be so annexed; his security depending upon the conditions and qualifications under which the power is to be executed, and not upon the estate or interest of the person by whom it is executed. Many occasions arise in which it becomes important to the convenience of the tenant for life that he should transfer his estate to another; an execution of the leasing power, after such a transfer, cannot, for the reasons already given, be prejudicial to the remainderman; and the reasons upon which such powers have been introduced, shew that it may be more beneficial to him that the leasing power should be retained and continue to exist, than

As to powers being inseparably annexed to the estate.

that it should be extinguished and annihilated. We ought not, therefore, to hold that such a power is extinguished by a transfer of the estate, unless we see clearly in the language of the deed whereby the power is created, that the donor of the power intended inseparably to annex it to the life estate given, and to a continuance of that estate, in the identical person to whom it is given." The judgment of the House was delivered accordingly.

It is not, however, too readily to be inferred that a tenant for life, who has parted with his estate, can exercise a power of leasing without the consent of the alienee, unless he has stipulated for the reservation of such a power; for Lord *Eldon* observed, "I am a little anxious to say, that I desire it may not be understood that I have given any opinion whatever with respect to the decision of *Renn* v. *Bulkeley*," Sugd. Pow. 60. The point seems to turn much upon the same principle as the question, whether the *cestui que trust* for life of a settled fund can concur in powers for changing trustees, &c., after alienation (*g*).

Consent to exercise of powers by trustees, whether suspended by alienation.

It was repeatedly held that fines did not operate to destroy or suspend the rights of beneficiaries to direct sales or exchanges of settled lands under powers in settlements, so as to prevent the exercise of these powers by the trustees: see *Jersey* v. *Deane*, 5 B. & A. 569; *Davies* v. *Bush*, M'Cl. & Y. 58; *Tyrell* v. *Marsh*, 10 Moo. 305. The doctrine laid down in these cases has been recognised in more recent decisions, and it is now well established that where a tenant for life with power to consent to a sale by the trustees of the settled lands, conveys his life estate by way of mortgage, the power is not extinguished, but that a good title may be made by means either of a reconveyance by the mortgagee to

(*g*) See on this point, *ante*, tit. Appointment of New Trustees, Vol. II. p. 13 *et seq.*

Statutory powers.

The statutory powers of sale, &c., given to tenants for life by the Settled Land Act, 1882, are not assignable; and a contract not to exercise any of them is void; but they are not exerciseable to the prejudice of an assignee for value, nor, except as regards granting leases (see *ante*, p. 41), without the consent of the assignee: Stat. 45 & 46 Vict. c. 38, s. 50.

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the mortgagor, or by the concurrence of the mortgagee in a conveyance to the purchaser: *Walmesley* v. *Butterworth*, 13 L. J. Ch. 253. And the same principle will apply where the conveyance by the tenant for life of his life estate is absolute: *Alexander* v. *Mills*, L. R. 6 Ch. A. 124. Of course any subsequent exercise of the power must not prejudice the interest of the mortgagee or purchaser of the life estate; this point arose in regard to powers of advancement in the case of *Noel* v. *Lord Henley*, M'Cl. & Y. 302, in which *Alexander*, C. B., said, "The simple question here is, whether a tenant for life, with a power of appointment for the advancement of his children, can by his act preclude himself from exercising that power. On reference to the different authorities, it seems quite contrary to all of them, and to the principle on which those cases have been decided, that a tenant for life, having assigned the dividends of the whole of the fund to which he is entitled for life, as a security, should be at liberty to lessen that security by exercising a power for advancement, and consequently diminishing the fund from which those dividends arise:" see also *Goodright* v. *Caton*, Doug. 477; *Snape* v. *Turton*, Cro. Car. 472.

Effect of bankruptcy on powers.

The interest which trustees in bankruptcy acquire in the bankrupt's estate by act of law, is protected from the subsequent execution of powers vested in him, equally with interests acquired under the donee's own act; so that he will not be permitted to exercise any power which otherwise might be exercisable for the benefit of others, if his creditors will be prejudiced thereby. Thus, it was early determined, that where a tenant for life, with remainder in fee expectant on certain estates, and a power of revocation, became bankrupt, and the intermediate estates failed, the bankrupt could not exercise his power of revocation: *Anon.*, Lofft, 71. In a later case it was held, that a power in a conveyance to the common uses to bar dower in favour of a trader, could not be executed by the donee after an act of bankruptcy committed by him: *Doe* v. *Britain*, 2 B. & Ad. 93: see also *Badham* v. *Mee*, 1 M. & Sc. 14;

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7 Bing. 695; *Jones* v. *Winwood*, 3 M. & W. 693; *Hole* v. *Escott*, 2 K. 444: see also Sugd. Pow. 75 *et seq.*, where these cases are stated and considered.

By sect. 44 (ii.) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), all such powers as might have been exercised by a bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge (except the right of presentation to a vacant ecclesiastical benefice) may be executed by his trustee for the benefit of his creditors (*h*).

Sales and mortgages by executors.

Sales and mortgages of personal estate by executors.]—The whole personal estate of a testator or intestate vests in his executors or administrators (as the case may be), who have full and absolute powers of disposal thereof. It is the first duty of an executor or administrator to provide for the payment of debts, and as it is in many cases necessary for the performance of this duty that the executor should sell, the general rule is that a person may safely deal with an executor for the purchase of any part of the assets; for, as the personal estate is first applicable to the payment of debts, it is to be presumed (unless the contrary appears) that the sale by the executor or administrator is made for this purpose; and therefore, such sale cannot be impeached by the creditors of the deceased, much less by the legatees, whether specific or general, of a testator.

The power of executors and administrators to dispose of personal property specifically bequeathed seems to have been formerly questioned, but may now be regarded as established beyond dispute (*i*):

(*h*) This section is stated at length, *ante*, Vol. II. p. 446. The trustee cannot exercise a general power of appointment after the debtor's death: *Nichols* v. *Nichols*, 29 Ch. D. 1005.

(*i*) In Vol. V. of the last Edition of this Work, at p. 178, the opinion is expressed that where a purchase or mortgage of leaseholds is taken from an executor, it is proper to ascertain, by an examination of the will, whether the property is specially bequeathed, and that if it be, the concurrence of the legatee should be required as a precaution against the possibility of the executor having assented to the bequest. The same point is raised by Lord *St. Leonards*, in his Treatise on Vendors and Purchasers, at p. 669, and his Lordship cites *Thomlinson* v. *Smith*, Finch, 378, in support of that position. But Mr. Coote (Mortg. 309) observes

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see *Ewer* v. *Corbet*, 2 P. Wms. 149; *Andrew* v. *Wrigley*, 4 B. C. C. 137; *M'Leod* v. *Drummond*, 14 Ves. at p. 355; *S. C.* 17 Ves. at p. 161.

As an executor may absolutely dispose of the testator's assets for the general purposes of the will, there seems to be no good reason why, in the exercise of a sound discretion, and presuming the language of the will does not peremptorily require an absolute sale, the executor may not raise the money required by a partial sale or mortgage of the assets: Coote, Mortg. 309. The power of an executor or administrator to mortgage the assets has been repeatedly affirmed by Lord *Hardwicke*, in *Mead* v. *Orrery*, 3 Atk. 239; by Lord *Thurlow*, in *Scott* v. *Tyler*, 2 Dick. 725; and by Lord *Eldon*, in *M'Leod* v. *Drummond*, 17 Ves. 154: see also *Re Cooper*, 20 Ch. D. 611. Sir *R. P. Arden* (afterwards Lord *Loughborough*) is indeed reported to have said, that: "Mortgaging is not the natural way of paying debts, though in some cases it may be the most proper way. But it would lead to an inquiry as to the circumstances of the testator's estate:" *Andrew* v. *Wrigley*, 4 B. C. C. 138. But this observation must, as it is conceived, be taken as referring to cases where the circumstances are such as to raise a suspicion of fraud. In the absence of fraud and collusion it may be regarded as settled that executors and administrators have full power to mortgage the assets, and that the mortgagee is under no liability to see to the application of his money: *M'Leod* v. *Drummond*, 17 Ves. 154. The mortgage may be of legal or equitable assets: *Nugent* v. *Gifford*, 1 Atk. 463; or of a mere chose in action: *Scott* v. *Tyler*, 2 Dick. 724; *Vane* v. *Rigden*, L. R. 5 Ch. A. 667; and may be either by actual assignment or by deposit: *Scott* v.

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that this was a case of gross fraud, and that where a person deals with an executor within a reasonable time after a testator's death, and obtains possession of the muniments of title, a specific legatee would never be permitted to set up the executor's assent against the sale or mortgage, for by the sale and delivery the title of the purchaser or mortgagee is complete: see *Scott* v. *Tyler*, 2 Dick. 725. To prevent any question on the point, an executor who sells property specifically bequeathed without the concurrence of a specific legatee should, by express stipulation in the contract or conditions of sale, preclude the purchaser from requiring it.

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Tyler, supra. And a mortgagee may be given a power of sale: *Russell* v. *Plaice,* 18 Beav. 21.

Assignment of executor to secure, or in satisfaction of, his own debt invalid, when.

As, however, the principle upon which sales and mortgages by executors are supported is, that they are presumed to be made in order to raise money for the payment of the testator's debts, it follows that, where it is apparent, upon the face of the deed, that such was not the purpose of the sale or mortgage, the transaction is not within the protection of the rule in question. In such a case, the executor's act in disposing of the property is a *devastavit;* and the purchaser, having notice, is considered as concurring in, and is, therefore, involved in, all the consequences of that act: *Downes* v. *Power,* 2 B. & B. 491; *Wilson* v. *Moore,* 1 My. & K. 337; *Collinson* v. *Lister,* 7 De G. M. & G. 634. So, a sale by an administrator to his brother and co-partner was set aside, it appearing to the Court from the evidence, that the sale was at an undervalue so gross, that it ought to be deemed fraudulent and void: *Rice* v. *Gordon,* 11 Beav. 265. In the application of this doctrine, a sale or mortgage by an executor in satisfaction of or for the purpose of securing his own private debt has frequently been set aside, at the instance as well of creditors as of legatees: see *Crane* v. *Drake,* 2 Vern. 266; *Carter* v. *Sanders,* 2 Drew. 248.

In two instances, indeed, mortgages by an executor, to secure a debt due from himself, were sustained by Lord *Hardwicke*—in one case against a creditor, and in the other against a residuary legatee: see *Nugent* v. *Gifford,* 1 Atk. 463; *Mead* v. *Lord Orrery,* 3 Atk. 235. But the circumstances in these two cases were peculiar, and the decisions cannot be regarded as of general application: see *Taner* v. *Ivie,* 2 Ves. sen. 466.

As to what circumstances will amount to notice to a purchaser or mortgagee that the transaction is for the executor's own purposes, see *Scott* v. *Tyler,* 2 Dick. 725; *Collingwood* v. *Russell,* 10 Jur. N. S. 1063; *Howard* v. *Chaffers,* 2 Dr. & Sm. 236; *Farhall* v. *Farhall,* L. R. 7 Ch. A. 173. An alienation by an executor of the testator's assets, as a security for his own debt, will be set aside, not only against

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a specific legatee, but even against a general pecuniary legatee: *Hill* v. *Simpson*, 7 Ves. 152: see also *Watkins* v. *Cheek*, 2 S. & S. 205.

The general rule on this subject is thus laid down by Sir *J. Leach*, V.-C., in *Kean* v. *Roberts*, 4 Madd. 332: "Every person who acquires personal assets by a breach of trust, or *devastavit*, in the executor, is responsible to those who are entitled under the will, if he is a party to the breach of trust. Generally speaking, he does not become a party to the breach of trust by buying or receiving as a pledge any part of the personal assets, whether specifically given by the will or otherwise, because this sale or pledge is held to be *primâ facie* consistent with the duty of an executor. Generally speaking, he does become a party to the breach of trust by buying or receiving in pledge any part of the personal assets, not for money advanced at the time, but in satisfaction of his own private debt due from the executor, because this sale or pledge is, *primâ facie*, inconsistent with the duty of an executor."

Effect of long acquiescence in barring relief.

It should be observed, however, that in these, as in all other cases of equitable demands, long acquiescence will be a bar to relief, though the sale should have taken place under circumstances which would clearly have induced the court to set it aside if the application had been made at an earlier period: see *Bonney* v. *Ridgard*, 1 Cox, 146; *Andrew* v. *Wrigley*, 4 B. C. C. 125.

Where the executor is also specific legatee, a mortgage by him to secure his own debt will clearly be protected against creditors of the testator, unless it can be proved that the mortgagee was aware that there were, at the time, debts of the testator remaining unpaid: *Taylor* v. *Hawkins*, 8 Ves. 209; *Spackman* v. *Timbrell*, 8 Sim. 253.

Testator's goods cannot be taken in execution for the executor's debt.

Upon a principle analogous to that which governed the preceding cases, it has been held that the assets of a testator cannot be taken in execution for a debt of the executor, the execution being regarded as an alienation; and since an alienation to secure the private debt of the executor would, as we have seen, be void, it follows that an execution, levied in satisfaction of such debt, is equally so:

Farr v. *Newman*, 4 D. & E. 621; see *Payne* v. *Drew*, 4 East, 523; *M'Leod* v. *Drummond*, 17 Ves. 168; *Quick* v. *Staines*, 1 B. & P. 293; *Gaskell* v. *Marshall*, 5 Car. & P. 31.

2. Mortgages by Tenants in Tail.

Voidable conveyance by tenant in tail.

A tenant in tail has the whole estate in him; and therefore his conveyance or demise, is in its inception good to the whole extent of the estate tail; and the interest purported to be conveyed or demised does not determine by the death of the tenant in tail, until the entry of the issue: *Machell* v. *Clarke*, 2 Ld. Raym. 778 (overruling *Took* v. *Glascock*, 1 Saund. 260); *Goodright* v. *Mead*, 3 Burr. 1703. And, under the covenant for further assurance, the purchaser or mortgagee can in equity oblige the tenant in tail to do such acts as may be in his power to perfect the title: *Sutton* v. *Stone*, 2 Atk. 101; *Tourle* v. *Rand*, 2 B. C. C. 650. But if the tenant in tail die before he had performed the necessary acts for barring his issue, even though there has been a decree against him, and he has stood out all process of contempt, the issue are not bound: *Powell* v. *Powell*, Prec. Ch. 278; *Att.-Gen.* v. *Day*, 1 Ves. sen. 218; see stat. 3 & 4 Will. 4, c. 74, s. 47. A fine or recovery levied or suffered by a tenant in tail who had made a voidable conveyance, enured to confirm such conveyance, even against a purchaser or mortgagee without notice: *Stapilton* v. *Stapilton*, 1 Atk. 1; *Tourle* v. *Rand*, 2 B. C. C. 652; *Brook* v. *Bulkeley*, 2 Ves. sen. 498. Such voidable conveyance was also good against the assignees in bankruptcy of the tenant in tail: *Edwards* v. *Applebee*, 2 B. C. C. 252, n.; *Pye* v. *Daubuz*, 3 B. C. C. 595; *Beck* v. *Welsh*, 6 Wil. 276, *contrà* is clearly wrong. But an equitable tenant in tail who had mortgaged his interest might suffer a good equitable recovery without the concurrence of the mortgagee: *Nonaille* v. *Greenwood*, T. & R. 26; see also *Re Dudson's Contract*, 8 Ch. D. 628. As to the effect of bankruptcy on estates tail, see *Ex parte Somervill*, 1 M. & A. 408; and 3 & 4 Will. 4, c. 74, ss. 55 to 69, inclusive, and

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the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 56 (5).

But the old rule is altered by the stat. 3 & 4 Will. 4, c. 74, s. 38, so far as concerns purchasers by assurances under the Act without *express notice* of any prior voidable disposition by the tenant in tail, who are not now bound by such disposition. The clause in question provides :—

A voidable estate created by a tenant in tail, in favour of a purchaser, confirmed by a subsequent disposition of such tenant in tail under this act, but not against a purchaser without express notice.

"That when a tenant in tail of lands under a settlement shall have already created or shall hereafter create in such lands, or any of them, a voidable estate in favour of a purchaser for valuable consideration, and shall afterwards, under this Act, by any assurance, other than a lease not requiring inrolment, make a disposition of the lands in which such voidable estate shall be created, or any of them, such disposition, whatever its object may be, and whatever may be the extent of the estate intended to be thereby created, shall, if made by the tenant in tail with the consent of the protector (if any) of the settlement, or by the tenant in tail alone if there shall be no protector, have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent as against all persons except those whose rights are saved by this Act ; but if at the time of making the disposition there shall be a protector of the settlement, and such protector shall not consent to the disposition, and the tenant in tail shall not without such consent be capable under this Act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estate, as far as such tenant in tail would then be capable under this Act of confirming the same without such consent : Provided always, that if such disposition shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, then and in such case the voidable estate shall not be confirmed as against such purchaser and the persons claiming under him" (*k*).

Sect. 21 of the same statute enacts as follows :—

Extent of the estate created by a tenant in tail by way of mortgage, or

"That if a tenant in tail of lands shall make a disposition of the same under this Act, by way of mortgage, or for any other limited purpose, then and in such case such disposition shall, to the extent of the estate thereby created, be an absolute bar in equity as well

(*k*) Sect. 62 of the Act contains a similar provision with respect to the disposition of the estate of a bankrupt tenant in tail.

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as at law to all persons as against whom such disposition is by this Act authorized to be made, notwithstanding any intention to the contrary may be expressed or implied in the deed by which the disposition may be effected: Provided always, that if the estate created by such disposition shall be only an estate *pur autre vie*, or for years absolute or determinable, or if, by a disposition under this Act by a tenant in tail of lands, an interest, charge, lien, or incumbrance shall be created without a term of years absolute or determinable, or any greater estate, for securing or raising the same, then such disposition shall in equity be a bar only so far as may be necessary to give full effect to the mortgage, or to such other limited purpose, or to such interest, lien, charge, or incumbrance, notwithstanding any intention to the contrary may be expressed or implied in the deed by which the disposition may be effected."

for any other limited purpose.

The distinction effected by this section appears to be as follows. If the tenant in tail's assurance comprises an estate larger than an estate *pur autre vie*, or for years, the entail is absolutely and completely barred in equity as well as at law, to the extent of the estate so created; but, if an estate *pur autre vie*, or for years only is created, or an "interest, charge, lien, or incumbrance," without any term of years, the bar takes effect *pro tanto* only. Thus, if a tenant in tail by a conveyance inrolled, makes a mortgage *in fee*, with a proviso for redemption in the common form, he is thenceforth equitable owner *in fee simple* subject to the mortgage; but if he makes a mortgage for one thousand years, the entail subsists in the equity of redemption in the term no less than in the legal inheritance in fee expectant thereon, which, of course, the mortgage does not reach. If, therefore, in the latter case, the mortgagor did no further act to destroy the entail, the issue or remainder-man, to whom the lands devolved at his decease, would be entitled to redeem the mortgage.

Where a tenant in tail, who creates a mortgage in fee, is desirous that the equity of redemption should continue subject to the entail, he should distinctly express such intention. And it should seem that the property ought to be resettled by a *separate* deed, as the Act declares the entail to be barred, notwithstanding any express or implied

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intention to the contrary in the mortgage deed. The object, of course, might be attained without any re-settlement or declaration, by making the mortgage for a term. But, though the effect of a mortgage in fee to destroy the entail and remainders cannot be negatived by express declaration, yet it has been truly observed by an able commentator on the Act, that, if the mortgage deed is conditioned to be void on the payment of the money at the prescribed day, and the condition is performed, the assurance being wholly vacated, the entail will remain in force; for which reason a mortgage in fee, which is intended to work an absolute bar, should not be so conditioned, but the proviso for redemption should direct a reconveyance on the payment of the money: Hayes' Intr. Conv. 626 n. 4th Ed.

Cautions to be observed by vendee and mortgagee as to inrolment.

Though the above-mentioned Act allows six calendar months for the inrolment of a disentailing conveyance, a vendee or mortgagee should not permit more than is absolutely requisite of this interval to elapse between the payment of his money and the inrolment of the deed, lest a subsequent purchaser should obtain precedence by an earlier inrolment of his assurance. Indeed, the money ought not to be parted with until the conveyance has been inrolled, nor until it has been ascertained that up to the period of actual inrolment, no other assurance by the tenant in tail has been inrolled. These two simple precautions will render innoxious against a vendee or mortgagee any prior dealing of the tenant in tail with the property of which he has not express notice; for it is observable that none of the provisions in the Act respecting voidable estates have the effect of confirming them against purchasers for value without such notice. The inrolment of a disentailing conveyance has relation to the execution, so that intermediate conveyances by the persons deriving title under it will have their full effect.

Defective assurance

As has been seen (*supra*, p. 731), if before the stat. 3 & 4 Will. 4, c. 74, a mortgage deed contained a covenant for further assurance, a defective conveyance by a tenant in tail was good as against his

assignees in bankruptcy. And it is conceived that this rule would still hold good so as to enable a mortgagee whose security contained a covenant for further assurance, express or implied by the mortgagor's conveyance as beneficial owner, might compel the trustee in bankruptcy to redeem or to perfect his security: see Coote, Mortg. 365.

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A debtor under the belief that he had the fee simple in an estate subject to his mother's life interest therein, conveyed his interest to trustees for the benefit of his creditors by deed containing a covenant for further assurance. It turned out that at the time of the conveyance the mother had the fee simple which upon her death intestate, devolved on the debtor as her heir at law: it was held that the debtor was bound to make good the defective conveyance: *Smith* v. *Baker*, 1 Y. & C. C. C. 223. So, also, where a contingent remainderman conveyed his reversionary interest to secure a debt, which interest was afterwards destroyed by the tenant for life, and the remainderman afterwards acquired a new interest under the will of the tenant for life; it was held that the remainderman must make good the security out of the interest thus acquired: *Noel* v. *Bewley*, 3 Sim. 103. See also *Seabourne* v. *Powell*, 2 Vern. 11; *Smith* v. *Osborne*, 6 H. L. C. 375.

Smith v. *Baker.*

Noel v. *Bewley.*

3. Mortgages by Limited Owners, Corporations, &c., under Acts of Parliament.

Questions on the liability of a purchaser or mortgagee under an Act of Parliament to see to the application of his money do not often arise, as a proper clause of indemnity is always inserted in well-drawn Acts. But in the absence of any such clause it seems that a purchaser or mortgagee will be bound to see that the money he advances is applied for the purposes of the Act, notwithstanding he pays it into the hand appointed by the Act to receive it: see *Cotterell* v. *Hampson*, 2 Vern. 5.

The individual members of a company mortgaging under the authority of an Act of Parliament are not, generally speaking, personally liable for either prin-

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cipal or interest: *Pontet* v. *Basingstoke Canal Co.*, 4 Scott, 182.

Guardians, tenants for life, &c., may charge allotments with expenses if not exceeding 5*l.* per acre;

Mortgages under Inclosure Acts.]—By the General Inclosure Act (41 Geo. 3, c. 109), sect. 30, the husbands, guardians, trustees, committees, or attornies, of any of the owners of allotments or exchanged lands being under coverture, minors, lunatics, beyond the seas, or under any other disability; and any of such owners being tenants in tail, or for life or lives, or years determinable on a life or lives, or any other contingency, or otherwise interested, as [therein] mentioned (except rectors or vicars), may charge such allotments or exchanged lands with such sums, not exceeding 5*l.* per acre, as the Inclosure Commissioners (*l*) shall, by their award, adjudge necessary to defray their shares of the charges and expenses incident to the obtaining any Inclosure Act, and carrying the same into execution, and of charging the lands, or in case any person in possession liable to a share of the expenses aforesaid shall choose to advance the money, then the Commissioners may, by deed, mortgage or otherwise subject the lands, &c., to such person paying the same for any term or number of years to and for the payment of such sum and sums, with interest for the same, to commence on the termination of his right in the premises, is to contain a covenant to pay and keep down the interest, so that no person shall be liable to pay any arrear of interest than for six calendar months preceding the time when his title to possession shall have commenced.

and if persons in possession shall advance the money, the commissioners may mortgage the lands to them for reimbursement.

Statute 8 & 9 Vict. c. 118.

These provisions are in substance re-enacted by sect. 133 of the General Inclosure Act, 1845 (8 & 9 Vict. c. 118), which provides that tenants for life or

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(*l*) Now the Land Commissioners: see the Settled Land Act, 1882 (45 & 46 Vict. c. 38), sect. 2, sub-sect. 10 (x). The subject of charges under the Enclosure Acts, the Drainage Acts, and the Copyhold Enfranchisement Acts are here very briefly considered, as persons wishing to effect such charges must apply to the Land Commissioners for the purpose, and can obtain full information for their guidance at the office of the Commissioners, No. 3, St. James's Square.

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in tail, or for any other estate of freehold or inheritance, and their husbands, guardians, &c., in case of disability or incapacity, and for the trustees or feoffees for charitable, parochial, or other uses, or the majority in number of them, in respect of any lands held by them in trust for any charitable, parochial, or other uses (with the consent of the commissioners (*m*) testified in writing under their hands and seal), and for incumbents, with the consent in writing of the bishop of the diocese and of the patron of the benefice, may charge their allotments with any money not exceeding 5*l.* per acre towards their respective proportions of the inclosure expenses, and for securing the repayment of such money, with interest, may mortgage or demise their allotments, provided every such mortgage or demise shall contain a covenant to keep down the interest during his life, so that no subsequent owner shall be liable to more than six months' arrears accrued previous to the time when his title shall accrue or commence; and in the case of a benefice the incumbent is to keep down the interest, and also to repay, in reduction of the principal, one thirtieth part of the money every year until the whole be repaid.

11 & 12 Vict. c. 99.

By the stat. 11 & 12 Vict. c. 99, sect. 8, it is provided that on mortgage of allotments the money shall be paid to the commissioners (*m*), and their receipt shall be a sufficient discharge for the money; and such money shall be applied by the commissioners for the purpose for which it may be raised under the Act.

By the stat. 20 & 21 Vict. c. 31, sects. 7, 8, on a partition the disproportion in value of allotments in severalty may be compensated by a rent-charge, provided the deficiency in value does not exceed one-eighth of the actual value of the land or other hereditaments partitioned.

As to mortgages under the General Inclosure Acts.

It will be perceived that these Acts provide for two distinct cases: one, that of the tenant for life or in tail raising the money by mortgaging the allotment to a third person; the other, that of his ad-

(*m*) Now the Land Commissioners, see last note.

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vancing it himself. In the former case the mortgage is made by the tenant for life, or tenant in tail, to the person advancing the money; in the latter case it is made by the commissioners to the tenant for life or tenant in tail. The concurrence of the commissioners in a mortgage by a tenant for life or in tail is not required by the Act. It is sufficient that they have certified the amount to be raised; but in order to obtain from them a recognition of the fact of their having given their certificate, it is desirable that they should join in the mortgage.

It sometimes happens that a tenant for life, or in tail, advances money for the expenses of an inclosure, and dies without having taken a mortgage from the commissioners. The Act makes no express provision for this case. But the representatives of the tenant for life have a claim upon the estate for the sum so expended; and the same principle has been held to apply where the payment was made by the owner of a defeasible fee: *Drinkwater* v. *Combe*, 2 S. & S. 340.

Charges under the Copyhold Enfranchisement Acts.] —As has already been seen (*ante*, sub tit. ENFRANCHISEMENT, Vol. II., p. 875 *et seq.*) lords and tenants of manors, whatever their respective estates and interests, were empowered by the Copyhold Act, 1841 (4 & 5 Vict. c. 35), to effect enfranchisements of lands by voluntary agreement. And, for the purpose of effecting such enfranchisement, this Act empowered lords and tenants having only limited interests to charge the manors and the enfranchised lands respectively with the consideration and expenses of enfranchisements. Several of the future Copyhold Acts contained further provisions as to raising monies for the purposes of effecting enfranchisements either by voluntary agreement or by compulsory process; but by the Copyhold Act, 1858 (21 & 22 Vict. c. 24), sect. 2, all provisions of the Copyhold Acts "which authorize the charging of enfranchisement or compensation monies, or the expenses of commutations or enfranchisements upon land," are repealed. And the same Act (sects.

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21—37) contains provisions enabling lords and tenants, with the consent of the Commissioners, to charge the manors and enfranchised lands respectively with the consideration or compensation for commutation or enfranchisement, and the expenses incident to the same: every such charge is to be made by a certificate of charge under the seal of the commissioners, and to be transferable by endorsement. The forms of certificate and transfer are given in sects. 36 and 37. By sect. 33 of this Act it is enacted that:—

Priority of charge.

"Any charge under this Act made in consideration of the value of land conveyed as consideration, or of consideration or compensation money, or of purchase-money, or of the expenses of purchase and conveyance, shall be a first charge on such manor or land, or shall have priority over all mortgages, charges, and incumbrances whatsoever, affecting such manor or land (except tithe commutation, rent-charges, and any charges or rent-charges which may have been or shall be charged upon the same land for the drainage thereof by virtue of any of the statutes in that behalf), notwithstanding the actual priority in point of date or anterior title of such mortgages, charges, and incumbrances; but any monies already invested or previously secured or charged thereon may be continued on the security of the same, notwithstanding the imposition of the said charge under this Act."

Charges under this Act do not merge in the freehold, unless the owner otherwise declares by endorsement on the certificate: sect. 34.

Mortgages under the Improvement Acts.]—The stat. 8 & 9 Vict. c. 56, empowers tenants by the curtesy, tenants for life, or *pur autre vie*, or for years, determinable on any life or lives, and infants, idiots, lunatics, and married women, by their guardians or next friends, committees, or husbands respectively, and also trustees and feoffees, for any charitable or other purposes, and ecclesiastical and other corporations aggregate or sole, and also mortgagees or incumbrancers in fee in possession, and persons entitled in fee to the equity of redemption and in possession of lands mortgaged, to petition the Chancery Division of the High Court of Justice for leave to make per-

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manent improvements by drainage, &c., in lands in their possession: sect. 3. Such petition is to be referred to the chief clerk, who will report thereon: sect. 4. The report is to be filed, and on confirmation thereof by the Court, the improvements may be made. The chief clerk is, therefore, to certify that persons advancing money for the improvements, will upon proof that the money has been properly applied become entitled to a charge on the estate: sect. 5. The chief clerk upon being satisfied as to the application of the money is to endorse upon the certificate a memorandum to that effect, and thereupon the inheritance of the lands is to become charged with the payment of the sum advanced, with interest; such charge is to have priority over other charges, except tithe commutation rent-charge, and chief and quit rents; and memorials of all certificates affecting lands in Middlesex, Yorkshire, or Ireland, are to be registered: sect. 6. The certificate is to be filed and a duplicate to be issued is to be evidence of title to the money: sect. 7. The money advanced is to bear interest at any rate agreed upon not exceeding five per cent.: sect. 8. The principal is to be repaid by annual instalments: sect. 9. And the person for the time being in possession of the lands charged is to pay the interest and annual instalments of principal during his title to the land; And, on the determination of his title, the inheritance is to be chargeable "with no more than six months' arrears of interest then due, and one half of the last instalment then due, and the interest and instalments thereafter to become due:" sect. 10. The improvements are to be kept in repair by the tenant for life, or other limited owner for the time being: sect. 11. And the assent of the actual occupier of any land is to be necessary to the validity of any application in respect of the land held by him: sect. 13.

By sect. 12 of the Act, the Lord Chancellor was empowered to make orders for facilitating proceedings under the Act, which have accordingly been made: see Ord. IV., March, 1846.

Improvement

The Improvement of Land Act, 1864 (27 & 28

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Vict. c. 114), sects. 49—71, contains provisions with regard to charges for improvements under the Act, whereby the commissioners, on completion of the works, are to charge the inheritance of the lands improved with the costs and expenses of the improvements: the charge is to be by way of rent-charge for a term of years, payable half-yearly, in reduction of principal and interest, and is to be according to a form prescribed in Schedule B. to the Act. Such charges are to have priority over all existing and future charges and incumbrances, except quit rent, crown rents, chief rents, and other charges incident to tenure, tithe commutation, rent-charges, and statutory improvement charges. Charges under this Act are personal property, but may be merged, if the holder so desire, in the land charged.

of Land Act, 1864.

The provisions of this Act are by the stat. 33 & 34 Vict. c. 56, extended so as to enable limited owners, with the consent of the commissioners, to charge in like manner the inheritance of their lands with the expenses of building residences, &c.

Limited Owners' Residences Act, 1870.

Charges under the Drainage Acts.]—The stat. 9 & 10 Vict. c. 101 (explained by the stat. 10 & 11 Vict. c. 11) empowered the Commissioners of the Treasury to advance to landowners sums of money to the extent and in manner therein provided. The application for an advance is to be made by the owner to the Inclosure (now Land) Commissioners, who having satisfied themselves as to the value of the land and the proper completion of the works, may certify to the Treasury that an advance should be made; and thereupon the land is to become charged with payment to the crown of a rent-charge at the rate of 6*l.* 10*s.* per centum on the amount advanced, whereby the principal and interest of the advance will be repaid by half-yearly payments in twenty-two and a half years. The charge has priority over all other charges, except quit rents and tithe commutation rent-charge, and is redeemable.

And by the stat. 12 & 13 Vict. c. 100, the owner of any land is empowered to borrow from private individuals or himself to advance money for pur-

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poses of drainage, &c., of such land, and to have the amount advanced charged on the inheritance of the land by way of rent-charge, whereby the principal and interest of the advance will be repaid by half-yearly payments in twenty-two and a half years.

The rent-charges created under this Act are to be kept down by limited owners: sect. 13; and are to have priority over all other charges, except tithe commutation rent-charge, land tax, local rates and taxes, and quit rents, and charges incident to tenure, and statutory charges for drainage and improvements: sect. 21. These rent-charges are not to be deemed to be incumbrances so as to preclude the investment of trust monies on lands charged therewith: sect. 20.

It will generally be prudent on the occasion of a mortgage or purchase of land to cause inquiry and search to be made as to the existence of any charges for drainage or improvements.

Charges under the Tithe Commutation Acts.]—By the Tithe Commutation Acts (*n*) limited owners of lands, &c., and ecclesiastical corporations aggregate and sole, and collegiate bodies are empowered to charge the expenses of commutation or redemption of tithe rent-charges, by charges on the lands, &c., for terms of twenty years.

Mortgages under the Land Tax Acts.]—The Land Tax Redemption Act, 42 Geo. 3, c. 116, provides that for the purpose of redeeming land tax on lands belonging to individuals, the persons in possession, but not having the absolute estate, and persons beneficially entitled to the rents and profits (except tenants at rack rent and crown tenants) may sell part of such lands or may mortgage the same, or grant any rent-charge to the amount of the land tax: sect. 51. Tenants in tail in England may

(*n*) See stats. 6 & 7 Will. 4, c. 71, sects. 77, 78; 2 & 3 Vict. c. 62, sects. 16, 17; 3 & 4 Vict. c. 15, sect. 23; 5 & 6 Vict. c. 54, sect. 8; 9 & 10 Vict. c. 73, sect. 11; 10 & 11 Vict. c. 104; 14 & 15 Vict. c. 53; 23 & 24 Vict. c. 93.

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convey by deed enrolled: sect. 52. And committees, guardians, executors, and administrators or trustees may sell or mortgage on behalf of persons under disability: sect. 53. Such sales or mortgages of estates in England are to be made under the authority of two of the commissioners for the time being acting in the execution of the Act, to whom one month's previous notice of the intended sale or mortgage must be given, with a schedule stating the interest of the party desirous of selling or mortgaging, the name of the remainderman, and the particulars of incumbrances affecting the property: sects. 54, 55. Prior mortgages are not to be affected by mortgages under this Act, except as to interest; and they are to be entitled according to their priorities to advance the money required for redemption of the land tax in preference to all others: sect. 114. All mortgages under this Act are to be enrolled within six months if the consideration exceeds 200*l.*: sect. 119. Proof of the execution of any mortgage deed by the commissioners is to be sufficient evidence that all requirements of the Act were duly complied with: sect. 120.

By sect. 100 of this Act it is provided that when there shall be surplus monies after redemption of the land tax, such surplus from lands in England shall be invested in the bank in the name of the Accountant-General in Chancery (now the paymaster-general) and shall be applied by order of the court in discharge of debts affecting the lands, or in the purchase of other lands to be settled in like manner as the lands mortgaged; the dividends in the meantime to be paid to the person entitled to the lands. But it has been held that where a portion of the glebe lands of a vicarage had been sold to redeem the land tax, the surplus monies could not be applied towards repairs and improvements of the vicarage house: *Re Nether Stowey Vicarage,* L. R. 17 Eq. 156. Where the land tax has been redeemed by a tenant for life, the remainderman may compel his representatives to receive the money and clear the estate: *Cousens* v. *Harris,* 12 Q. B. 726.

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Where leaseholds, the land tax on which has been redeemed, are brought into settlement, the charge of the land tax does not, unless expressly included, pass by the settlement, but remains in the settlor: *Neame* v. *Moorsom*, L. R. 3 Eq. 91.

Where a lessee agreed to pay the land tax which had been redeemed by the superior landlord, it was held that the lessee was still liable to pay the redeemed land tax and the lease was reformed accordingly: *Murray* v. *Parker*, 19 Beav. 305.

Conversion of turnpike roads.

Mortgages of Tolls under the Turnpike Acts.]—This subject, which was discussed at some length in the last edition of this work, may be very shortly treated, inasmuch as turnpike roads are being gradually converted into common highways; and there can be no doubt that before long tolls on public roads will be entirely abolished in England and Wales, as they have already been in Ireland.

The General Turnpike Act (3 Geo. 4, c. 126) authorises trustees or commissioners of turnpike roads to raise money from time to time by mortgage of the tolls, and the turnpikes and toll-houses for collecting the same. These mortgages confer upon the mortgagees no priority of charge over subsequent mortgagees; but all mortgagees, whatever the date of their respective securities, are entitled *pari passu* in proportion to the amount of their respective advances: *Doe* v. *Booth*, 2 B. & P. 223. The mortgages are to be in the following form:—

Form of mortgage.

"By virtue of an Act passed in the —— year of the reign of —— intituled [*here set forth the title of this Act*], We, whose hands and seals are hereunto subscribed and set, being —— of the trustees [*or* commissioners] for putting into execution an Act passed in the —— year of the reign of —— intituled [*here set forth the title of the Act under which the trustees or commissioners borrowing the money and granting the mortgage shall act*], in consideration of the sum of —— sterling, advanced and paid by A. B. of ——, to the treasurer of the said trustees [*or* commissioners], do hereby grant and assign unto the said A. B., and his executors, administrators, and assigns, *such proportion of the tolls* arising and to arise on the said turnpike road, and the toll-gates and toll-

houses erected or to be erected for collecting the same, *as the said sum of —— doth or shall bear to the whole sum now or hereafter to become due and owing on the security thereof:* To have, hold, receive, and take the said proportion of the said tolls, toll-gates, toll-houses, and premises, with the appurtenances, unto the said A. B., and his executors, administrators, and assigns, for and during the residue of the term for which the said tolls are granted by the said last-mentioned Act, unless the said sum of ——, with interest after the rate of —— per centum per annum, shall be sooner repaid and satisfied. Given under our hands this —— day of ——."

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A mortgage of tolls may be transferred by an assignment in the following form, endorsed on or annexed to the mortgage :—

"I, A. B. [*or* I, C. D., assignee, executor, or administrator of A. B., *as the case may happen*], do hereby assign and transfer this mortgage security, with all my right and title to the principal money thereby secured, and all interest now due and hereafter to grow due upon the same, unto E. F., his or her executors, administrators, and assigns. Dated this —— day of ——, one thousand eight hundred and ——.

"Witness, G. H.

"(Signed) A. B. [*or* C. D.]"

Form of assignment.

Copies of all such mortgages are to be entered in books to be kept by the clerk or treasurer of the commissioners : see sect. 81 of the Act. The transferee has no title till entry : *Doe* v. *Jones,* 5 Exch. 16. Sect. 43 prohibits the trustees from reducing or advancing the tolls without the consent of four-fifths of the creditors. Any mortgagee taking possession of the toll-houses and receiving the tolls is to account to the trustees for the tolls received by him under a penalty of 50*l.* for every omission or refusal so to account ; and if a mortgagee keeps possession after he has received the money due to him on his security, he is to forfeit double the sum and treble costs : see sects. 47, 48. Any mortgagee may obtain possession of the tolls and premises without the other mortgagees ; but the tolls are to be applied for the use and benefit of all the mortgagees of the said premises, *pari passu,* and in proportion to the several sums which

Regulations as to mortgages of tolls.

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may be due to them as such mortgagees (*p*), sect. 49; and see *Doe* v. *Booth*, 2 B. & P. 223. This right of entering into possession belongs to any mortgagee without any reference to the priority of his charge: *Doe* v. *Peafold*, 3 Q. B. 757.

Priority of mortgagees under different acts.

Where a local act subjected the tolls of a turnpike road to the payment of the money borrowed thereon, and a subsequent act for making a branch road subjected the tolls of the branch road to the monies borrowed under the former act, and directed that such monies should have priority of charge and payment, and mortgages were executed under both acts, it was held, that the words "priority of charge and payment" meant merely priority of payment; and that a mortgagee under the second act had the legal estate of the tolls and toll-houses of the branch, and, after recovery in ejectment, would become a trustee for the former mortgagees: *Doe* v. *Lediard*, 4 B. & Ad. 137.

By sect. 60 of the stat. 4 Geo. 4, c. 95, it is provided, that instead of paying creditors off rateably, the trustees may do so by lot; and by the stat. 12 & 13 Vict. c. 87, sect. 3, a sinking fund is provided, to be applied in reduction of debts. By sect. 13 of the stat. 9 Geo. 4, c. 77, trustees are empowered to renew mortgages of tolls which may have been lost or mislaid.

Personal liability of trustees.

Sect. 81 of the stat. 4 Geo. 4, c. 95, exonerates the trustees from personal liability in consequence of having signed any mortgage or other security to be made by virtue of or in pursuance of any act for making or maintaining any turnpike road; and the stat. 7 & 8 Geo. 4, c. 24, s. 3, contains a similar provision.

If a trustee of a turnpike road borrow money, he must, in order to avoid personal liability to repay such money, execute a legal security to the borrower, in the manner prescribed by the statutes: *Parrot* v. *Eyre*, 10 Bing. 283. In which case the chairman of the trustees of a turnpike road applied to the

(*p*) By the stat. 12 & 13 Vict. c. 87, sect. 4, mortgagees in possession are empowered to let and farm the tolls.

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treasurer of the road to advance money to the trust; which was done, and the money placed to the credit of the trustees, but no security upon the tolls was executed; and it was held, that the chairman was personally liable for the money.

Mortgagees may farm tolls.

By sects. 4, 5 of the stat. 12 & 13 Vict. c. 87, mortgagees in possession are empowered to farm the tolls.

Mortgage of tolls is within the Mortmain Act.

Money secured by a mortgage of turnpike tolls is an interest in land, and within the statute of Mortmain: *Knapp* v. *Williams*, 4 Ves. 430, n.

4. Mortgage of an Advowson.

Right of presentation.

The mortgagee of an advowson, whether appendant or in gross, has the legal right to present: Dick. 662; but, until foreclosure, equity will compel him to present the nominee of the mortgagor, notwithstanding an express agreement to the contrary: *Mackenzie* v. *Robinson*, 3 Atk. 559; because the mortgagee can make no profit by presenting to the church, nor can he account for any value in respect of it, to sink or lessen his debt: *Joy* v. *Cox*, Pre. Ch. 71; *Amherst* v. *Dawling*, 2 Vern. 401; *Gubbins* v. *Creed*, 2 Sch. & Lef. 216. If a nominee of the mortgagee be inducted, the mortgagor may bring his action to compel resignation within six months from the occurrence of the vacancy: *Gardiner* v. *Griffiths*, 2 P. Wms. 404; *Mutter* v. *Chauvel*, 1 Mer. 493. It is obvious, therefore, that an advowson can only be made available as a security by means of a power of sale, which, however, cannot be exercised during a vacancy, so as to confer the right to present for that turn: *Salisbury, Bp.*, v. *Wolferston*, 3 Burr. 1504; *Mirehouse* v. *Rennell*, 1 M. & Sc. 683; but the power may be exercised if the present incumbency is *voidable* only: *Alston* v. *Atlay*, 7 Ad. & E. 209; and knowledge on the part of the purchaser, that the incumbent is on his death-bed, does not make the contract simoniacal: *Barrett* v. *Glubb*, Dick. 516; *Fox* v. *Bishop of Chester*, 1 Dow. N. S. 416; *S. C.*, 3 Bligh, N. S. 123.

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5. Mortgages and Charges on Church Livings.

Charges void under 13 Eliz. c. 20.

Impropriate rectories may be mortgaged like any other hereditaments, but no mortgage or charge of a benefice with cure of souls can now be made, by reason of the revival of that portion of the statute 13 Eliz. c. 20, which prohibits such charges; and the only manner in which the creditor of a clergyman can obtain payment out of the profits of his living, is by sequestration under a judgment: *ante*, p. 663.

By sect. 1 of this statute, which is intituled, "An Act touching the leases of benefices, and other Ecclesiastical livings with cure," it is enacted that—

> "All charging of such benefices with cure, hereafter, with any pension, or with any profit out of the same to be yielded or taken, hereafter to be made, other than rents to be reserved upon leases hereafter to be made according to the meaning of this Act, shall be utterly void."

This Act was made perpetual by the 3 Car. 1, c. 4, s. 2.

43 Geo. 3, c. 84, repealed the above acts, and was itself, with part of 13 Eliz. c. 20, repealed by 57 Geo. 3, c. 99.

By the 43rd Geo. 3, c. 84, s. 10, which passed in the year 1803, the stat. 13th Eliz. c. 20, and also so much of the stat. 3 Car. 1, c. 4, whereby the same was made perpetual, were repealed. But the 57 Geo. 3, c. 99, s. 1, by repealing the 43 Geo. 3, c. 84, revived the 13 Eliz. c. 20, which is now in force, except as to certain parts as the reviving statute of 57 Geo. 3, c. 99, has itself repealed. For when a repealing Act is repealed, the first Act repealed is revived: *Spencer's case*, 12 Co. 17; 2 Inst. 686: 4 Inst. 325; 1 Bl. Com. 90.

That part of 13 Eliz. c. 20, relating to charges, revived.

The stat. 57 Geo. 3, c. 99, not being retrospective, *a demise* by a rector of all the glebe lands, tithes, &c., to a trustee for securing an annuity, if the rector should so long live, which was executed in December, 1816, and therefore in the interval between the Acts of the 43 and 57 Geo. 3, was held to be good: *Doe* d. *Cates* v. *Somerville*, 6 B. & C. 126. But in *Shaw* v. *Pritchard*, 10 B. & C. 241, a similar demise was held to be void, "being in substance a charging of the benefice within the meaning

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of the 13 Eliz. c. 20, which, so far as relates to the charging of benefices is still in force": see also *Walthew* v. *Crafts*, 6 Exch. 1.

Invalidity of an agreement to apply the income of living for the benefit of creditors.

Where a clergyman, having no other income than the profits of his benefice, entered into a composition, to permit his income to be received by a third person, for the purpose of the surplus, after payment of a competent stipend to a curate to serve his church, being applied in liquidation of his debts. It was held, that the agreement was void, as an agreement to charge the profits of the livings: *Alchin* v. *Hopkins*, 4 Moo. & S. 615.

Pew rents.

A mortgage of pew rents made by the vicar of a district church is void: *Ex parte Arrowsmith*, 8 Ch. D. 96.

Canonry.

The stat. 13 Eliz. c. 20, applies only to benefices with cure of souls, and it has been accordingly held that a mortgage of the profits of a canonry to which no cure of souls was attached was valid, and that a receiver of profits may be appointed: *Grenfell* v. *Dean and Canons of Windsor*, 2 Beav. 544. So where a rectory or manor is specifically allotted to a prebend, the prebendary may create a valid charge thereof: *Doe* v. *Musgrave*, 5 Man. & Gr. 631.

A charge on a benefice is merely a *malum prohibitum* by virtue of statutory enactment, not a *malum in se*, and consequently collateral securities to secure the debt are not necessarily void: *Errington* v. *Howard*, Amb. 485.

What warrants of attorney given by clergymen are invalid.

Flight v. *Salter*.

Several cases require to be noticed with reference to the effect of charges upon benefices, in connection with a warrant of attorney given by the debtor. In *Flight* v. *Salter*, 1 B. & Ad. 673, a warrant of attorney reciting a grant of annuity, secured by the demise of a rectory, &c.; and that the warrant was executed for the purpose of securing the annuity, and to the intent that a sequestration might be obtained and continued during the continuance of the annuity, for the better securing the same, was held to be void, so far as it was given for the purpose of obtaining a sequestration: see also *Newland* v. *Watts*, 2 M. & Sc. 174; *S. C.*, 9 Bing. 174; *Saltmarshe* v. *Hewett*, 1 A. & E. 812.

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Kirlew v. *Butts.*

In *Kirlew* v. *Butts,* 2 B. & N. 736, n., the sequestration was set aside, except as regards the arrears due, but the warrant of attorney and judgment were upheld: see also *Britten* v. *Waite,* 3 B. & Ad. 915; *Moore* v. *Ramsden,* 3 B. & Ad. 917.

Faircloth v. *Gurney.*

But in *Faircloth* v. *Gurney,* 2 M. & Sc. 822; *S. C.,* 9 Bing. 622, the warrant of attorney recited a deed containing a charge on a rectory, but did not expressly authorize a sequestration of the rectory; and it was held to be unimpeachable. *Bosanquet,* J., observed, "It does not follow that an illegal use will be made of an instrument in which the power of sequestration is not referred to; but where such a power is expressly mentioned, it may be presumed that the party will avail himself of it:" see also *Gibbons* v. *Hooper,* 2 B. & Ad. 736; *Aberdeen* v. *Newland,* 4 Sim. 281.

Remarks on the preceding cases.

In *Colebrook* v. *Layton,* 4 B. & A. 578, there is no doubt, upon all the authorities, that by no contrivance can a writ of sequestration be made available for more than the debt actually due at the time of issuing it; that (disregarding the case of *Kirlew* v. *Butts, supra,* for the reasons mentioned) a warrant of attorney, expressly authorizing a continuing sequestration, is void altogether; and that, whether a recital in such warrant of a charge upon the benefice, on the one hand, or an express authority to issue sequestration for arrears actually due, on the other, would invalidate the warrant or not, such recital or authority being wholly nugatory, should be omitted. But the result of the cases appears to be that a warrant of attorney to enter up judgment for the gross principal sum, and containing no reference, either to any sequestration, or to the annuity, that being a collateral bargain, cannot be impeached, even though the intention and necessary conveyance of the warrant is to effect a sequestration; for unless the intention appears on the face of the warrant or other collateral security, such intention cannot be proved by parol evidence: *Colebrook* v. *Layton,* 4 B. & Ad. 579.

Sequestration.]—Where a judgment debtor is an

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incumbent of a benefice, the creditor, if unable otherwise to obtain satisfaction of his claim, may sue out a writ of sequestration. As to the process of execution of such writ, see Coote Mortg. 377; and Burn's Eccl. Law (Sequestration), 1.

The sequestration extends to rents, not only to the tithes and glebe, but also to rents reserved on leases thereof: *Arbuckle* v. *Cowtan*, 3 B. & P. 321; *Doe* v. *Black*, 3 Camp. 447; and an incumbent's balance at his bankers may be attached under it: *Miller* v. *Huddlestone*, 22 Ch. D. 233. But the parsonage house cannot be taken under a sequestration: *Pack* v. *Tarpley*, 9 A. & E. 468; nor arrears of rents and profits due to the incumbent previous to the publication (*q*) of the sequestration: *Waite* v. *Bishop*, 1 C. M. & R. 507; except on the bankruptcy of the incumbent, in which case such arrears will pass to his trustee: *Arbuckle* v. *Cowtan*, 3 B. & P. 321; see also Coote Mortg. 378.

The sequestrator is an officer of the bishop; his powers and duties are now regulated by the stat. 12 & 13 Vict. c. 67.

Bankruptcy.

Under the old insolvent debtors' Acts, the profits of ecclesiastical benefices did not pass to the assignees, although included in the insolvent's schedule: *Arbuckle* v. *Cowtan*, 3 Bos. & P. 321; and it seems that the assignees could not obtain a sequestration, while the discharge of the insolvent would have been a clear bar to an action by an individual debtor. But by a clause first introduced in the stat. 53 Geo. 3, c. 102, and continued in subsequent Acts, assignees were empowered to obtain sequestration of the profits of the benefice of an insolvent incumbent. And now by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), sect. 52, it is enacted that—

Sequestration of ecclesiastical benefice.

"(1) Where a bankrupt is a beneficed clergyman, the trustee may apply for a sequestration of the profits of the benefice, and the certificate of the appointment of the trustee shall be sufficient authority for the granting of sequestration without any writ or other proceeding, and the same shall accordingly be issued as on a

(*q*) As to what amounts to publication, see *post*, p. 753.

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writ of *levari facias* founded on a judgment against the bankrupt, and shall have priority over any other sequestration issued after the commencement of the bankruptcy in respect of a debt provable in the bankruptcy, except a sequestration issued before the date of the receiving order, by or on behalf of a person who at the time of the issue thereof had not notice of an act of bankruptcy committed by the bankrupt, and available for grounding a receiving order against him.

"(2) The bishop of the diocese in which the benefice is situate may, if he thinks fit, appoint to the bankrupt such or the like stipend as he might by law have appointed to a curate duly licensed to serve the benefice in case the bankrupt had been non-resident, and the sequestrator shall pay the sum so appointed out of the profits of the benefice of the bankrupt by quarterly instalments, while he performs the duties of the benefice.

"(3) The sequestrator shall also pay out of the profits of the benefice the salary payable to any duly licensed curate of the church of the benefice in respect of duties performed by him as such during four months before the date of the receiving order, not exceeding fifty pounds.

"Nothing in this section shall prejudice the operation of the Ecclesiastical Dilapidations Act, 1871 (*r*), or the Sequestration Act, 1871 (*r*), or any mortgage or charge duly created under any Act of Parliament before the commencement of the bankruptcy on the profits of the benefice."

The effect of this provision is merely to give priority to a sequestration issued by the trustee in the bankruptcy of a beneficed clergyman, over a sequestration issued by an individual creditor provable in bankruptcy, and the section does not apply where two sequestrations are issued by trustees in different bankruptcies; in such a case the title of the trustee in the first bankruptcy will have priority, notwithstanding the discharge of the debtor: *Ex parte Chick, Re Meredith*, 11 Ch. D. 731.

Priority of sequestrations.

A sequestration by a subsequent incumbrancer will give him priority over one whose incumbrance

(*r*) The Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), contains provisions as to repairs: see sects. 12—18, 20, 21 of the Act. And the Sequestration Act, 1871 (34 & 35 Vict. c. 45), enables bishops to appoint curates, and to provide for their stipend, and to inhibit incumbents, pending sequestrations.

is earlier in date: *Bates* v. *Brothers*, 2 Sm. & G. 509. Sequestrations take priority among themselves according to the priority in the publication of the writs of sequestration: *Bennet* v. *Apperley*, 6 B. & Cr. 530; *Doe* v. *Black*, 3 Camp. 447.

Publication.

The ordinary mode of publication is by causing a copy to be affixed to the church door, but any other mode of publication practised in the diocese will be sufficient, as by reading the writ in the parish church, &c.: *Bennet* v. *Apperley*, 6 B. & C. 630.

Several sequestrations.

Where several sequestrations were issued at the same time, and through the same attorney, on judgments of different dates, confessed at the suit of several annuitants, and the bishop's registrar had entered the plaintiff's sequestration second in the series, though his judgment was first in point of date, the Court held that his sequestration ought to have been first entered, and directed that it should have precedence: *Rex* v. *Bishop of London*, 1 D. & R. 486.

Account.

A second sequestrator is entitled to an account against the prior sequestrator, and to payment of the surplus after satisfaction of such creditor: *Cuddington* v. *Withy*, 2 Swans. 174; see *Cottle* v. *Warrington*, 2 Nev. & M. 127.

Power to raise money to build or repair parsonage.

Statutory charges for building parsonages, &c.]—The stat. 17 Geo. 3, c. 53 (amended by the 1 & 2 Vict. c. 23, and 28 & 29 Vict. c. 69), authorizes incumbents, with the consent of the patron and ordinary, to raise money for building or repairing parsonage-houses; and the incumbent may advance his own money on such security: *Boyd* v. *Barker*, 4 Drew. 582.

But the money must not be advanced by a person whose duty it is to see that the requirements of the Acts are duly complied with. So where a rector was empowered by Act of Parliament, with the consent of the bishop, to raise money for the purpose of building a new rectory-house by a charge on the benefice, and the bishop himself advanced the money and took a charge in favour of a trustee for himself, it was held, at the suit of the succeeding rector, that

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the transaction would not stand, and the charge was set aside: *Greenlaw* v. *King*, 3 Beav. 49.

By the stat. 55 Geo. 3, c. 147, ss. 6, 7, incumbents are empowered to purchase additional lands for glebe, and to charge the glebe-lands for that purpose.

Benefices Plurality Act.

By the stat. 1 & 2 Vict. c. 106, s. 62, the bishop is empowered, on the avoidance of a benefice, to issue a commission to report as to the parsonage-house, and if there be no fit house, to raise money to build one by mortgage of the glebe, &c., for thirty-five years. See also 5 & 6 Vict. c. 26, s. 13.

An incumbent who redeems the land tax on the glebe has a charge on the living if he exercises the option given him by the statute: *Kilderbee* v. *Ambrose*, 10 Exch. 454.

Ecclesiastical Dilapidations Act, 1871.

The Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), s. 38, empowers new incumbents, with the consent of the bishop and patron, to borrow from the governors of Queen Anne's Bounty, "on the security of the possessions of the benefice, (1) the whole or any part which the governors shall not have received from the new incumbent of the sum stated in the order (*s*) as to the cost of the repairs; and (2) such sum as the governors shall think fit in respect of the costs and expenses."

6. Mortgages of Pensions, Salaries, &c.

Assignments of either the half or whole pay of a military officer, or of seamen's wages, are void.

In *Flarty* v. *Odlum*, 3 T. R. 681, the creditors of a military officer sought to obtain an assignment of his half-pay, under an Insolvent Debtors' Act. Lord *Kenyon* said, "I am clearly of opinion that this half-pay could not be legally assigned by the defendant, and consequently that the creditors are not entitled to an assignment of it for their benefit. Emoluments of this sort are granted for the dignity of the state, and for the decent support of those persons who are engaged in the service of it. It would,

(*s*) *I. e.*, the order to be made by the bishop under sect. 34 of the Act, stating the repairs and their cost, for which the incumbent, his executors, or administrators, is or are liable.

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therefore, be highly impolitic to permit them to be assigned; for persons, who are liable to be called out in the service of their country, ought not to be taken from a state of poverty. Besides, an officer has no certain interest in his half-pay; for the king may, at any time, strike him off the list:" see *Macdonald* v. *Steele*, Peake, 175. Nor can the full pay of a military officer be assigned; it being contrary to the policy of the law, that a stipend given to one man for future services, should be transferred to another who cannot perform them: *Barwick* v. *Read*, 1 H. Bl. 627; see also *Lidderdale* v. *Duke of Montrose*, 4 T. R. 248; *Stone* v. *Lidderdale*, 2 Anst. 533; *Arbuckle* v. *Cowtan*, 3 B. & P. 328; *M'Carthy* v. *Goold*, 1 Ba. & B. 387; *Price* v. *Lovatt*, 15 Jur. 786; *Lloyd* v. *Cheetham*, 3 Giff. 171; *Willcock* v. *Terrell*, 3 Ex. D. 326. The commission of a military officer cannot be pledged or mortgaged: *Collyer* v. *Fallon*, T. & R. 459.

By the stat. 1 Geo. 2, sess. 2, c. 14, s. 7, all assignments of pay, wages, or allowances due or to become due to seamen in the service of the crown are void.

Pensions.

Although a pension is equally uncertain as half-pay, yet as no future benefit is meant to arise to the state from granting it, a material distinction arises between them. A pension for past services may, therefore, be assigned, unless the pensioner is liable to be called upon to render future service: *M'Carthy* v. *Gould*, 1 B. & B. 380; *Wells* v. *Foster*, 8 M. & W. 149.

A pension for past services may be assigned;

The following classes of pensions have been held to be assignable, viz., pensions of colonial judges: *Ex parte Huggins*, 21 Ch. D. 85: of county court judges: *Willcock* v. *Terrell*, 3 Ex. D. 323: of a bankruptcy commissioner: *Spooner* v. *Payne*, 1 De G. M. & G. 383: moneys payable to the representatives of an Indian judge, who died during his term of office: *Arbuthnot* v. *Norton*, 5 Moo. P. C. C. 219: and civil service pensions generally: *Sansom* v. *Sansom*, 4 P. D. 69. So also prize-money, and the right to it before actually granted: *Alexander* v. *Duke of Wellington*, 2 R. & My. 35: and moneys

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payable to a custom-house officer as compensation for loss of his office: *Tunstall* v. *Boothby*, 10 Sim. 542.

but a pension for supporting the grantee in the performance of future duties is unalienable.

But a pension granted by Act of Parliament "for the more honourable support of the dignities" of a dukedom, payable out of the revenues of the post office, to such persons severally and successively to whom the same should come by virtue of the Act, with a proviso that the acquittance of every such person should be a sufficient discharge, is unalienable by the person in possession as against himself, and cannot be charged: *Davis* v. *The Duke of Marlborough*, 1 Swanst. 74, 79.

Pension on resignation of benefice.

Pensions to incumbents on resignation of their benefices under the Incumbents Resignation Act, 1871 (34 & 35 Vict. c. 44), are not transferable at law or in equity: see sect. 10. Nor can they be the subject of set-off: *Gathercole* v. *Smith*, 17 Ch. D. 1.

Stat. 5 & 6 Edw. 6, c. 16.

By stat. 5 & 6 Edw. 6, c. 16, it is enacted that, "if any person bargain or sell any office, or deputation of any office, or any part of them, or receive or take any money or other profit, or take any promise, agreement, covenant, bond, or assurance, to receive or have any money or profit for any office or deputation, or any part of them, or to the intent that any person should have any office or deputation, or any part of them, which office shall in any wise touch or concern the administration or execution of justice, or the receipt of any of the king's revenue, or which shall concern any clerkship in any court of record wherein justice is to be administered; every such person that shall bargain or sell any of the said offices or deputations, or that shall take any money, profit, &c., shall not only lose all his right and estate in the office, or the gift or nomination of the office, but also such person that shall give any money, or make any promise or assurance for the office, &c., shall be adjudged a disabled person to have and enjoy the said office," &c. And by the third section it is further enacted that, "all such bargains, agreements and insurances shall be void." The provisions of this Act are extended by stat. 49 Geo. 3, c. 126, s. 1, to Scotland and Ireland, and to all

Sale of offices concerning the administration of justice, &c., void.

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offices in the gift of and appointed by the crown, and to all commissioners, civil, naval, or military; and to all places and employments of government at home, or in the colonies at the East Indies. Sections 8 and 9 except commissions in the army at the regulated prices, offices excepted by the stat. 5 and 6 Edw. 6, and all offices then legally saleable.

Profits of clerk of the peace not assignable.

It has been held that the office of clerk of the peace is an office within the meaning of this statute; and the circumstances that the assignment was of the profits, after deducting the salary of the deputy and the expenses attending the execution of the office, did not support it: *Palmer* v. *Bate*, 6 Moo. 28. But the profits of the office of private secretary are of course assignable; and a covenant to assign the emoluments of all offices of which the covenantor might become possessed, would clearly be good as to assignable offices: *Harrington* v. *Klosprogge*, 6 Moo. 38, n.

It seems that the profits of the office of registrar of the Court of Chancery are assignable: *Drummond* v. *Duke of St. Albans*, 5 Ves. 433. So, in a case in the Exchequer, where the question was raised whether an assignment by the clerk of the deputy registrar of the Prerogative Court, of the profits of his office, in trust to secure an annuity, was valid, the Court decided in the affirmative: *Aston* v. *Gwinnell*, 3 Y. & J. 136; see also *Wheeler* v. *Trotter*, 3 Swan. 174; *Clarke* v. *Richards*, 1 Y. & C. 351.

The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), contains the following provisions with regard to pay, salaries and pensions of officers and others in the employment of the crown:—

Appropriation of portion of pay or salary to creditors.

Sect. 53. "(1) Where the bankrupt is an officer in the army or navy, or an officer or clerk, or otherwise employed or engaged in the civil service of the Crown, the trustee shall receive for distribution amongst the creditors so much of the bankrupt's pay or salary as the Court, on the application of the trustee, with the consent of the chief officer of the department under which the pay or salary is enjoyed, may direct. Before making any order under this sub-section, the Court shall communicate with the chief officer of the department as to the amount, time, and manner

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of the payment to the trustee, and shall obtain the written consent of the chief officer to the terms of such payment.

"(2) Where a bankrupt is in the receipt of a salary or income (*t*) other than as aforesaid, or is entitled to any half pay, or pension, or to any compensation granted by the Treasury, the Court on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary, income, half pay, pension, or compensation, or of any part thereof, to the trustee, to be applied by him in such manner as the Court may direct.

"(3) Nothing in this section shall take away or abridge any power of the chief officer of any public department to dismiss a bankrupt, or to declare the pension, half pay, or compensation of any bankrupt to be forfeited."

7. Mortgage of a Reversion.

Dealings with reversionary interests.

The expectancy of an heir, &c., not being an actual estate or interest, cannot be the subject of mortgage; for, though a contract in respect of a mere expectancy may bind a *person* (as in the case of a covenant to settle after-acquired property) it has no operation (except by way of estoppel) upon the subject-matter itself: see *Carleton* v. *Leighton*, 3 Mer. 667. Sales of reversionary interests, when set aside for inadequacy of consideration, are, except under very peculiar circumstances, treated as mortgages, redemption being decreed on repayment of the consideration-money and interest (*u*); and it would seem to follow that all the doctrines applicable to mortgages, as to tacking, notice, priority, &c., must equally hold good with respect to such transactions. A purchaser will not, however, be charged with what, without wilful default, he might have made;

(*t*) A voluntary allowance made to a bankrupt is not "income" within the meaning of this clause: *Ex parte Wicks*, 17 Ch. D. 70.

(*u*) And generally *costs*, as in case of a mortgage: *Twistleton* v. *Griffiths*, 1 P. W. 310; *Gwynne* v. *Heaton*, 1 Bro. C. C. 1 *Evans* v. *Peacock*, 16 Ves. 512; *Gowland* v. *De Faria*, 17 Ves. 20 *contra Lawley* v. *Hooper*, 3 Atk. 278; *Barnadiston* v. *Lingwood*, 2 Atk. 133. Compound interest will not be allowed, however long the purchaser may have been kept out of his money: *Gowland* v. *De Faria*, *supra*.

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the case is not like that of mortgagees, who are thus charged in order to render them sufficiently alert in receiving the rents: *Murray* v. *Palmer*, 2 Sch. & L. at p. 489.

Mortgagees of reversionary interests stand on a similar footing to purchasers, and are entitled only to the amount actually advanced with interest and costs: *Bowes* v. *Heaps*, 3 Ves. & B. 117; *Re Slater's Trusts*, 11 Ch. 227.

By the Sales of Reversions Act (31 Vict. c. 4), it is enacted:—

Sect. 1. "No purchase, made *bonâ fide*, and without fraud or unfair dealing, of any reversionary interest in real or personal estate, shall hereafter be opened or set aside merely on the ground of undervalue.

Sect. 2. "The word 'purchase' in this Act shall include every kind of contract, conveyance, or assignment under or by which any beneficial interest in any kind of property may be acquired.

Sect. 3. "This Act shall come into operation on the first day of January, 1868, and shall not apply to any purchase concerning which any suit shall be then depending."

Unconscionable bargains.

Unconscionable bargains with young men have always been regarded with suspicion by the Courts and have been held liable to be set aside unless the borrower was fully aware of the nature of the transaction: *Emmet* v. *Tottenham*, 12 L. J. (N. S.) 838; *Burnley* v. *Smith*, 26 Beav. 644: see also *Barnadiston* v. *Lingwood*, 2 Atk. 133; *Marsack* v. *Reeves*, 6 Mad. 108; *Wharton* v. *May*, 5 Ves. 27; *Curling* v. *Marquis of Townsend*, 19 Ves. 628. And the law as to unconscionable bargains is not altered by the statute: see *Miller* v. *Cook*, L. R. 15 Eq. 646; *Tyler* v. *Yates*, L. R. 6 Ch. A. 667; *Earl of Aylesford* v. *Morris*, L. R. 8 Ch. A. 484; *Beynon* v. *Cook*, L. R. 10 Ch. A. 389; *Nevill* v. *Snelling*, 15 Ch. D. 679. And the *onus* of proving the transaction to have been fair will fall on the purchaser or mortgagee: *Davis* v. *Duke of Marlborough*, 2 Swnst. 139; see also *O'Rorke* v. *Bolingbroke*, 2 App. Ca. 814, in which case, however, there being no evidence of fraud, it was held by Lords *Blackburn* and *Gordon* (*diss.* Lord *Hatherley*, C.), that a bill to set aside a sale of

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a reversionary interest could not be sustained, though the borrower, who had only just come of age, had no independent legal advice.

Mortgages of reversions differ in no respect from mortgages of immediate interests, except in the increased danger to which a mortgagee in the former case is exposed, of the existence of prior incumbrances; the usual evidence of unincumbered ownership, afforded by possession and the custody of the title-deeds, being, in such cases, necessarily absent. This objection to securities upon reversionary property has, however, been in a great measure removed, so far as it relates to *equitable choses en action*, by the modern doctrine of obtaining priority by notice to the trustee; a doctrine which will be discussed in connexion with the general subject of priority, in Chapter VII., *infra*.

8. Mortgage of a Rent-charge.

As to the custody of the deeds in the case of a mortgage of a fee-farm rent.

Where a mortgagee advances money on a *subsisting* rent-charge, he should, of course, have the deeds creating and subsequently granting the rent delivered up to him, as in other cases. Where he takes as a security a rent-charge created *de novo* out of the mortgagor's lands, he should either have the deeds relating to the lands delivered to him, or they should be deposited with a third person, for the common benefit of the mortgagor and the mortgagee; or, at least, a memorandum of the creation of the charge should be indorsed on the principal conveyance, in order that any person claiming under the mortgagor derivatively through such conveyance might have notice of the charge.

The stat. 3 & 4 Will. 4, c. 27, s. 42, enacts that:—

3 & 4 Will. 4, c. 27. No arrears of rent to be recovered after more than six years from time of becoming due, or of written

"No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action or suit, but within *six years* next after the same respectively shall have become due, or next after an acknowledgment in writing shall have been given to the person entitled thereto, or his

agent, signed by the person by whom the same was payable, *or his agent.*"

Mortgage of a Rent-charge.

acknowledgment.

The stat. 3 & 4 Will. 4, c. 42, s. 3, enacts, that all actions of debt for rent *upon an indenture of demise,* all actions of covenant or debt upon any bond or other specialty, &c., shall be commenced and sued "within *ten years* after the end of this present session, or within *twenty years* after the cause of such actions or suits, but not after."

3 & 4 Will. 4, c. 42, s. 3.

In deciding that the right to sue for rent accruing under an indenture of lease, was regulated by the last-mentioned enactment, three of the judges of the Court of Common Pleas (*diss. Bosanquet,* J.) expressed an opinion, that rent-service reserved by specialty was not within the 42nd section of the 3 & 4 Will. 4, c. 27, which was intended to apply to rent-charges only: *Paget* v. *Foley,* 3 Scott, 120; *S. C.* 2 Bing. N. C. 679; and see *James* v. *Salter,* 4 Scott, 168; *Paddon* v. *Bartlett,* 3 A. & E. 884; *Strachan* v. *Thomas,* 12 A. & E. 556; *Homfrey* v. *Grey,* 7 C. B. 567.

Statutory remedies.

By the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sect. 44, the insertion in grants of rent-charges of powers of distress and entry and of limitations of terms to trustees to secure rent-charges are rendered unnecessary: see the provisions of the Act set out in full, *ante,* Vol. I., pp. 671, 673, 674.

The payment of arrears of a rent-charge may be enforced by sale of the land charged if there is not sufficient distress to cover the amount due, but, apparently, not otherwise: see *Burton* v. *Monkhouse,* G. Coop. 41; *White* v. *James,* 26 Beav. 191; *Sollory* v. *Leaver,* L. R. 2 Eq. 22; *Horton* v. *Hall,* L. R. 17 Eq. 437; *Dawson* v. *Robins,* 2 C. P. D. 37; *Scottish Widows' Fund* v. *Craig,* 20 Ch. D. 208.

9. Mortgages of Copyholds.

As to mortgages of copyholds.

Mortgages of copyholds are usually effected by a conditional surrender by the mortgagor into the hands of the lord of the manor, to be afterwards

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perfected (if necessary) by admittance of the mortgagee. It is however necessary that there should be a deed, in addition to the surrender, for the purpose of making the mortgagor enter into the usual covenants for the title and the payment of the money, and to confer upon the mortgagee powers of sale, which cannot be contained or implied in the surrender (*v*). This deed may be either precedent to, contemporaneous with, or subsequent to the surrender. But even where the deed is in the form of a covenant to surrender, it is frequently executed simultaneously with the surrender. The surrender is made either at the next general court, or at a special court, or (which is more common) out of court, to the steward or his deputy, or before tenants of the manor, if such be the custom. The mortgagee should not pay his money until both the deed and surrender are completed. The completion of the surrender is of course increasingly important, where its operation is required to bind the interests of persons who would not be concluded by the covenant (as where an entail is to be barred or the estate belongs to a *feme covert*, &c.), and even in other cases a mortgagee cannot be advised to rely merely upon a covenant to surrender, which confers an equitable title only, and one therefore which is liable to be postponed to a future purchaser or mortgagee acquiring the legal estate without notice: *Oxwick* v. *Plumer*, 5 Bac. Ab., 7th ed., Vol. V., p. 664. Where the mortgagor has no more than an equitable interest, the legal title being in a former mortgagee,

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(*v*) A covenant to surrender copyholds (but not an actual surrender) is a "conveyance" within the meaning of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41): see sect. 2 (v) of that Act: if, therefore, a mortgagor covenants "as beneficial owner" to surrender, the mortgagee will thereby obtain implied covenants by the mortgagor for right to convey, and quiet enjoyment free from incumbrances, and for further assurance.

The powers of sale, &c., given to mortgagees by sects. 19—22 of the Act, apply only where the mortgage is by deed, and therefore are not to be implied in a conditional surrender. And it is very doubtful whether a covenant to surrender will confer on a mortgagee such implied powers, unless it contains a proviso expressly *charging* the property.

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or in any other person, the objection to a covenant does not apply, as such a covenant binds all the interest the mortgagor has.

The condition for avoiding the surrender should not be comprised in a separate defeazance, but should be inserted in the surrender itself, in order that the title may be complete on the rolls of the manor, and any inconvenience which might arise from the loss of a separate defeazance be prevented. A recognition by the lord of the manor, on the court rolls, of the equity of redemption was, previously to the passing of the statute 4 & 5 Will. 4, c. 23, necessary to bind the lord's paramount title by escheat, on the death of the mortgagee, without heirs: *Weaver* v. *Maule*, 2 R. & My. 97; *Attorney-General* v. *Duke of Leeds*, 2 My. & K. 343.

On performance of the condition by the mortgagor by payment of the money on the day specified, the surrender is *ipso facto* avoided, and the land reverts to the surrenderor without any readmittance or fine: *Simonds* v. *Lawnd*, Cro. Eliz. 239; but if default is made on the day of payment, the surrender takes effect, so as to give the mortgagee a good title against all persons except the lord, and on payment of the money subsequently, the mortgagor ought apparently in strictness to be re-admitted, and to pay a fine thereupon: Gilb. Ten. 276. It is, however, the general practice in such cases, unless the mortgagee has been actually admitted, not to require the mortgagor, on payment of the mortgage debt, to be re-admitted, but merely to enter up satisfaction on the court rolls: see Scriv. Cop. 129.

Until a conditional surrender has been entered on the court rolls of the manor nothing passes: *Frosel* v. *Welsh*, Cro. Jac. 403; *Burgoyne* v. *Spalding*, Cro. Car. 283.

Admission of mortgagee.

Until the conditional surrender is perfected by admittance of the mortgagee, the mortgagor continues tenant to the lord: see Scriv. Cop. 107. A mortgagee does not, therefore, usually cause himself to be admitted until it becomes necessary that he should do so for the purpose of exercising his power of sale and assuring the land to a purchaser; in the mean-

Mortgages of Copyholds.

time the fines and fees payable on admittance are saved, and the mortgagee incurs no liability with respect to heriots, services, &c. If the mortgage is actually admitted, then, on payment of the mortgage debt, the mortgagor must be re-admitted, and will acquire an entirely new estate: *Benson* v. *Scott*, 12 Mod. 49; *Doe* v. *Morgan*, 7 T. R. 103 (*w*).

The lord is not generally entitled to insist on the admission of the mortgagee, on the condition of the surrender being broken: *Basspool* v. *Long*, Cro. Eliz. 879. But there may be a valid special custom empowering the lord to require such admission: *Tredway* v. *Fotherley*, 2 Vern. 367; see Scriv. Cop. 130.

Whether an eligible security.

A copyhold of inheritance, where the fines are small and certain, and the custom imposes no burthensome obligations on the tenants, is scarcely less eligible as a mortgage security than a freehold. Indeed it formerly possessed an advantage over the latter, in being exempt from judgments and crown debts, &c. But as copyholds, though still exempt from crown process, are now liable to execution upon a judgment, the advantage alluded to no longer exists to the same extent.

See further on the form of a mortgage of copyholds, *infra*, Chap. IX. A mortgagee should require the production of the copies of court roll; as to mortgages by deposit of which, see *ante*, p. 695.

10. Mortgages of Leaseholds.

Modes of mortgaging leaseholds.

Leaseholds may be mortgaged either by assignment or underlease. The latter course is the most usual, in order not to render the mortgagee liable to payment of the rent and observance of the covenants reserved by and contained in the original lease: see further as to the forms of mortgages of leaseholds, *post*, Chap. IX.

Goodwill of business.

A mortgage of a leasehold house will include the goodwill of a business carried on on the premises: *Chissum* v. *Dewes*, 5 Russ. 29. But where mort-

(*w*) Presentment by the homage is not now essential to the validity of an admission: see Stat. 4 & 5 Vict. c. 35, s. 90.

gagees of a house, to which a wine and spirit licence was attached, sold the premises under their power of sale after the licence had become forfeited, and took no steps to secure a new licence, it was held that they were not entitled to the proceeds of the sale of a new licence which was subsequently obtained by the mortgagor's assignee in bankruptcy: *Manifold* v. *Morris*, 5 Russ. 420. Mortgages of Leaseholds.

The effect of renewals and surrenders of leases in mortgages on the rights of parties will be considered later in Chapters IV. and V. of this Dissertation.

11. Mortgages of Personalty.

Mortgages of Chattels, Debts, &c., generally.]—The most important inquiry in regard to mortgages of personal chattels, is how far possession is requisite to give effect to them. The point has generally arisen either between the mortgagee and some other creditor of the mortgagor who has obtained possession by execution or otherwise subsequently to the mortgage, or between the mortgagee and the general creditors of the mortgagor, he having become bankrupt. These cases, though frequently confounded, require a distinct consideration; for it frequently happens, as we shall presently see, that mortgages which might be supported against execution-creditors, notwithstanding the non-delivery of possession, are void under the enactments of the bankruptcy law. Whether possession requisite to give effect to a mortgage of chattels.

The question, as it regards the mortgagee and any other individual creditor or creditors, turns either upon the principles of the common law, or the 13th of Elizabeth, c. 5 (made perpetual by the 29 Eliz. c. 5), which is intituled "An Act against fraudulent Deeds, Alienations," &c., enacts:— Fradulent mortgages under stat. 13 Eliz. c. 5.

Sect. 2.—"All and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, and hereditaments, goods, and chattels, or of any of them, or of any lease, rent, common, or other profit or charge, out of the same lands, . . . by writing, or otherwise, and all and every bond, suit, judgment, and execution, at any time had or made . . . . to or for any intent or purpose before declared and expressed, shall be from

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henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators, and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, by such guileful, covinous, or fraudulent devices and practices as aforesaid, are, shall, or might be in anywise disturbed, hindered, delayed, or defrauded) (*y*), to be clearly and utterly void, frustrate, and of none effect."

Proviso.

Act not to extend to alienations for a good and *bonâ fide* consideration without notice.

Sect. 5.—"This act, or anything therein contained, shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods, or chattels, had, made, conveyed, or assured, or hereafter to be had, made, conveyed, or assured, which estate or interest is, or shall be, upon good consideration, and *bona fide* lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having, at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud or collusion as is aforesaid."

Twyne's case.

Soon after the passing of this statute, the principles governing its application to fraudulent transfers of chattels underwent much discussion in *Twyne's Case*, 3 Rep. 80; *S. C.* 1 Sm. L. C. 1; the circumstances of which were these: A., being indebted to B. in 400*l.*, and to C. in 200*l.*, pending an action by C., made a secret general assignment of his goods and chattels of the value of 300*l.* to B., in satisfaction of his debt: A., however, remained in possession? and continued to deal with the goods as his own. C. obtained judgment, and issued execution; and the question was—Whether the sheriff, under this process, was entitled to seize the goods in question? and it was decided that he was, for that the gift was fraudulent; and six points were resolved:—

Bill of sale of goods held to be fraudulent and void.

1st. That this gift had the signs and marks of fraud, because the gift is general, without exception of his apparel or anything of necessity; for it is commonly said, *quod dolosus versatur in generalibus.*

2nd. The donor continued in possession, and used

(*y*) Of course the conveyance, &c., though void against creditors, is valid against the party making it, and privies: *Robinson* v. *M'Donnell*, 2 B. & Ad. 134; *Steele* v. *Brown*, 1 Taun. 381; *Baldwin* v. *Cawthorne*, 19 Ves. 100; *Olliver* v. *King*, 8 De G. M. & G. 110.

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them as his, and by reason thereof he traded and trafficked with others, and defrauded and deceived them.

3rd. It was made in secret; *et dona clandestina sunt semper suspiciosa.*

4th. It was made pending the writ.

5th. Here was a trust between the parties; for the donor possessed all, and used them as his proper goods: a fraud is always apparelled and clad with a trust, and a trust is the cover of fraud.

6th. The deed contains (expresses) that the gift was made honestly, truly, and *bonâ fide; et clausulæ inconsuetæ semper inducunt suspicionem.*

The grand principle of this case, namely, that an *absolute* sale of goods, with a retention of possession, is void against creditors, has been followed in many subsequent cases. Thus, in *Edwards* v. *Harben,* 2 D. & E. 587, where a creditor took an absolute bill of sale, but permitted the effects described in the bill of sale to remain in the possession of the debtor until his death, whereupon the creditor entered and took possession of the effects contained in the bill of sale, being then in the house of the deceased, the Court held that the assignment was void, on the ground that "the bill of sale was on the face of it absolute, and to take place immediately, and the possession was not delivered." See also *Reed* v. *Blades,* 5 Taun. 212; *Woodall* v. *Smith,* 1 Camp. 332; *Martindale* v. *Booth,* 3 B. & Ad. 498.

But a *bonâ fide* and absolute purchase, by a person who is not antecedently a creditor, stands upon a different footing from an assignment to secure a pre-existing debt; and in some cases of this kind, the transfer has been protected, though the purchaser restored the possession to the original owner: *Kidd* v. *Rawlinson,* 2 B. & P. 59. The validity of such transactions will depend on whether the circumstances of the case are such as will incline a jury to hold that the presumption of fraud *primâ facie* to be drawn from the retention of possession by the vendor is rebutted; the notoriety of the sale is regarded as a material element in such cases: see *Latimer* v. *Benson,* 4 B. & C. 652; *Leonard* v. *Baker,* 1 M. & S.

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251; *Watkins* v. *Birch*, 4 Taun. 823; *Armstrong* v. *Buldock*, Gow. 33; *Dewey* v. *Baynton*, 6 East, 27; *Fortescue* v. *Barnett*, 3 My. & K. 43.

Purpose of deed being to protect against an execution does not necessarily invalidate it.

If a deed be valid in other respects, the transaction is not rendered illegal by the circumstance that the object of the deed is to protect the property for the general body of creditors, against the execution of a particular creditor: *Pickstock* v. *Lyster*, 3 M. & S. 371; *Darvill* v. *Terry*, 6 H. & N. 807; *Wolverhampton, &c., Co.* v. *Marston*, 7 H. & N. 148. But the title of a person claiming under a writ of sequestration issued by the Court prevails over that of a mortgagee with notice of the circumstances, under a mortgage made in order to avoid the effect of the writ: *Ward* v. *Booth*, L. R. 14 Ex. 195.

Distinction between absolute and conditional alienations.

There is a clear distinction between absolute and conditional transfers, in regard to the necessity of their being accompanied by immediate possession: for while the retention of possession by a vendor, who has made an absolute alienation, is considered as indicative of fraud, because it is at variance with the sale, such act is perfectly consistent with a mortgage, according to the usual terms of which it is intended that the mortgagor is to retain the possession and enjoyment until default of payment (*y*).

Bill of sale of goods as a security for money, supported against an execution-creditor, notwithstanding the retention of possession.

Thus, in the case of *Bucknell* v. *Royston*, Pre. Ch. 282, one, Brewer, supercargo of a ship bound to the East Indies, shipped goods, and made a bill of sale to the plaintiff of the goods on board, and of the profits thereof, as a security for the repayment of a loan of £600. In the course of the voyage the goods were sold, and others bought; but before the return of the ship Brewer died, and the defendant Roiston, who was a judgment creditor, obtained administration, and took possession of the goods in question on the return of the ship. The plaintiffs brought their bill for an account and discovery of the goods, and to have satisfaction of the produce and advantage that was made thereof. The Lord Chancellor said that

(*y*) Observe that this position has regard to the Statute of Elizabeth, and not to the bankruptcy law, as to which, *vide post*, p. 770 *et seq.*

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the trust of those goods appeared upon the very face of the bill of sale; and though they were sold to the plaintiffs, yet they trusted Brewer to negotiate and sell them for their advantage; and Brewer's keeping possession of them was not to give a false credit to him, but for a particular purpose agreed upon at the time of sale; and therefore his Lordship decreed an account.

In *Edwards* v. *Harben*, 2 D. & E. 587, *Buller*, J., expressly recognised the distinction between absolute and conditional alienations, or, as his lordship expressed it, "between deeds or bills of sale which are to take place immediately, and those which are to take place at some future time; for in the latter case the possession continuing in the vendor till that future time, or till that condition is performed, is consistent with the deed, and such possession comes within the rule as accompanying and following the deed." The same learned judge, in his well-known treatise on the law of Nisi Prius (Bull. N. P. 258), lays it down, "that the donor's continuing in possession is not in all cases a mark of fraud, as where a donee lends his donor money to buy goods, and at the same time takes a bill of sale of them for securing the money." The principle in question, too, is corroborated by those cases in which goods and chattels have been protected against the execution creditor of a person on whom they have been settled for life, and in whose possession they were, on the ground that the enjoyment was consistent with the deed: *Cadogan* v. *Kennet*, Cowp. 432; *Earl of Shaftesbury* v. *Russell*, 1 B. & C. 666 (*a*). And in *Reed* v. *Wilmott*, 5 M. & P. 553, it was distinctly admitted that an assignment of chattels (which there consisted of certain barges and lighters) as a security for money, and qualified by the usual proviso permitting the enjoyment by the mortgagor until default in payment, was not impeachable on account of his retaining

(*a*) That goods settled for the separate use of a woman cannot be taken under a *fi. fa.* against the husband: see *Haslington* v. *Gill*, 3 T. R. 620, n.

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possession during that period. See also *Martindale* v. *Booth*, B. & Ad. 498.

As to chattels which are immovable and incapable of manual transfer.

And the application of this principle is if possible still more unquestionable, when the chattels, being in the nature of fixtures to the realty, are incapable of manual transfer. As, in *Steward* v. *Lombe*, 4 Moo. 281; where a miller mortgaged a piece of ground and a windmill, in his occupation, to A.; the mill was made of wood, and was removable at pleasure, it was held that the retention of the mill in his possession by the mortgagor was consistent with the deed. So also where the mortgagor was an hotel keeper, and the retention by him of the chattels was necessary for his business: *Cook* v. *Walker*, 25 L. T. 51; *S. C.*, 3 W. R. 357.

It is scarcely necessary to observe, that a mortgage of *lands*, of any tenure, cannot be impeached on the ground of the mortgagor retaining the possession: *Saltingstone's Case*, cited in 2 Bulstrode, 236; *Lambert's Case*, Shep. Touchst. 67.

Fraudulent and void mortgages under the law of bankruptcy.

Order and Disposition in Bankruptcy.]—We shall now proceed to consider what constitutes a valid mortgage of goods and chattels within the meaning of the Bankruptcy Law, in regard to which the question is not, as in the cases already discussed, whether the possession is consistent with the deed; but, whether the property remains, with the permission of the true owner, in the "possession, order, or disposition" of the mortgagor, so as to invest him with that apparent or reputed ownership which it is the design and policy of these statutes to identify with, and not to permit to be severed from, the actual ownership.

Under the old Bankruptcy Acts, prior to the Bankruptcy Act, 1869 (32 & 33 Vict c. 71), the doctrine of reputed ownership applied to all bankrupts, and to all choses in action, but by that Act non-traders, and choses in action, not being trade debts, were exempted from the application of the doctrine.

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), sect. 44, it is enacted that "the property of a

bankrupt divisible amongst his creditors . . . . . shall comprise" *inter alia*,— Order and Disposition.

"(iii.) All goods being at the commencement of the bankruptcy (*b*), in the possession, order or disposition of the bankrupt, in his trade *or business* (*c*), by the consent of the true owner under such circumstances that he is the reputed owner thereof: provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section."

Some of the decisions under the earlier bankruptcy statutes are still applicable with respect to the construction of this clause.

Mortgages of lands not within the statute.

It was early settled, that the statute 21 Jac. 1, c. 19, sect. 11, did not apply to mortgages of chattels real: *Stephens* v. *Sole*, cit. 1 Ves. sen. 352; *Roe* v. *Galliers*, 2 T. R. 183; for, though they fall under the denomination of "goods and chattels," they are not within the mischief against which the act was directed, possession not being even *primâ facie* evidence of ownership in regard to property of this description, as it is in the case of personal chattels: see *Hiern* v. *Mill*, 13 Ves. 122. And the present Act impliedly excludes chattels real from the doctrine of reputed ownership, as it only mentions "goods," which include only personal chattels: see sect. 168 of the Act; and also money: *Ex parte Simpson*, De G. 9. No objection, therefore, can be made to a mortgage of leaseholds, on the ground of the mortgagor continuing in possession, even after the mortgage becomes absolute. The same reasoning, and it seems the same rule, applies, to a considerable extent at least, to mills, vats, machinery, &c., and other immovable chattels; for, though such chattels, if affixed to the freehold by the tenant, are, for some purposes, in the contemplation of law, dis-

Provision does not extend to mortgages of leaseholds: nor, generally, to fixtures.

(*b*) By sect. 43 the bankruptcy of a debtor is to be deemed to have relation back to and "to commence at the time of the act of bankruptcy being committed on which a receiving order is made against him:" see this section set out at length, sub tit. COMPOSITION, *ante*, Vol. II. p. 445 (the words "*compounding or arranging creditor*" being substituted for "bankrupt," and "*composition or scheme of arrangement*" for "bankruptcy.")

(*c*) "Business" is a word of wider import than "trade:" see *Harris* v. *Amery*, L. R. 1 C. P. 184.

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tinct from the freehold (*d*) to which they are actually fastened, and constitute the personal estate of the person to whom they belong, and, as such, are liable to be taken in execution at the suit of his creditor, and devolve at his decease upon his executors or administrators, yet, in applying the doctrine under consideration, a distinction has been taken between them and goods which can be transferred from hand to hand; and it has been repeatedly decided, that a mortgage of chattels not capable of being thus transferred, is valid against the claim even of assignees in bankruptcy, although the possession be retained by the mortgagor.

Mortgages of fixtures valid, though possession not changed.

Thus, in the case of *Ryall* v. *Rowles*, 1 Ves. sen. 348; *S. C.*, 1 Atk. 165; where a brewer demised his dwelling-house and brew-house, and all the coppers and utensils in trade belonging thereto, by way of mortgage, and continued in possession until he became bankrupt, when the validity of the mortgage was disputed, upon the ground of the possession being retained by the mortgagor; it was held, on great consideration, that the mortgagee had a valid lien on the fixtures.

The well-settled rule with regard to fixtures is, that whatever may be the relative rights of the lessor and lessee in regard to them, they are not goods and chattels within the enactments of the bankrupt law as to reputed ownership, nor, generally, for other purposes. They may, however, be sold in execution of a *fi. fa.* as goods and chattels: *Poole's*

Rights of landlord and tenant as to fixtures.

(*d*) In the absence of any contract or usage to the contrary, articles attached to the freehold before the tenant enters, belong, of course, to the landlord, and pass to the heir, not to the executor: *Fisher* v. *Dixon*, 12 Cl. & F. 312; *Mather* v. *Fraser*, 2 K. & J. 549. Articles affixed by the tenant to the freehold (not placed upon it merely, as in the case of a barn built upon sleepers laid upon the ground) also, as a general rule, become part of the freehold, subject to the tenant's right to remove them during the term, and to reconvert them into chattels: *Culling* v. *Tuffnell*, Bull. N. P. 34; *Elwes* v. *Mawe*, 3 East, 38; *Rex* v. *Otley*, 1 B. & Ad. 161. Where, however, a mortgagor let the premises to a tenant who placed thereon certain trade fixtures, and subsequently the mortgagee sold the premises under his power of sale, it was held that the fixtures did not pass by the mortgage: *Sanders* v. *Davis*, 15 Q. B. D. 218. See also *ante*, p. 313 *et seq.*, and Amos & Ferrand on Fixtures, 224 *et seq.*

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Case, 1 Salk. 368; and may be so treated in trespass: *Pitt* v. *Shaw*, 4 B. & Al. 206; until the tenant has exercised his right of converting them into chattels by actual severance, which he cannot do after his possession has determined, whether by afflux of time or by forfeiture: see *Storer* v. *Hunter*, 5 D. & R. 240; *Rex* v. *Topping*, M'Cl. & Y. 544. Of course, the powers of a vendee or mortgagee, or of the trustee of a bankrupt lessee, are equally circumscribed: see *Lee* v. *Risden*, 7 Taun. 188; *Lyde* v. *Russell*, 1 B. & Ad. 394; *Hallen* v. *Runder*, 1 C. M. & R. 266; *Boydell* v. *M'Michael*, Id. 177; *Minshall* v. *Lloyd*, 2 M. & W. 450; *Mackintosh* v. *Trotter*, 3 M. & W. 184. That a mortgagee of a leasehold house is, generally, entitled to fixtures, though they are not mentioned: see *Longstaff* v. *Meagoe*, 2 A. & E. 167; *Hare* v. *Horton*, 5 B. & Ad. 715; *Hitchman* v. *Walton*, 4 M. & W. 409; *Mather* v. *Fraser*, 2 K. & P. 536; *Holland* v. *Hodgson*, L. R. 7 C. P. 328; *Meux* v. *Jacobs*, L. R. 7 H. L. 481.

In *Clark* v. *Crownshaw*, 3 B. & Ad. 804, L. and C., partners, dissolved partnership, and L. assigned to C. all his interest in a leasehold mill, and fixed and moveable machinery, &c., as a security for the payment of the purchase-money for C.'s share in the partnership. L. became bankrupt, and it was held, that the moveable property was in the reputed ownership of L. at the time of his bankruptcy, but not the fixtures: see also *Coombes* v. *Beaumont*, 5 B. & Ad. 72; *Boydell* v. *M'Michael*, 1 C. M. & R. 177; *Ex parte Spicer*, 2 Dea. 335.

Trappes v. *Harter*.

In the case of *Trappes* v. *Harter*, 2 C. & M. 153, machinery, of a kind which is generally classed with fixtures, was held, under the circumstances, to pass under the bankruptcy. In that case, buildings in which a calico-printing business was carried on, were purchased by the partners. The machinery was erected by the partners, and was mostly fixed by bolts and screws, and the whole could be removed without any, or any material damage to itself or to the freehold; and it appeared, that in that part of the country machinery of the kind was frequently,

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but not universally, the property of the tenant, and sold apart from the freehold, a circumstance upon which the Court laid much stress. The partners subsequently, to secure the value of the widow's share, conveyed, by way of mortgage, all the premises and the steam engine, gearing, fixed machinery, &c., on the demised premises. The partners having become bankrupt, it was held that the fixed machinery, as well as the trade utensils, passed to their assignees.

Custom of trade.

The above case affords a strong instance of the extent to which the ordinary rule respecting fixtures may be excluded by the custom of trade, and the particular circumstances of individual cases. As the freehold belonged to the partnership, the question as to the general right of assignees in bankruptcy to fixtures did not arise. The decision amounted to this, that the mortgage, being confined to the freehold and fixtures, did not include the machinery in question; because, looking to the custom of the place, and the circumstances, such machinery did not constitute fixtures to the freehold. The principle of *Horn* v. *Baker*, therefore, that when stationary articles of machinery are mortgaged, their remaining in the possession of the mortgagor shall not constitute reputed ownership, was not involved in the case; and though the Court, indeed, said that the machinery remained in the order and disposition of the bankrupts after the mortgage, yet, as that observation referred to the custom of the trade, and was, besides, extra-judicial, the decision being made on the other ground, it cannot be regarded as important. The decision in *Trappes* v. *Harter*, so far as it relates to the doctrine of reputed ownership, has been frequently called in question, and even if it is not to be regarded as altogether overruled, it must be accepted with great caution, as merely governing particular cases, in which the same or very similar special circumstances may occur; see *Rufford* v. *Bishop*, 5 Russ. 347 (*e*); *Hubbard* v. *Bagshaw*, 4 Sim.

(*e*) Among the articles held in *Rufford* v. *Bishop*, not to be within the doctrine of order and disposition, were the following :—

326 ; *Shuttleworth* v. *Hernaman,* 1 De G. & J. 321 ; *Whitmore* v. *Empson,* 23 Beav. 313 ; *Cullwick* v. *Swindell,* L. R. 3 Eq. 249 ; *Re Trethowan,* 5 Ch. D. 559. Order and Disposition.

The principle of the preceding cases seems to apply where the chattel is already in the possession of the mortgagee in another character, so as not to be susceptible of any further ostensible change of ownership. Thus, in *Manton* v. *Moore,* 7 T. R. 67, where A., having contracted with a canal company to build locks and bridges on the canal, as their engineer, purchased timber and other materials for the purpose, which were laid on the company's premises, on the banks of the canal. He, being indebted to the company for advances of money made by them, executed a bill of sale of these materials, and possession was stated to be delivered to the company, by the delivery to them of a halfpenny. The delivery was held to be sufficient, as, under the circumstances, no other possession could have been given. So, also, where the chattel is of a nature which does not admit of actual delivery, it will be sufficient to deliver to the mortgagee or purchaser some symbol of possession, *e. g.,* the key of a warehouse in which the goods are stored: *Ryall* v. *Rowles,* 1 Ves. Sen. 366. So the marking of goods sold with the name or initials of the vendee, has been held to amount to a valid delivery : *Stoveld* v. *Hughes,* 14 East, 308. Rule as to goods incapable of manual transfer.

But in regard to goods capable of manual transfer, the delivery of possession is essential to the validity of the assignment, as well in the case of a mortgage, as in that of a sale, unless the assignment is effected by a bill of sale duly made and registered in accordance with the recent Acts (as to which, see *post,* p. 791) ; for the distinction existing, in reference to the stat. 27 Eliz. c. 4, between absolute and con- No distinction, in regard to bankruptcy, between absolute and conditional sales.

Iron chest in office (to receive which the wall had been cut away), grates in mansion-house, weighing machine, and clock : wood turning lathes with cast-iron wheels and shafts, carriage, headstocks, rests and puppets, &c. ; wrought iron and steel spindles, &c. ; iron spur and bevel wheels, shafts, and spindles, communicating motion from the forge lathe wheels to the wood lathes, &c.

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ditional sales, has, in general, no application to the case of bankruptcy, the aim of the statutory provisions under consideration being to prevent the existence of the possession in one person, and *any* beneficial interest, whether partial or absolute, in another: see *Ryall* v. *Rowles,* 1 Ves. Sen. 348; *S. C.,* 1 Atk. 165; *Meggot* v. *Mills,* 1 Lord Raym. 286.

Operation of the doctrine of reputed ownership as regards mortgages of debts, &c.

Debts due to a bankrupt in the course of his trade or business are the only class of debts which are "goods" within the meaning of the present Bankruptcy Act, so as to be subject to the doctrine of reputed ownership: see *ante,* p. 771.

In order to make an effectual transfer of debts and choses in action, whether the interest therein be present or future, vested or contingent, the security should be delivered to the mortgagee or vendee, and notice of the assignment should be forthwith given to the debtor, or to the trustees in whom the chattel is vested. For it is a well-established rule that if a person takes an assignment of a chattel personal, and omits or delays to give notice to the debtor or trustees, a subsequent assignee giving such notice will obtain preference, unless the debtor or trustees have already received notice *aliunde* of the former assignment: *Ryall* v. *Rowles,* 8 Ves. Sen. 348; *Jones* v. *Gibbons,* 9 Ves. 410. So, in the case of *Ex parte Monro,* Buck. 300, where a bond debt was assigned by the obligee, and the bond delivered to the assignee; but no notice of the assignment being given to the obligor previously to the bankruptcy of the obligee, it was held, that the bond was in his order and disposition, and belonged to his assignees: see also *Buck* v. *Lee,* 3 Nev. & M. 580; *Loveridge* v. *Cooper,* 3 Russ. 584; *Dean* v. *James,* 1 Nev. & M. 392; *Ex parte Tuck,* 2 Dea. 58.

Assignment of legacy.

Where the assignor is a legatee of a fund vested in trustees, notice must be given, not only to the trustees, but to the executor of the will under which the legacy is derived, unless he has assented to the bequest: *Holt* v. *Dewell,* 4 Ha. 446.

Assignment of interest of bankrupt in contract.

When an interest under a contract is assigned, in the event of the subsequent bankruptcy of the assignor, the right to sue will not vest in his

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trustee, but will remain in the bankrupt as trustee for the assignee: *Wynch* v. *Keeley*, 1 T. R. 619; *Carpenter* v. *Mornall*, 3 B. & P. 40; *De Mattos* v. *Saunders*, L. R. 7 C. P. 570.

What assignment sufficient.

A formal deed of assignment is not necessary to charge the property in a debt. Any writing assenting to an equitable transfer is sufficient. If a creditor gives to a stranger an order on his debtor to pay a sum in or towards discharge of the debt, and that order is shown to the debtor, it binds him: *Ex parte South*, 3 Swanst. 392. So, where a debtor gave to his creditor an order on a third person who had moneys of the debtor in his hands, which order was immediately delivered to the third person, it was held that this was a good assignment *pro tanto* of the debt, and gave the creditor a good title against the assignees in bankruptcy of the debtor: *Row* v. *Dawson*, 1 Ves. Sen. 331; see *Tattock* v. *Harris*, 3 T. R. 180; *Jones* v. *Farrell*, 1 De G. & J. 208; *Morrell* v. *Wootton*, 16 Beav. 197; *Burn* v. *Carvelho*, 4 M. & C. 690; *Cook* v. *Hemming*, L. R. 3 C. P. 334; see also *Thompson* v. *Simpson*, L. R. 5 Ch. A. 659; *Brice* v. *Bannister*, 3 Q. B. D. 569. An equitable assignment may be effected by parol: *Tibbitts* v. *George*, 5 A. & E. 107.

Order to pay.

The terms of the order, however, must unequivocally show the intention of the person giving it, that the debt should be paid out of the fund in question: *Watson* v. *Duke of Wellington*, 1 Russ. & M. 602; *Wedlake* v. *Hurley*, 1 C. & J. 83; *Moore* v. *Jervis*, 2 Coll. 60.

Mortgage by one partner to another, within the act.

A mortgage by one partner to another of his undivided share in the partnership property, consisting of debts, utensils, chattels, &c., is within the rule as to reputed ownership; and therefore, where a trader made a mortgage to his partner of his share of property of this description, and continued to act in the concerns, and deal with the property of the partnership as before, until he became bankrupt, it was held, this share passed to his assignees; and that the mortgagee-partner had no claim: *Ryall* v. *Rowles*, 1 Ves. Sen. 348. And where, at the dissolution of a partnership, an assignment of the debts

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owing to the firm is made (according to a common arrangement) to one of the partners, who takes upon himself the joint engagements, and notice of the assignment is not given to all the debtors of the firm; this deed does not change the property in the debts due from persons to whom no notice has been given; so that, if the firm afterwards becomes bankrupt, such debts belong to the joint creditors, and not to the separate creditors of the assignee partner: *Ex parte Burton*, 1 Cl. & J. 207. See also *Ex parte Sprague*, 4 De G. M. & G. 866. And notice in the "London Gazette," directing the payment of the debts to one of the partners, is not sufficient to place them in his order and disposition: *Ex parte Wheeler*, 1 Buck, 25. If the assignment include the share of the assignor partner in other property, as leaseholds, stock, &c., of which possession *is* delivered to the assignee partner, it will be effectual as to such property, though inoperative as to the share of the debts, or any other part of the property with regard to which the arrangement is still executory: *Ex parte Usborne*, 1 Gl. & J. 358: see also *Ex parte Wood, Re Wright*, 10 Ch. D. 554. And if the assignee partner become bankrupt, the assigned share in the property of which the possession was delivered, will belong to his creditors; and neither the assignor partner nor the joint creditors will have any lien upon the property remaining in his hands *in specie* at the time of his bankruptcy: see *Ex parte Ruffin*, 6 Ves. 119; *Ex parte Fell*, 10 Ves. 347; *Ex parte Williams*, 11 Ves. 3; *Ex parte Smith*, 1 Buck, 147; *Ex parte Nanson*, 22 W. R. 875; *S. C.*, 30 L. T. N. S. 40; *Ex parte Manchester Bank, Re Collie*, 3 Ch. D. 481. And the circumstance, that the retiring party had been a dormant partner only, does not vary the rule: *Re Gilpin*, 2 B. & C. 389.

Where the partner to whom possession of the partnership effects is given assigns the property to the retiring partner, in order to secure a sum of money to be paid to the latter as the consideration for the purchase of his share, the case is, of course, within the general rule; and if the mortgagor becomes bankrupt, the security is void against his

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trustee: see *Horn* v. *Baker*, 9 East, 215; *Smith* v. *Watson*, 2 B. & C. 401; *West* v. *Skip*, 1 Ves. Sen. 243; *Ex parte Hunter*, 2 Rose, 382; *Ex parte Hare*, 1 Dea. 16.

Best transmutation of the visible ownership that the nature of the case admits of, must be made.

Enough has been stated to show the general principle deducible from the authorities, to be, that to take goods and chattels out of the "possession, order, and disposition" of the assignor, the best transmutation of the visible or apparent ownership that the nature of the property admits of, must be made. Thus, in transferring goods in a warehouse, the key must be delivered; and in transferring debts, notice to the debtor is requisite. Upon this principle, too, it has been held that, if the printer and publisher of a newspaper assigns his interest in the paper to a creditor, as a security, an affidavit of the change of interest should be delivered to the Commissioners of Stamps; and if this is not done, and the mortgagor continues to print and publish as before, and then becomes bankrupt, the right to the paper will pass to his trustee: *Longman* v. *Tripp*, 2 B. & P. N. R. 67; *Ex parte Foss*, 2 De G. & J. 230. So also copyright and patent rights would seem to be within the doctrine of reputed ownership, and it would seem that assignments of them by way of security should be registered: see stats. 5 & 6 Vict. c. 45; 15 & 16 Vict. c. 83; Robson Bankr. 459.

As to share in a newspaper.

Shares in a joint-stock company, standing in bankrupt's name, considered as in his "order and disposition."

So, shares of a bankrupt in a joint-stock company, which by the Act of Parliament, or instrument under which the company is constituted, are to be deemed personal estate, are considered to remain in the order and disposition of the bankrupt, unless transferred in strict accordance with the forms prescribed by such Act or instrument; *Ex parte Lancaster Canal Navig. Co.*, 1 Dea. & C. 411; *Ex parte London and Provincial Tel. Co.*, L. R. 9 Eq. 653; *Ex parte Union Bank of Manchester*, L. R. 12 Eq. 354; *Re Colonial Bank and Whinney*, 30 Ch. D. 261; *Société Générale de Paris* v. *Tramways Union Co.*, 14 Q. B. D. 424.

Thus, where the directors of the London Assurance Corporation covenanted with the corporation, that their shares in the stock and the dividends thereon, together with their salaries, should be a

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security for any sums of money they should owe the corporation, and authorized a committee of treasury to stop the salaries and dividends, and sell the shares; one of the directors became bankrupt before any sale and order had been made by the court of directors; and it was held that the shares passed to his assignees, but that the corporation might set off the salary and dividends due against the money owing to them from the bankrupt: *Nelson* v. *London Assurance Co.*, 2 Sim. & Stu. 292. The doctrine of reputed ownership has been held to apply to shares in insurance companies: *Ex parte Masterman*, 2 M. & A. 209; canal shares: *Ex parte Lancaster Canal Navig. Co., supra*; dock shares: *Ex parte Littledale*, 6 De G. M. & G. 714; waterworks shares: *Ex parte Lawrence*, De G. 269: gas shares: *Ex parte Spencer*, 1 Dea. 468; *Ex parte Vallance*, 2 Dea. 354; and railway shares: *Ex parte Dobson*, 2 M. D. & De G. 685. But where shares are, by the Act of Parliament constituting the company, declared to be *real* estate, as they do not fall under the denomination of "goods and chattels," the doctrine in question does not apply: see *Ex parte Vauxhall Bridge Co.*, 1 Gl. & J. 101. On the general question, whether the shares of a company or partnership possessing land are real or personal estate: see *Townsend* v. *Ash*, 3 Atk. 336; *Lord Stafford* v. *Buckley*, 2 Ves. Sen. 82; *Buckeridge* v. *Ingram*, Id. 652; *Ex parte Taylor*, Mon. 240, and cases cited, Id. 245, n.; *Phillips* v. *Phillips*, 1 My. & K. 639; *Randall* v. *Randall*, 7 Sim. 271; *Ex parte Richardson*, 3 Dea. 496; *Weekley* v. *Weekley*, 2 Y. & C. 281; and *Bligh* v. *Brent*, Id. 268; in which last case (which arose in respect of shares in the Chelsea Waterworks Company) the authorities were very fully gone into, and the general principle laid down, that real property held by a trading company is, as to the interests of the shareholders, personalty, although the shares are assignable, and there is no express provision declaring them to be personalty.

Upon the principle of the above cases it is settled that to take a policy of life or marine assurance out of the order and disposition of a trustee in bankrupty, notice of the assignment must be given to the

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insurers, although it is not the practice of the office to keep books for entering such assignments, nor to take any notice of them: *Williams* v. *Thorp*, 2 Sim. 257; *Ex parte Tennyson*, Mon. & Bl. 67; *Ex parte Stright*, 2 D. & C. 314.

Notice to trustees.

Where a fund is vested in a trustee (*a*) notice must be given to him: *Richards* v. *Gledstanes*, 3 Giff. 298. Where there are more than one trustee notice should be given to all, although notice to one will be sufficient during his lifetime: *Jones* v. *Smith*, 1 Ha. 43; *Timson* v. *Ramsbottom*, 2 Keen, 35. In the case of a trustee or other person having the legal custody of the property, knowledge, however acquired, will be sufficient. At all events, if he actually does, or if, as a reasonable man, he ought to act upon it: see *Smith* v. *Smith*, 2 Cr. & M. 231; *Saffron Walden Building Soc.* v. *Rayner*, L. R. 14 Ch. D. 406. In *Ex parte Smart*, 2 Mon. & A. 60, the mortgagee was one of the trustees, and it was held no further notice was requisite. New trustees are not bound to inquire of the old trustees whether they have received notice of any incumbrance: *Phipps* v. *Lovegrove*, L. R. 16 Eq. 80: and accordingly it will be prudent on an appointment of a new trustee of a fund or chose in action in mortgage to give notice to him of the incumbrance. A trustee who has received notice of an assignment or charge by the *cestui que trust* is not bound, in the absence of inquiry, to give notice of any prior assignment or charge even if in his own favour: *Ex parte Wilkes*, *Re Lewin*, 14 Ch. D. 101.

Notice to solicitor.

Notice to the solicitor or agent of the debtor is good notice to exclude the principle of reputed ownership: *Tibbits* v. *George*, 5 Ad. & E. 107; see *Gardner* v. *Lachlan*, 8 Sim. 123. So also notice to the solicitor of trustees in whom the mortgaged property is vested: *Richards* v. *Gledstanes*, 3 Giff. 298. Notice given on the same day in which the act of bankruptcy occurs, if prior to the act, is sufficient: *Ex parte Bignold*, 3 M. & A. 13.

What notice of transfer of

What notice is sufficient to exclude the apparent

(*a*) As to notice to executors of assignment of a legacy, see *ante*, p. 776.

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shares, &c., is sufficient.

ownership of the assignor of a policy of insurance, or of shares in a company, cannot be defined with precision, but must depend on the particular circumstances of each case. Notice to the secretary of the company will be sufficient: *Alletson* v. *Chichester*, L. R. 10 C. P. 319: or an express communication in writing or by parol to the directors at a board meeting: *Ex parte Agra Bank, Re Worcester*, L. R. 3 Ch. A. 555. Otherwise notice to individual directors is not notice to the company. So in *Ex parte Burbidge*, 1 Dea. 131, it was held, that the knowledge of the actuary and one of the directors of the company was not, under the circumstances, sufficient. So also knowledge of the secretary acquired casually does not affect the company with notice: *Société Générale de Paris* v. *Tramways Union Co.*, 14 Q. B. D. 424. In *Ex parte Waithman*, 4 Dea. & C. 412, it was held, there was sufficient notice where one of the directors of an insurance company deposited a policy of the company with his bankers, one of them being an auditor of the company. See also *Ex parte Harrison*, 3 Dea. 183; but notice to an auditor was held not to be sufficient in *Re Henessey*, 2 Dr. & W. 555. Mention of the assignment in conversation with one of the clerks in the office was considered too loose to stand for notice: *Ex parte Carbis*, 4 Dea. & C. 354. When the assignment of shares is not made in a manner conformable to the rules of the company, and notice of such assignment is given, it is sufficient: *Ex parte Masterman*, 4 Dea. & C. 751. As to joint-stock banking companies, see stat. 1 & 2 Vict. c. 26 (made perpetual by 5 & 6 Vict. c. 85) and see *Stewart* v. *Dunn*, 12 M. & W. 664. In all cases the *onus* is on the trustee in bankruptcy to prove that due notice of the assignment was not given: *Ex parte Stevens*, 4 Dea. & C. 117.

Company in liquidation.

Where a company is in liquidation the assignee of a debt due from the company will effectually complete his title, and take the debt out of the order and disposition of the assignor, by giving notice of the assignment to the official liquidator: *Re Breech-loading Armoury Co.*, L. R. 5 Eq. 284.

Transfer of public funds.

The best evidence of the change of ownership in

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stock in the public funds, of course, is the transfer of the stock in the books at the Bank of England (*f*), but where the bankrupt has a partial or equitable interest only in the stock, which is standing in the name of another, and which, therefore, cannot be the subject of this species of transfer, any instrument capable of operating as a charge or assignment in equity, will be sufficient. *Ex parte Kensington*, 2 V. & B. 79; 2 Rose, 138. It would seem, however, that such an assignment would not be valid for this purpose, unless notice were given to the person having the *legal* title or ownership, so as to take the stock out of the disposing power of the bankrupt: *Smith* v. *Smith*, 2 C. & M. 231; see also *Belcher* v. *Bellamy*, 2 Exch. 303. In *Carruthers* v. *Payne*, 5 Bing. 270, the bankrupt had transferred stock into the joint names of himself and his landlord, as a security for his rent, and afterwards deposited the lease with his bankers as a security for advances, with a written memorandum, that he assigned to them the stock also, and would execute a formal assignment both of the lease and of the stock on demand. It was held, that the bankrupt having no power to make an actual transfer, the stock was not in his reputed ownership.

Consent of owner.

The words in sect. 44 of the Bankruptcy Act, 1883, render "the consent and permission of the true owner" necessary to bring a case within the statute. This rule has been long recognized by judicial decision: see *Ex parte Richardson*, Buck, 480; *West* v. *Skip*, 1 Ves. Sen. 243; *Smith* v. *Topping*, 5 B. & Ad. 674; and in former bankruptcy statutes. In the case of a mortgage, where the mortgagor is to remain in possession till demand, he is in possession with the consent of the mortgagee, who is the true owner: *Ex parte Harding*, L. R. 15 Eq. 223.

(*f*) The Bank of England is only a depositary, and not a trustee of stock standing in its books: *Bank of England* v. *Lunn*, 15 Ves. 516; *Franklin* v. *Bank of England*, 9 B. & C. 156. If it have distinct notice, that the person in whose name stock is standing is not entitled to exercise dominion over it, it may be bound by such notice; but it is not bound to make inquiries respecting the trusts to which stock may be liable: *Humberstone* v. *Chase*, 2 Y. & C. 209.

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If the consent is withdrawn before the bankruptcy, the clause will not apply although the owner has not taken actual possession of the goods: *Re Eslick*, 4 Ch. D. 496; see also *Ex parte Harris*, L. R. 8 Ch. A. 48. So also, a demand by the owner or his servant for the delivery of the goods takes them out of the operation of the statute, see also *Carruthers* v. *Payne*, 5 Bing. 270; *Smith* v. *Topping*, 2 Nev. & M. 421. Where goods were returned by a pledgee to the bankrupt, that he might sell them in the name of the creditor, but were fraudulently sold by the bankrupt in his own name, they were held not to have been in his order and disposition: *Ex parte Carlow*, 2 Mont. & A. 39. And where chattels are left in the order and disposition of a mortgagor, if, without the mortgagee's knowledge he lease them to another, who becomes bankrupt, the security remains good: *Fraser* v. *Swansea Company*, 1 Ad. & E. 354. See *Bertram* v. *Payne*, 3 Car. & P. 175.

The true owner is the person legally entitled to the possession, and therefore, the consent of a trustee will bind his *cestui que trusts*, although they are infants: *Ex parte Dale*, Buck, 365. But, of course, the consent of a person having a limited interest in, or power over the goods, will operate only to the extent of such interest or power against the principal: *Ex parte Martin*, 19 Ves. 491. See also *Earl of Shaftesbury* v. *Russell*, 1 B. & C. 666, where this rule was held to apply to heirlooms.

This rule is thus stated by Lord *Redesdale* in *Joy* v. *Campbell*, 1 Sch. & Lef. 328, "In cases of specific chattels which are settled, upon marriage, upon the husband for life, and then on the children, the possession has been with the party, the bankrupt, with the consent of the person creating the trust, and so far with the consent of the true owner; but the possession was, according to the title, qualified by the rights of others: and wherever that has been the case, I take it, the law has never been construed to extend to destroy that right of property; but it has been confined to those cases where the sole and absolute owner of the property has permitted it to remain in the possession of the trader, in whose possession it ought not to be."

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As to the separate property of married women.

It seems, that if household furniture is vested in trustees for the separate use of a married woman, they will not necessarily be considered as in the order and disposition of her husband, because they are in the house which is occupied by him: see *Campion* v. *Cotton*, 17 Ves. 272; *Ex parte Hencliffe*, Mon. 24; *Ex parte Elliston*, 2 Mon. & A. 653; *Earl of Shaftesbury* v. *Russell*, 1 B. & C. 666; *Ashton* v. *Blackshaw*, L. R. 9 Eq. 510.

In the case of *Jarman* v. *Woolloton*, 3 D. & E. 618, A. (a trader), upon her marriage with B., assigned her stock in trade and furniture to a trustee for her separate use. A. continued to carry on her business after the marriage separately from and without the interference of B., until her bankruptcy; it was held that she was the agent of the trustee, and that the furniture did not pass to her assignees. See *Ex parte Massey*, 4 D. & C. 405. As to a woman living with a man to whom she is not married, see *Miller* v. *Demetz*, 1 M. & Rob. 479.

In the case of *Darby* v. *Smith*, 8 D. & E. 82, goods, the property of a widow and children, were, upon her second marriage, assigned to trustees, in trust to suffer the husband to enjoy them on condition that he should pay to the trustees, for the use of the children, 800*l.* by instalments; he continued in possession, having paid only 250*l.*; on his bankruptcy it was held that the assignee of the bankrupt was entitled to the goods. See also *Ex parte Cox*, 1 Ch. D. 302; *Ex parte Symmons*, 14 Ch. D. 692.

Transfer of dock warrants passes property in docks.

With regard to goods lying in the East or West India or London Docks, the possession of the dock warrants constitutes the evidence of reputed ownership: see *Lucas* v. *Dorrien*, 1 Moo. 29; *Greening* v. *Clarke*, 4 B. & C. 316; *Ridout* v. *Lloyd*, Mon. 103; *Ex parte Davenport*, 1 D. & C. 397. So also, generally, as to goods which pass by delivery and endorsement of documents, such as bills of lading, warehouse-keepers' certificates, and delivery orders, or warrants; the possession of such documents by a purchaser or mortgagee will be sufficient to exclude the reputed ownership of the vendor or mortgagor, provided notice of the transfer has been given to the person in whose custody the goods are:

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Abatson v. *Pearle,* 1 Bing. N. C. 327 ; *Holderness* v. *Shackles,* 3 M. & R. 25 ; *Tucker* v. *Ruston,* 2 C. & P. 86 : and see *Knowles* v. *Horsfall,* 5 B. & Al. 134. In *Ex parte Marrable,* 1 Gl. & Ja. 402, wine sold by the bankrupt, and entered in his books as belonging to the purchaser, but left in the bankrupt's cellars, set apart in a particular bin, and marked with the purchaser's seal, was held not to have remained in the bankrupt's order and disposition. By the usage of Liverpool, goods sold while in warehouse, are delivered by the vendor giving to the purchaser a delivery order, upon which the holder may obtain credit as having possession of the goods. Such order takes the goods out of the reputed ownership of the seller : *Townley* v. *Crump,* 4 Ad. & E. 58.

The transfer of possession need not take place at the time of the sale or loan. It is sufficient that it be complete before the bankruptcy ; for the statute only transfers to the trustee such goods as the bankrupt has in his possession *at the time of his bankruptcy.* And therefore, where the purchaser of goods lying at a wharf in the name of the seller, received from him at the time of the sale an order on the wharfinger for the delivery of the goods, but suffered them to remain in the name of the seller for several months after, during which time the seller disposed of part ; but, upon notice of the seller's insolvency, and previously to his bankruptcy, the purchaser carried the order to the wharfinger, and had the goods transferred into his own name ; it was held, that the assignees of the bankrupt were not entitled to these goods ; for there was a complete transfer of the possession by the entry in the wharfinger's books before the bankruptcy : *Jones* v. *Dwyer,* 15 East, 21 ; 1 Rose, 339 : see also *Arbouin* v. *Williams,* 1 R. & M. 72 ; *Robinson* v. *M'Downell,* 2 B. & A. 134.

Exceptions to the doctrine, grounded on the usages of trade.

An exception to the general doctrine under consideration exists, where the presumption of ownership generally arising from possession is encountered and repelled by the notorious fact that property of such kind is frequently possessed by persons who are not owners. An obvious instance of this is the case of a furnished house, or furnished lodgings, the occu-

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pation of which by a person engaged in trade or business, clearly gives his trustee no title to the furniture (*g*) : see *Lingham* v. *Biggs*, 1 B. & P. 88. The doctrine will accordingly not apply to furniture in an hotel, if it be shown that in the locality there is a custom for hotel-keepers to hire their furniture : *Mullet* v. *Green*, 8 C. & P. 382 ; *Ex parte Powell*, 1 Ch. D. 501 ; *Crawcour* v. *Salter*, 18 Ch. D. 30 ; *Ex parte Brooks*, 23 Ch. D. 261 ; *Ex parte Turquand*, 14 Q. B. D. 636. So where, from the nature of a man's trade, he necessarily has possession of the property of others, as in the instance of a wharfinger : *Boddy* v. *Esdaile*, 1 C. & P. 62. So in the case of a factor : *Ryall* v. *Rowles*, 1 Atk. 165. And coal barges, hired by and in the possession of a bankrupt coal merchant, with his name painted on them, and registered in his name under the Waterman's Act, were held not to pass to his assignees, it being the custom of coal merchants so to hire and deal with barges : *Watson* v. *Peach*, 1 Scott, 149 ; *Kirkley* v. *Hodgson*, 1 B. & C. 583. Similarly where a custom was proved of using hired horses and carts in the bankrupt's business : *Ex parte Wiggins*, 2 D. & C. 269 ; or cabs : *Re Hill*, 1 Ch. D. 503, n.

As to machinery, &c., demised to bankrupt.

Upon the same principle, where machinery or utensils of trade are in the possession of a trader *as lessee*, the question whether they pass to his assignees as his apparent property generally turns upon the inquiry whether a demise of such chattels consistent with the usage of the trade : *Storer* v. *Hunter*, 3 B. & C. 368 ; *Rufford* v. *Bishop*, 5 Russ. 346. For other instances where custom of trade has been held to exclude the presumption of reputed ownership, see *Newport* v. *Hollins*, 3 C. & P. 223 ; *Whitfield* v. *Brand*, 16 M. & W. 282 ; *Pennell* v. *Fox*, 1 F. & F. 617 ; *Ex parte Vaux*, L. R. 9 Ch. A. 602 ; *Re Blanshard*, 8 Ch. D. 601. In all such cases, however, the usage or custom must be proved to exist, and to be so general as to raise the presump-

(*g*) Furniture, unless it belongs to the bankrupt "in his trade or business," is not within the reputed ownership clause of the present Bankruptcy Act : see *ante*, p. 771.

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tion that it must have been known to the creditors: *Watson* v. *Peach, supra; Priestley* v. *Prata,* L. R. 2 Ex. 101; *Ex parte Powell, supra; Ex parte Wingfield,* 10 Ch. D. 591.

Distinction where the bankrupt has antecedently been owner.

But a distinction seems to exist between cases in which the chattels were originally placed in the possession of the bankrupt as lessee, and where, having been once his absolute property, they were subsequently purchased by a third person, and let by him to the bankrupt; in which case, if there were not any notorious circumstance shewing the altered character of his possession, inasmuch as persons who knew the property to have been once his own would naturally conclude that his continuing possession was the consequence of continuing ownership, he would be considered as the reputed owner, so as to give a title to his trustee: *Lingard* v. *Messiter,* 1 B. & C. 308; 2 D. & R. 495. Where A. purchased a dyer's plant, and was put in possession, but being unable to pay the purchase-money re-sold it to the vendor, who, without any change in the possession, demised it to A. for three years, who during that time became bankrupt; it was held that the plant belonged to the assignees: *Bryson* v. *Wylie,* 1 B. & P. 83, n. So where the furniture of a coffee-house was taken in execution by a creditor, and, without ever being removed, was let by him to the keeper of the coffee-house: *Lingham* v. *Biggs,* 1 B. & P. 82.

Effect of the possession of goods on sale or return.

Another exception founded on the usages of trade applies to goods which are sent by a wholesale dealer to his retail customer on sale or return: *Gibson* v. *Bray,* 8 Taun. 76; *Ex parte Wingfield,* 10 Ch. D. 591 (*h*).

But if the retail dealer continue in possession of the goods for such a period as to raise an inference of its being his intention to retain them, he will be considered as having made his election to purchase: *Livesay* v. *Hood,* 2 Camp. 83; and his return of the goods after an act of bankruptcy will not defeat

(*h*) It has been held that a person to whom goods are sent on sale or pledge cannot return them: *Delauney* v. *Barker,* 2 Starkie, 539.

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the title of the assignees: *Neate* v. *Ball*, 2 East, 117.

In further illustration of the principle in question, it may be observed, that short bills deposited with bankers do not pass to assignees in bankruptcy; as bankers, in the course of their dealing, are known to have property of this kind in their possession, and therefore the possession does not give them a false credit to the world: *Ex parte Pease*, 1 Rose, 232: see also *Bryson* v. *Wylie*, 1 B. & P. 84, n.; *Giles* v. *Perkins*, 9 East, 12; *Collins* v. *Martin*, 1 B. & P. 648.

Where the owner of skins was in the habit of sending them to a glove-maker, who was not in trade as a tanner, to be tawed, with a bill of them as sold to the latter, and of receiving them back from him, with a like bill of sale; the skins in possession of the party who received them to be tawed at the time of his bankruptcy, were held (no general usage of the trade to the contrary being proved) to belong to the assignees: *Ex parte Batten*, 3 Dea. & C. 328.

So property, of which the bankrupt is in possession *as trustee*, is not within the rule as to order and disposition: see sect. 44, sub-sect. 1 of the Bankruptcy Act, 1883. Thus, where some leases and other personal estate were assigned by A. to B. & C., upon trust to pay A.'s debts, C. took possession of the trust property, and became bankrupt; and it was held that it did not pass to his assignees: *Copeman* v. *Gallant*, 1 P. Wms. 314. See also *Gardner* v. *Rowe*, 2 S. & St. 346; *Joy* v. *Campbell*, 1 Sch. & L. 328; *Murray* v. *Pinkett*, 12 Cl. & F. 764; *Sinclair* v. *Wilson*, 20 Beav. 324. But where a trustee is not merely the legal owner of the property, but has a power to dispose of it, and he sells goods, and allows the purchaser to take possession of them before payment of the purchase-money, the goods will, in the event of the bankruptcy of the purchaser, pass to his trustee, as being in his reputed ownership with the consent of the true owners: *Ex parte Dale*, Buck. 365: see also *Ex parte Symonds*, 14 Ch. D. 692.

Similarly, where a bankrupt is executor or administrator, without any interest, his trustee could

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have no right to any of the property in his possession, in his character of executor or administrator; *Viner* v. *Cadell*, 3 Esp. 88; *Ex parte Ellis*, 1 Atk. 101; *Howard* v. *Jemmett*, 3 Burr. 1369.

The trading of an executor, by his testator's direction, only renders such of the assets liable to the bankrupt laws as the testator has directed to be employed in the trade: *Ex parte Garland*, 10 Ves. 110; *Thompson* v. *Andrews*, 1 Myl. & K. 116: *Cutbush* v. *Cutbush*, 1 Beav. 134. See also *Shearman* v. *Robinson*, 15 Ch. D. 548.

Fraudulent trust.

Where by the rules of an insurance company, no person, except a director, could hold more than two shares in his own name, and a proprietor of two shares purchased other two, which he caused to be entered in the name of the bankrupt, with the knowledge of one of the directors and of the actuary, and the bankrupt signed a declaration that he held the shares as trustee for the proprietor; but no notice of the trust was taken in the books of the company, and the bankrupt held the certificates of the shares, and received the dividends, accounting for them to the proprietor, and acted as owner, by voting in respect of the shares: it was held that the shares standing in the bankrupt's name, passed to his assignees: *Ex parte Burbridge*, 1 Dea. 131; *Ex parte Ord*, 2 Mon. & A. 724.

As to property in the hands of the bankrupt for a specific purpose.

Nearly allied in principle to the class of cases just noticed, in which the bankrupt's possession was acquired as trustee, are those in which property has been placed in his hands for a specific purpose; as where A. delivered to B. a cheque upon his bankers, to be paid to the bankers of B., in order to liquidate the balance due from him; B. did not use the cheque, but returned it to A., having in the meantime committed an act of bankruptcy; it was held not to belong to B.'s assignees: *Moore* v. *Barthrop*, 1 B. & C. 5. See also *Walker* v. *Burnell*, 1 Doug. 317; *Took* v. *Hollingworth*, 5 D. & E. 215; *Collins* v. *Forbes*, 3 Id. 316; *Toovey* v. *Milne*, 2 B. & Al. 685; *Buchanan* v. *Findlay*, 4 Man. & R. 593; *Taylor* v. *Plumer*, 3 M. & S. 562; *Belcher* v. *Campbell*, 8 Q. B. 1.

On the questions as to what settlements are void

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under the stat. 13 Eliz. c. 5, and how far to exclude a disposition of property within that statute, the owner must be solvent at the time of making it, and also as to what settlements are void under sect. 47 of the Bankruptcy Act, 1883, see SETTLEMENTS.

Absolute and conditional bills of sale.

Bills of Sale Acts.]—The property in personal chattels can be effectually transferred either, as has been seen, by delivering actual or constructive possession (see *ante*, p. 775), or by means of a deed (*i*), or instrument of transfer, commonly called a bill of sale. Bills of sale are either absolute, where the absolute property in the chattels passes *in presenti* to the grantor by way of sale: see *Brantom* v. *Griffits*, 2 C. P. D. 214; or conditional, where the grantee is entitled to take possession only on the performance or non-performance of a condition, as in the case of a mortgage.

Bills of Sale Acts.

Mortgages of chattels by means of conditional bills of sale, without delivery of possession, have long been permitted by the law of England; and in consequence of the insecurity caused by the ease with which persons in the apparent possession of chattels, of which they were not the real owners, obtained credit by reason of such possession, the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), was passed, providing that bills of sale should be registered, so that where a person remained in apparent possession of chattels which he had assigned by way of sale or mortgage, notice of such assignment might be publicly given by the registration. This Act was amended by the Bills of Sale Act, 1866 (29 & 30 Vict. c. 96), but both Acts were repealed by the Bills of Sale Act, 1878 (see sect. 23), whereby the law on the subject was consolidated and amended, and which has itself been amended by the Bills of Sale Act Amendment Act, 1882.

Decisions under the

The decisions under the repealed Acts, however,

Deed whether necessary.

(*i*) It is not in all cases necessary to the validity of a bill of sale that it should be under seal; but bills of sale by way of mortgage, containing covenants for payment of the principal and interest, &c., must be by deed.

Bills of Sale Acts.

repealed statutes still applicable.

still generally apply to bills of sale under the present statutes, except so far as the latter have expressly altered the law on the subject, and many of such decisions will accordingly be referred to.

Stat. 41 & 42 Vict. c. 31.

The Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), which came into operation on the 1st of January, 1879 (see sect. 2), enacts:

Application of act (*k*).

Sect. 3. "This Act shall apply to every bill of sale executed on or after the 1st day of January, 1879 (whether the same be absolute, or subject or not subject to any trust), whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale."

Definition of bill of sale.

The definition of the expression "bill of sale" in sect. 4 of this Act is as follows:

"The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred, but shall not include the following documents; that is to say, assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document transfer or receive goods thereby represented."

The Bills of Sale Act Amendment Act, 1882 (45 & 46 Vict. c. 43), came into operation on the 1st of

(*k*) Acts relating to bills of sale are to be construed strictly: see *Gough* v. *Everard*, 2 H. L. C. 1.

November, 1882 (which date is therein referred to as the commencement of that Act (*l*)), and enacts as follows : Bills of Sale Acts.

Sect. 3. "The Bills of Sale Act, 1878, is hereinafter referred to as 'the principal Act,' and this Act shall, so far as is consistent with the tenor thereof, be construed as one with the principal Act; but unless the context otherwise requires shall not apply to any bill of sale duly registered before the commencement of this Act so long as the registration thereof is not avoided by non-renewal or otherwise. Construction of Act. 41 & 42 Vict. c. 31.

"The expression 'bill of sale,' and other expressions in this Act, have the same meaning as in the principal Act, except as to bills of sale or other documents mentioned in section 4 of the principal Act, which may be given otherwise than by way of security for the payment of money, to which last mentioned bills of sale and other documents this Act shall not apply."

The various instruments enumerated by sect. 4, of the Act of 1878, as coming within the definition of a "bill of sale" are very similar to those enumerated by the Act of 1854, with the addition of "inventories of goods with receipt thereto attached, or receipts for the purchase moneys of goods," and of "agreements" whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon shall be conferred." These two classes of instruments will be first considered. What instruments are bills of sale within the meaning of the Acts.

The inclusion of inventories among bills of sale is merely a statutory confirmation of judicial decision. It was held that an inventory constituted a bill of sale within the meaning of the repealed Acts, if the vendor remained in the apparent possession of the goods : *Ex parte Cooper,* 10 Ch. D. 313 ; see also *Ex parte Odell,* 10 Ch. D. 78 ; but not otherwise. So also, where a sheriff having seized goods under a *fi. fa.,* sold them and gave to the purchaser an inventory with attached receipt for the price of the goods, which remained in the possession of the debtor, it was held that, inasmuch as *the vendor* (*i.e.,* the sheriff), did not retain possession of the goods, the Inventories.

(*l*) See sect. 2 of the Act of 1882.

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inventory and receipt did not amount to a bill of sale within the Act of 1878: *Marsden* v. *Burrows*, 7 Q. B. D. 80; following *Woodgate* v. *Godfrey*, 5 Ex. D. 24, which was a similar decision under the Act of 1854.

Agreements conferring rights in equity.

Under the repealed Acts it was decided that an unregistered agreement to give a bill of sale was a good consideration for a subsequent bill of sale: *Ex parte Homan*, L. R. 12 Eq. 598; though the agreement would require registration if it became necessary to rely upon it, as conferring an equitable title: *Ex parte Anning*, L. R. 16 Eq. 414; *Ex parte Mackay*, L. R. 8 Ch. A. 642; *Edwards* v. *Edwards*, 2 Ch. D. 291. But now all agreements to give bills of sale are rendered invalid, unless duly registered, and otherwise in conformity with the Act. So in *Chapman* v. *Knight*, 5 C. P. D. 308, it was held that a registered bill of sale given by a person deriving title from the grantee under an unregistered bill of sale was void against an execution creditor of the debtor who had remained in possession. A parol agreement to give a bill of sale is not within the section, being incapable of registration: *Ex parte Hauxwell*, 23 Ch. D. 626.

Building agreements.

A very important question arises whether the stipulation often contained in a building contract, that on the builder's bankruptcy or default in completing the works, the buildings, and other materials on the premises shall become the property of the landowner, renders such contract a bill of sale under the Act of 1878, requiring registration in order to protect the materials from the builder's creditors. Up to the passing of the Act of 1878 building agreements containing such stipulations did not require to be registered as bills of sale: *Brown* v. *Bateman*, L. R. 2 C. P. 272; *Blake* v. *Izard*, 16 W. R. 108. And in the recent case of *Reeves* v. *Barlow*, 12 Q. B. D. 436, it has been decided by the Court of Appeal, that the right conferred by a clause in a building agreement that upon the happening of a specified event, the materials shall become the property of the landowner, is not a right in equity but a right in law, and consequently that agreements

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containing such clauses are still governed by the decisions in *Brown* v. *Bateman,* and *Blake* v. *Izard,* and do not require to be registered as bills of sale.

Agreements for sale on hire system.

Agreements for the sale of furniture on the hire system are not within the Bills of Sale Acts, inasmuch as the purchaser has no property in the goods until all the instalments are paid: see *Re Robertson,* 26 W. R. 733; *Ex parte Hattersley,* 8 Ch. D. 601; and the remarks of *Jessel,* M.R., and *Brett,* L.J., in *Ex parte Crawcour,* 9 Ch. D. 419, see also *ante,* Vol. I., pp. 632, 634.

Agreement for lien.

As to agreements for a lien on goods shipped until payment of bills of exchange given in respect of the goods, see *Ex parte Watson,* 5 Ch. D. 36.

Assignments and transfers.

The other classes of instruments included in the definition of bills of sale given by the Act of 1878 were also so included in the repealed Act of 1854. Assignments and transfers of bills of sale do not require registration, see sect. 10 of the Act of 1878, *infra.* The transfer of an unregistered bill of sale given before the Act of 1854, does not require registration: *Re Shaw,* 22 W. R. 686.

Assurances of chattels.

As to what documents not being strictly bills of sale will come under the head of equitable assurances of chattels, see *Ex parte Montagu,* 1 Ch. D. 554; *Baddeley* v. *Baddeley,* 9 Ch. D. 113.

Power of attorney, authorities, &c., to take possession.

A power in a brewers' lease for the lessor to take possession of stock in trade so as to secure payment of a current account is a "licence to take possession of chattels" within the Bills of Sale Acts: *Ex parte Hopcroft,* 14 W. R. 168. But the licence must be to take possession "as security for a debt," and therefore it has been held that a building contract, containing a stipulation that on the builder's default the landowner may enter and appropriate the materials on the premises, is not a "licence to take possession" within the meaning of the Acts: *Ex parte Newitt,* 16 Ch. D. 522; see also *Reeves* v. *Barlow,* 12 Q. B. D. 436. Nor is it an agreement confirming a right in equity, *vide supra.*

Instruments excepted from the operation of the Acts.

All the exceptions named in sect. 4 of the Act of 1878 are taken from the Act of 1854.

A creditor's deed, to come within the exception as "an assignment," must be for the benefit of all

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Assignments for benefit of creditors.

the creditors, though it is not necessary that it should be executed by all of them: *General Furnishing Co.* v. *Venn*, 2 H. & C. 153; see also *Boldero* v. *London and Westminster Discount Co.*, 5 Ex. D. at p. 51. An assignment by an executrix, who was also residuary legatee, of all the testator's property, to trustees for payment of his debts, was held to come within this exception: *Wolverhampton Bank* v. *Marston*, 7 H. & N. 148.

Marriage settlements.

A post-nuptial settlement (unless made in pursuance of an ante-nuptial agreement) is not within the exception as a "marriage settlement," and therefore requires registration: *Fowler* v. *Foster*, 5 Jur. N. S. 99; *Ashton* v. *Blackshaw*, L. R. 9 Eq. 510; see also *Ex parte Cox*, 1 Ch. D. 303.

Transfer, &c., of ships.

Transfers and assignments of British ships and shares of such ships are regulated by the Merchant Shipping Act, 1854, see *post*, p. 831. The exception extends also to trespass, &c., of foreign ships which are not within that Act: *Union Bank of London* v. *Lenanton*, 3 C. P. D. 243.

Bills of sale in foreign parts.

Bills of sale of chattels in Scotland or Ireland (*m*) do not require registration under the Acts of 1878 and 1882: see sect. 24 of the Act of 1878: see also *Coote* v. *Jecks*, L. R. 13 Eq. 597.

Dealings in ordinary course of business.

The exception of transfers and other documents used in the ordinary course of business will include all ordinary mercantile transactions by way of pledge, such as written hypothecations accompanying pledges by factors: see *Ex parte North Western Bank*, L. R. 15 Eq. 69; *Marsden* v. *Meadows*, 7 Q. B. D. 80; *Reeves* v. *Barlow*, 11 Q. B. D. 610; *Re Hall*, 14 Q. B. D. 386; and delivery orders given to bankers: *Ex parte Close*, 14 Q. B. D. 386. See as to pledges by factors, *post*, p. 819.

Instruments excepted by the Act of 1882.

The Act of 1882 excepts from the operation of that Act all bills of sale, &c., mentioned in sect. 4 of the Act of 1878, which may be given otherwise than as securities for money; sect. 3, *supra*. The repeal by the Act of 1882, sect. 15, of sect. 20 of the Act of 1878, has been held not to apply to

(*m*) Neither the Act of 1878 (see sect. 24), nor the Act of 1882 (see sect. 18) extend to Scotland, or to Ireland.

absolute bills of sale, and chattels comprised in such instruments are therefore not within the order and disposition of the grantor within the Bankruptcy Act, 1883 : *Swift* v. *Pannell,* 24 Ch. D. 210. Bills of Sale Acts.

The Act of 1882 also enacts that, "every bill of sale made or given in consideration of any sum under 30*l.* shall be void :" sect. 12. A bill of sale given *bonâ fide* in consideration of 30*l.*, of which 15*l.* is to be repayable on demand, and the remainder by monthly instalments is valid, notwithstanding this section, although at the grantor's request, the payment of 15*l.* is immediately demanded of and made by him : *Davis* v. *Usher,* 12 Q. B. D. 490.

The Act of 1882 also excepts from the operation of that Act debentures issued by incorporated companies : sect. 17 of that Act enacts as follows : Exception of debentures.

"Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock or goods, chattels, and effects of such company."

A document which did not expressly charge the property of a company, but merely purported to give the holder, *pari passu* with other holders of similar documents, the benefit of an assignment to a trustee of the property, was held not to be a debenture within the meaning of this section, and consequently to be void for non-compliance with the requirements of the Act of 1882 : *Brocklehurst* v. *Railway Printing, &c., Co.,* W. N. 1884, p. 70.

By sect. 4 of the Act of 1878 "personal chattels" are thus defined (*n*) :— Definition of personal chattels.

"The expression 'personal chattels' shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops, but shall not include chattel interests in real estate, nor fixtures (except trade machinery as hereinafter defined), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when as-

(*n*) This definition is only for the purposes of the Act : *Meux* v. *Jacobs,* L. R. 7 H. L. at p. 493.

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signed together with any interest in the land on which they grow, nor shares or interests in the stock, funds, or securities of any government, or in the capital or property of incorporated or joint-stock companies, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement or of the custom of the country, ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale."

A distinction was taken under the old law with regard to assignments of fixtures, where they were conveyed by separate witnessing parts, or where, if conveyed by the same witnessing part, the conveyance provided for their separate disposition, in which case the assignment was held to require registration: *Ex parte Daglish*, L. R. 8 Ch. A. 1072; *Holland* v. *Hodgson*, L. R. 7 C. P. 328; *Ex parte Alexander*, 4 Ch. D. 503; and where the fixtures were conveyed by the same witnessing part as the interest in the land, and were similarly disposed of, in which case the assignment did not require registration: *Ex parte Moore and Robinson's Banking Co.*, 14 Ch. D. 379. These distinctions are now abolished, and now in all cases the question whether an assignment of fixtures (not being trade machinery within sect. 5 of the Act of 1878, *post*, p. 800) will require registration depends on whether the fixtures are assigned or charged separately from or together with an interest in land. As to what amounts to separate assignment, sect. 7 of the Act of 1878 enacts as follows:—

Fixtures or growing crops not to be deemed separately assigned when the land passes by the same instrument.

"No fixtures or growing crops shall be deemed, under this Act, to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed, or from the land on which they grow, without otherwise taking possession of or dealing with such land or building, or land, if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed, or in the land on which such crops grow, is also conveyed or assigned to the same persons or person.

"The same rule of construction shall be applied to all deeds or instruments, including fixtures or growing crops, executed before

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the commencement of this Act and then subsisting and in force, in all questions arising under any bankruptcy, liquidation, assignment for the benefit of creditors, or execution of any process of any Court, which shall take place or be issued after the commencement of this Act."

The Act of 1882 renders void either altogether or as against the grantor, all bills of sale (except in respect of growing crops and fixtures, &c., separately assigned or charged) unless the following requirements are complied with :—

Bill of sale to have schedule of property attached thereto.

Sect. 4. "Every bill of sale shall have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in the bill of sale; and such bill of sale, save as hereinafter mentioned, shall have effect only in respect of the personal chattels specifically described in the said schedule; and shall be void, except as against the grantor, in respect of any personal chattels not so specifically described.

Bill of sale not to affect after acquired property.

Sect. 5. "Save as hereinafter mentioned, a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto, of which the grantor was not the true owner at the time of the execution of the bill of sale.

Exception as to certain things.

Sect. 6. "Nothing contained in the foregoing sections of this Act shall render a bill of sale void in respect of any of the following things: (that is to say),

"(1.) Any growing crops separately assigned or charged where such crops were actually growing at the time when the bill of sale was executed.

"(2.) Any fixtures separately assigned or charged, and any plant, or trade machinery where such fixtures, plant, or trade machinery are used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place in substitution for any of the like fixtures, plant, or trade machinery specifically described in the schedule to such bill of sale."

Schedule.

As to what is sufficient "annexation," see *Marsden* v. *Meadows*, 7 Q. B. D. at p. 84. A bill of sale will not be invalidated by reason of the schedule having been temporarily disannexed upon registration for the purpose of making a copy: *Green* v. *Attenborough*, 3 H. & L. 468. Where a schedule to a bill of sale contained a list of live stock, and under the heading of "growing crops" a list of the fields

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with their descriptions, acreage, and the nature of crops growing thereon, and also contained the words "household furniture and effects" without any list or specific inventory thereof, it was held that the description was good, except as regards the household furniture and effects, within sect. 4 of the Act of 1882 : *Roberts* v. *Roberts*, 13 Q. B. D. 794. See also *Crosser* v. *Maxwell*, W. N. 1885, p. 95, over-ruling *Levey* v. *Pollock*, W. N. 1885, p. 76. As to after acquired or substituted chattels, see *post*, p. 1116, n.

Trade machinery.

The Act of 1878 contains the following provisions with regard to trade machinery :—

Application of Act to trade machinery.

Sect. 5. "From and after the commencement of this Act trade machinery shall, for the purposes of this Act, be deemed to be personal chattels, and any mode of disposition of trade machinery by the owner thereof which would be a bill of sale as to any other personal chattels shall be deemed to be a bill of sale within the meaning of this Act.

For the purposes of this Act—

"'Trade machinery' means the machinery used in or attached to any factory or workshop ;

"1st. Exclusive of the fixed motive powers, such as the water-wheels and steam engines, and the steam-boilers, donkey engines, and other fixed appurtenances of the said motive-powers ; and,

"2nd. Exclusive of the fixed power machinery, such as the shafts, wheels, drums, and their fixed appurtenances, which transmit the action of the motive powers to the other machinery, fixed and loose ; and,

"3rd. Exclusive of the pipes for steam, gas, and water in the factory or workshop.

"The machinery or effects excluded by this section from the definition of trade machinery shall not be deemed to be personal chattels within the meaning of this Act.

"'Factory or workshop' means any premises on which any manual labour is exercised by way of trade, or for purposes of gain, in or incidental to the following purposes or any of them ; that is to say,

"(*a.*) In or incidental to the making any article or part of an article ; or

"(*b.*) In or incidental to the altering, repairing, ornamenting, finishing, of any article ; or

"(*c.*) In or incidental to the adapting for sale any article."

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By sect. 6 of the Act of 1878 it is enacted as follows :—

Attornments in mortgages.

Certain instruments giving powers of distress to be subject to this Act.

Sect. 6. "Every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of this Act, of any personal chattels which may be seized or taken under such power of distress.

"Provided, that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent."

In order to avoid the necessity of registration under the repealed Act of 1854, the practice had arisen of making personal chattels securities for advances by means of assignments or demises of the debtor's interest in the premises wherein the chattels were, with a proviso that the debtor should continue to hold the premises as tenant from year to year at a rent, the tenancy to cease and the property to be re-conveyed on payment of the monies intended to be secured, and a power of entry without demand being reserved to the creditor on default in payment: see Fisher, Mort., 25. The provisions of sect. 6 of the Act of 1878 render such transactions invalid. The effect of the section on attornments and powers of distress in mortgages generally, will be hereafter considered: *post*, Chap. IX.

Bills of sale to which the Act of 1882 applies (see *ante*, p. 793), afford no protection against distress for taxes or rates. That Act enacts as follows :—

Bill of sale not to protect chattels against poor and parochial rates.

Sect. 14. "A bill of sale to which this Act applies shall be no protection in respect of personal chattels included in such bill of sale which but for such bill of sale would have been liable to distress under a warrant for the recovery of taxes and poor and other parochial rates."

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The Act of 1882 imposes the following restrictions upon the seizure of chattels under bills of sale to which that Act applies, *i.e.*, conditional bills of sale subsequent to the commencement of the Act — :

Bill of sale with power to seize except in certain events to be void.

Sect. 7. "Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes :—

"(1.) If the grantor make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security;

"(2.) If the grantor shall become a bankrupt, or suffer the said goods or any of them to be distrained for rent, rates, or taxes;

"(3.) If the grantor shall fraudulently either remove or suffer the said goods, or any of them, to be removed from the premises;

"(4.) If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates, and taxes;

"(5.) If execution shall have been levied against the goods of the grantor under any judgment at law :

"Provided that the grantor may within five days from the seizure or taking possession of any chattels on account of any of the above-mentioned causes, apply to the High Court, or to a judge thereof in chambers, and such court or judge, if satisfied that by payment of money or otherwise the said cause of seizure no longer exists, may restrain the grantee from removing or selling the said chattels, or may make such other order as may seem just.

Chattels not to be removed or sold.

Sect. 13. "All personal chattels seized or of which possession is taken after the commencement of this Act, under or by virtue of any bill of sale (whether registered before or after the commencement of this Act), shall remain on the premises where they were so seized or so taken possession of, and shall not be removed or sold until after the expiration of five clear days from the day they were so seized or so taken possession of."

A bill of sale will be void, if it empowers the grantee to seize the chattels for any cause other than those above specified : *Davis* v. *Burton*, 11 Q. B. D. 537; *Re Williams*, 25 Ch. D. 656; but see *Duff* v. *Valentine*, W. N. 1883, p. 225, where a bill of sale containing a similarly unauthorized power,

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followed by a proviso that the chattels should not be liable to seizure except for the causes specified in the Act, was upheld. Covenants for payment of insurance premiums and production of receipts, are "covenants necessary for maintaining the security:" *Hammond* v. *Hocking*, 12 Q. B. D. 291. Where rent was only a few days in arrear, and payment had not yet been demanded by the landlord, it was held that the grantor had "reasonable excuse" for non-production of the last receipt: *Ex parte Cotton*, 11 Q. B. D. 310.

Apparent possession.

The following definition of "apparent possession" is given in sect. 4 of the Act of 1878:—

> "Personal chattels shall be deemed to be in the "apparent possession" of the person making or giving a bill of sale, so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person."

This definition is with special reference to sect. 8 of the same Act, which is now repealed so far as relates to conditional bills of sale subsequent to the commencement of the Act of 1882: see *infra*. The words "apparent possession" do not occur in the Act of 1882.

Actual possession by the grantee or any other person will take chattels out of the apparent possession of the grantor, *e.g.*, if possession has been taken by the sheriff under an execution: *Ex parte Saffery*, 16 Ch. D. 688; or by a receiver: *Taylor* v. *Eskersley*, 5 Ch. D. 740; or if the grantee, having taken personal possession, has advertised the goods for sale: *Ex parte Lewis*, L. R. 6 Ch. A. 626; *Emmanuel* v. *Bridger*, L. R. 9 Q. B. 280; and even wrongful possession may be sufficient: *Ex parte Fletcher*, 5 Ch. D. 809; but putting a man in formal possession will not exclude the operation of the Act; *Seal* v. *Claridge*, 7 Q. B. D. 516; but see *Ex parte National Guardian Ass. Co.*, 10 Ch. D. 408; so a demand will not be sufficient: *Ancona* v. *Rogers*, 1 Ex. D. 285.

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Apparent possession differs from reputed ownership under the Bankruptcy Act, 1883, sect. 44 (see *ante*, p. 771), as "apparent possession" depends merely on the fact of possession: see *Gough* v. *Everard*, 2 H. & C. 1; while reputed ownership depends upon the consent of the true owner: see *Ex parte Jay*, L. R. 9 Ch. A. 697.

The Act of 1878, sect. 20, enacts as follows:—

Order and disposition.

"Chattels comprised in a bill of sale which has been and continues to be duly registered under this Act shall not be deemed to be in the possession, order, or disposition of the grantor of the bill of sale within the meaning of the Bankruptcy Act, 1869."

32 & 33 Vict. c. 71.

This section has been repealed by the Act of 1882, sect. 15, so far as relates to bills of sale made by way of security subsequently to the commencement of that Act; and, consequently, the law as to order and disposition with regard to bills of sale as it existed before the 1st of January, 1879, is revived. The "order and disposition" clause of the Bankruptcy Act, 1883, sect. 44, is therefore not affected by the registration of a bill of sale within the Act of 1882, and chattels comprised in such a bill of sale will belong to the grantor's creditors notwithstanding registration, if they were in his order and disposition on his bankruptcy; *Stansfield* v. *Cubitt*, 2 De G. & J. 222; *Ex parte Harding*, L. R. 15 Eq. 223; see *Ex parte Payne*, 11 Ch. D. 539.

As to the meaning of "order and disposition," and as to the effect and operation of sect. 44 of the Bankruptcy Act, 1883, see *ante*, p. 770 *et seq.*

Successive bills of sale.

Under the Act of 1854 the practice arose of making successive unregistered bills of sale, each made within 21 days after the execution of the former one, so as to avoid the necessity of registration, and the validity of the device was upheld: see *Ramsden* v. *Lupton*, L. R. 9 Q. B. 17. In order to put an end to these evasions of the law it has been enacted, by the Act of 1878, sect. 9, that,—

Avoidance of certain duplicate bills of sale.

"Where a subsequent bill of sale is executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale, and comprises all or any part of the personal chattels comprised in such prior bill of sale, then, if such subsequent bill

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of sale is given as a security for the same debt as is secured by the prior bill of sale, or for any part of such debt, it shall, to the extent to which it is a security for the same debt or part thereof, and so far as respects the personal chattels or part thereof comprised in the prior bill, be absolutely void, unless it is proved to the satisfaction of the Court having cognizance of the case that the subsequent bill of sale was *bonâ fide* given for the purpose of correcting some material error in the prior bill of sale, and not for the purpose of evading this Act."

It has been held that this section does not apply to a bill of sale executed in accordance with a *bonâ fide* agreement to give such bill of sale, and that such an agreement need not be registered: *Ex parte Honywell*, 23 Ch. D. 626.

Attestation, form, and registration of bills of sale.

The Act of 1878 contains the following provisions, making such attestation and registration as is therein prescribed essential to the validity of all bills of sale to which that Act applies:—

Avoidance of unregistered bill of sale in certain cases.

Sect. 8. "Every bill of sale to which this Act applies shall be duly attested and shall be registered under this Act, within seven days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given, otherwise such bill of sale, as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in such bill of sale under the law relating to bankruptcy or liquidation, or under any assignment for the benefit of the creditors of such person, and also as against all sheriff's officers and other persons seizing any chattels comprised in such bill of sale, in the execution of any process of any court authorizing the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which, at or after the time of filing the petition for bankruptcy or liquidation, or of the execution of such assignment, or of executing such process (as the case may be), and after the expiration of such seven days are in the possession or apparent possession of the person making such bill of sale (or of any person against whom the process has issued under or in the execution of which such bill has been made or given, as the case may be)."

This section has been repealed by sect. 15 of the Act of 1882, except as to anything done or suffered

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before the commencement of that Act; but it has been held that this repeal only extends to bills of sale to which the Act of 1882 applies, and that absolute bills of sale which are not within that Act are still regulated by the sections and clauses of the Act of 1878, which are thus repealed: *Swift* v. *Pannell*, 24 Ch. D. 210.

The Act of 1882 enacts as follows with regard to the registration, form, and attestation of bills of sale:—

Bill of sale to be void unless attested and registered (*p*).

Sect. 8. "Every bill of sale shall be duly attested, and shall be registered under the principal Act within seven clear days after the execution thereof, or if it is executed in any place out of England then within seven clear days after the time at which it would in the ordinary course of post arrive in England if posted immediately after the execution thereof; and shall truly set forth the consideration for which it was given; otherwise such bill of sale shall be void in respect of the personal chattels comprised therein.

Form of bill of sale.

Sect. 9. "A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed.

Attestation.

Sect. 10. "The execution of every bill of sale by the grantor shall be attested by one or more credible witness or witnesses, not being a party or parties thereto. So much of section ten of the principal Act as requires that the execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and that the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting witness, is hereby repealed."

Effect of non-compliance with requirements of the Acts.

Non-compliance with the requirements of the Act of 1878 as regards attestation or registration avoids instruments to which that Act applies only as against the persons mentioned in sect. 8 thereof, but not as against the grantor himself: *Davis* v. *Goodman*, 5 C. P. D. 128. But an instrument to which the Act

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(*p*) This marginal note is inaccurate, as it makes no mention of the requirement that the consideration shall be truly set forth. But it would seem that no importance is to be attached to marginal notes as bearing on the interpretation of statutes: see *Att.-Gen.* v. *Great Eastern Railway Co.*, 11 Ch. D. at pp. 460, 465.

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of 1882 applies, *i.e.*, a bill of sale given by way of security for the payment of money, unless it is duly attested and registered, as prescribed by that Act, and truly sets forth the consideration, will be wholly void in respect of the personal chattels comprised therein; and it will also be wholly void unless in accordance with the prescribed form.

Attestation.

An instrument is not duly attested, unless the witness sees, or has an opportunity of seeing, the signature made: *Hudson* v. *Parker*, 1 Rob. 14; *Blake* v. *Blake*, 7 P. D. 102; *Sharpe* v. *Birch*, 8 Q. B. D. 111; *Ford* v. *Kettle*, 9 Q. B. D. 139.

Registration.

The effect of the requirements of the Acts of 1878 and 1882 as to registration within seven days is that for seven days after execution a bill of sale is valid without registration. Section 8 of the Act of 1882 does not apply to bills of sale executed more than seven days before the commencement of that Act: *Hickson* v. *Darlow*, 23 Ch. D. 691.

The addition of the word "truly" in the Act of 1882, sect. 8, is merely declaratory of the requirements of the Act of 1878, sect. 8: see *Ex parte Carter*, 12 Ch. D. 908; *Ex parte National Bank*, 15 Ch. D. 42.

Statement of consideration.

The consideration must be stated with substantial accuracy: *Roberts* v. *Roberts*, 13 Q. B. D. at p. 802: it is not necessary to set out the whole history of the transaction: *Ex parte Allam*, 14 Q. B. D. 43: but the true legal or business effect of what actually took place must be stated: *Ex parte Johnson*, 26 Ch. D. 338; see also *Credit Co.* v. *Pott*, 6 Q. B. D. 695. An obvious mistake in the statement of the consideration will not invalidate a bill of sale: *Ex parte Winter*, 44 L. T. 323.

It is not as a general rule necessary to state in the bill of sale any collateral arrangement as to the mode of payment or application of the money; it may be applied in or towards payment of any existing debt of the borrower due either to the lender himself or to any other person: *Ex parte National Bank*, 15 Ch. D. 42; *Hamlyn* v. *Batterby*, 5 C. P. D. 327; *Credit Co.* v. *Pott*, 6 Q. B. D. 695; *Ex parte Challinor*, 16 Ch. D.

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260; *Ex parte Firth*, 19 Ch. D. 419; *Ex parte Bolland*, 21 Ch. D. 543. "It is a general rule of law, that in every case where a transaction resolves itself into paying money by A. to B., and then handing it back again by B. to A., if the parties meet together and agree to set one demand against another, they need not go through the form and ceremony of handing the money backwards and forwards": per Mellish, L.J., in *Spargo's Case*, L. R. 8 Ch. A. at p. 414; see also *Ex parte Popplewell*, 21 Ch. D. 73. But the debt must be actually due at the time of the execution of the bill, so the consideration will not be truly set forth if money is retained in respect of interest not actually accrued due: *Ex parte Charing Cross Advance, &c., Bank*, 16 Ch. D. 35: or paid on account of rent for the current quarter: *Ex parte Rolph*, 19 Ch. D. 98.

So also, if part of the money is retained for legal expenses of preparing a bill of sale to secure a loan, or for commission on a loan (*a*), the consideration will not be truly set forth unless the deductions are expressly stated in the bill of sale, inasmuch as even though the borrowers may be properly liable to such payments they are not actually due until the bill of sale has been executed, and the whole consideration has come into the borrower's hands: *Ex parte Firth*, 19 Ch. D. 419; *Hamilton* v. *Chaine*, 7 Q. B. D. 319. But in *Re Cann*, 13 Q. B. D. 36, where a bill of sale did not state any deduction for legal expenses, and the solicitor who acted for both parties retained part of the sum advanced in payment of his bill of costs, it was held that under the circumstances the consideration was truly stated, the money being on execution of the bill held by the solicitor as agent for the grantor. The consideration will be in substance truly set forth where it is stated to have been "paid in hand," although part of the advance has been made previously to the execution of the bill of sale, if it was made on

(*a*) It seems that a bonus charged to the grantor comes within the rule above referred to, and should be stated in the consideration: see *Re Williams*, 25 Ch. D. 656.

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account of the whole advance and as part of the same transaction: *Hamilton* v. *Chaine*, 7 Q. B. D. at p. 5; see also *Carrard* v. *Meek*, 50 L. J. C. P. 187; *Ex parte Johnson*, 50 L. T. 214. The consideration must be truly set forth on the face of the deed; it is not sufficient if the consideration appears on the endorsed receipt: *Ex parte Charing Cross Advance Co.*, 16 Ch. D. 35.

Inadequate consideration.

Mere inadequacy of consideration will not of itself invalidate a bill of sale: *Westlake* v. *Adams*, 27 L. J. C. P. 274; see *Ex parte Challinor*, 16 Ch. D. 260; but the Court will grant relief, where there has been undue pressure: *Barrett* v. *Hartley*, L. R. 2 Eq. 789.

Form of conditional bills of sale.

The statutory form of bill of sale, prescribed by the Act of 1882, will be given in the Precedents following this dissertation: see *post*, Precedent XLVII. See also the notes to that Precedent.

Time for registration.

The time for registration may be extended by the Court if satisfied that the omission to register within the prescribed time was accidental or due to inadvertence: see sect. 14 of the Act of 1878, *post*, p. 815.

And by sect. 22 of the same Act,

Time for registration.

When the time for registering a bill of sale expires on a Sunday, or other day on which the registrar's office is closed, the registration shall be valid if made on the next following day on which the office is open.

The provisions of the Act of 1878 with regard to the mode of registration are as follows:

Mode of registering bills of sale.

Sect. 10. "A bill of sale shall be attested and registered under this Act in the following manner (*q*):—

"(2) Such bill, with every schedule or inventory thereto annexed, or therein referred to, and also a true copy of such bill and of every such schedule or inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same (or in case the same is made or given by any person under or in the execution of any pro-

(*q*) Sub-sect. (1) of this section is repealed: *vide supra*.

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cess, then a description of the residence and occupation of the person against whom such process issued), and of every attesting witness to such bill of sale, shall be presented to and the said copy and affidavit shall be filed with the registrar (*r*) within seven clear days after the making or giving of such bill of sale, in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed:

"(3) If the bill of sale is made or given subject to any defeasance, or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void.

"In case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels.

"A transfer or assignment of a registered bill of sale need not be registered."

Under the Act of 1854 (see sect. 1) the original bill of sale might be filed; but now the original must be produced to the registrar, and a true copy must be filed. The original bill and schedule or inventory must also be produced and true copies thereof must be filed, notwithstanding subsequent alterations: *Green* v. *Attenborough*, 3 H. & C. 468. Mere clerical errors will not invalidate a copy: *Re Hewer*, 21 Ch. D. 871; see also *Elliott* v. *Freeman*, 7 L. T. N. S. 715; *Gardnor* v. *Shaw*, 19 W. R. 753; *Lamb* v. *Brace*, 24 W. R. 645.

The affidavit.

By sect. 17 of the Act of 1878, the affidavit "may be sworn before a master of any division of the High Court of Justice, or before any commissioners empowered to take affidavits in the Supreme Court of Judicature."

(*r*) Directions as to questions of practice, &c., with regard to bills of sale are to be given by the masters at the Bills of Sale Department at the Central Office of the Supreme Court, see Rules of the Supreme Court, 1883, Ord. LXI. rr. 2, 25. For form of affidavit see Appendix to the Rules, B, No. 24.

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Section 13 of the same Act enacts that:—

The registrar.

"The masters of the Supreme Court of Judicature attached to the Queen's Bench Division of the High Court of Justice, or such other officers as may for the time being be assigned for this purpose under the provisions of the Supreme Court of Judicature Acts, 1873 and 1875, shall be the registrar for the purposes of this Act, and any one of the said masters may perform all or any of the duties of the registrar."

36 & 37 Vict. c. 66. 38 & 39 Vict. c. 77.

Statement of attestation.

The affidavit must expressly state the fact that the bill of sale was duly attested (as to which see *ante*, p. 806), but an omission to state that the deponent attested it will not vitiate the affidavit, if it be clear from the bill and affidavit that the deponent and the attesting witness are the same person: *Blaiberg* v. *Park*, 10 Q. B. D. 90. The signature of a bill of sale by directors for the purpose of authenticating the seal is not an attestation: *Shears* v. *Jacob*, L. R. 1 C. P. 512; *Deffell* v. *White*, L. R. 2 C. P. 144.

Description of residence and occupation.

The residence and occupation must be accurately and fully described in the affidavit itself, and it is not sufficient that such description is given in the bill of sale and referred to in the affidavit: *Pickard* v. *Bretz*, 5 H. & N. 9; *Hatton* v. *English*, 7 C. & B. 94; *Murray* v. *Mackenzie*, L. R. 10 C. P. 625: but as to supplementing an insufficient description in an affidavit by reference to an annexed copy of the bill of sale: *Jones* v. *Harris*, L. R. 7 Q. B. 157.

"Residence" generally means place of abode: *Attenborough* v. *Thompson*, 2 H. & N. 559; but it will be a sufficient description of the residence of either the grantor or of a witness, if his business residence is described: *Blackwell* v. *England*, 6 Jur. N. S. 1302; see also *Ex parte Breall*, 16 Ch. D. 484. In the case of an incorporated company its principal office is its residence; *Shears* v. *Jacob*, L. R. 1 C. P. 513. Indeed the business residence in the case of a man who is engaged in business is the residence which it is important to describe: *Ex parte Hooman*, L. R. 10 Eq. 63; see also *Ex parte Jerningham*, 9 Ch. D. 466, which was a case under the Bankruptcy Act, 1869, as to the sufficiency of the debtor's

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description in a petition for liquidation. If a man has two residences, both should be stated: *Wallis* v. *Smith*, W. N. 1882, p. 77. The residence at the time of the affidavit, not at the time of making the bill, must be described in the affidavit: *Button* v. *O'Neill*, 4 C. P. D. 354.

The present occupation (if any) must be stated; *Castle* v. *Downton*, 5 C. P. D. 56; a person having no present occupation may properly describe himself as "esquire" or "gentleman:" *Smith* v. *Cheese*, 1 C. P. D. 60; but not so a person who has a present occupation: *Ex parte Hooman*, L. R. 10 Eq. 63; *Brodrick* v. *Scale*, L. R. 6 C. P. 98. "Gentleman," though generally the proper legal description of a solicitor, is not sufficient for the purpose of an affidavit under the Bills of Sale Acts: *Tuton* v. *Sanoner*, 27 L. J. Ex. 293.

"Government Clerk" is a sufficient description, without specifying the particular office in which he is employed; so also "insurance clerk" without naming his employers: *Grant* v. *Shaw*, L. R. 7 Q. B. 700. So also it is sufficient to describe a man as "clerk to A. & Co.," without specifying the business of his employers: *Lamb* v. *Bruce*, 24 W. R. 645. "Widow" is a good description of a woman who is engaged in winding up her deceased husband's business: *Luckin* v. *Hamlin*, 21 L. T. N. S. 366; or of a person not actually engaged in any occupation at the time of making the bill of sale: *Ex parte Woolf*, 44 L. T. N. S. 321. See also as to the sufficiency of descriptions of occupation: *Gugen* v. *Sampson*, 2 F. & F. 974; *Allen* v. *Thompson*, 1 H. & N. 16; *Beales* v. *Tennant*, 29 L. J. Q. B. 188; *Adams* v. *Graham*, 33 L. J. Q. B. 71; *Briggs* v. *Boss*, L. R. 3 Q. B. 263; *Larchin* v. *North-Western Deposit Bank*, L. R. 10 Ex. 64.

If several persons concur in making a bill of sale the descriptions of all must be given, though only one of them is in possession of the chattels: *Hooper* v. *Parmenter*, 10 W. R. 648.

One witness is sufficient for the attestation of a bill of sale; but if there are several attesting witnesses the residences and occupations of all must be

stated in the affidavit: *Pickard* v. *Marriage*, 1 Ex. D. 364. **Bills of Sale Acts.**

A deponent witness may describe his residence and occupation in the introductory words of the affidavit, *e.g.*, "I, A. B. of No. 100, Lincoln's Fields, Solicitor, make oath," &c.: *Bleiberg* v. *Parke*, 10 Q. B. D. 10.

An inaccuracy or incompleteness in the description of residence or occupation will be fatal, if misleading, *e.g.*, a mistake in the number of a house: *Murray* v. *Mackenzie*, L. R. 10 C. P. 625. But not if the description given affords sufficient means for identification of the person mentioned: see *Hewer* v. *Cox*, 3 E. & E. 428; *Blount* v. *Harris*, 4 Q. B. D. 605; *Ex parte McHattie*, 10 Ch. D. 398.

By sect. 11 of the Act of 1882, it is enacted that:

Local registration of contents of bills of sale.

"Where the affidavit (which under section ten of the principal Act is required to accompany a bill of sale when presented for registration) describes the residence of the person making or giving the same or of the person against whom the process is issued to be in some place outside the London bankruptcy district as defined by the Bankruptcy Act, 1869, or where the bill of sale describes the chattels enumerated therein as being in some place outside the said London bankruptcy district, the registrar under the principal Act, shall forthwith and within three clear days after registration in the principal registry, and in accordance with the prescribed directions, transmit an abstract in the prescribed form of the contents of such bill of sale to the county court registrar in whose district such places are situate, and if such places are in the districts of different registrars to each such registrar.

32 & 33 Vict. c. 71, s. 60.

"Every abstract so transmitted shall be filed, kept, and indexed by the registrar of the county court in the prescribed manner, and any person may search, inspect, make extracts from, and obtain copies of the abstract so registered in the like manner and upon the like terms as to payment or otherwise as near as may be as in the case of bills of sale registered by the registrar under the principal Act.

Definition of defeazance.

A defeazance is an instrument which defeats the force or operation of some other deed or estate; and that which in the *same deed* is called a condition, if it be in a *separate* deed is called a defeazance. Com.

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Dig. Defeazance, (A). The word is derived from the French word defaire, to defeat or undo, *infectum reddere quod factum est.* Co. Litt. 236. b.

Declaration of trust.

The declaration of trust referred to in sect. 10, (2), of the Act of 1878, is a declaration of trust in favour of the grantor: *Robinson* v. *Collingwood*, 13 W. R. 84.

A stipulation that the debt shall be repayable in instalments must be noticed in the bill of sale, otherwise the bill will be void: *Ex parte Southam*, L. R. 17 Eq. 578. But a memorandum merely explanatory of charges for bonus, interest, &c., is not a defeasance or condition within the meaning of the section: *Ex parte Collins*, L. R. 10 Ch. A. 367; nor is a stipulation not to register a bill of sale: *Ex parte Popplewell*, 21 Ch. D. 73.

As to renewal of registration the Act of 1878 enacts as follows:

Renewal of registration.

Sect. 11.—"The registration of a bill of sale, whether executed before or after the commencement of this Act, must be renewed once at least every five years, and if a period of five years elapses from the registration or renewed registration of a bill of sale, without a renewal or further renewal (as the case may be), the registration shall become void.

"The renewal of a registration shall be effected by filing with the registrar an affidavit stating the date of the bill of sale and of the last registration thereof, and the names, residences, and the occupations of the parties thereto as stated therein, and that the bill of sale is still a subsisting security.

"Every such affidavit may be in the form set forth in the Schedule (A.) to this Act annexed (*s*).

"A renewal of registration shall not become necessary by reason only of a transfer or assignment of a bill of sale."

Form of affidavit.

(*s*) The form of affidavit set forth in Schedule (A) to the Act of 1878 is as follows:—

I [*A.B.*] of —— do swear that a bill of sale, bearing date the —— day of —— 18 [*insert the date of the bill*], and made between [*insert the names and descriptions of the parties in the original bill of sale*], and which said bill of sale [*or*, and a copy of which said bill of sale, *as the case may be*] was registered on the —— day of —— 18 [*insert date of registration*], is still a subsisting security.

Sworn, &c.

If there is a misdescription in the bill of sale, the registration of the bill may be renewed under this section, the affidavit not merely giving the true description, but expressly stating the mistake, otherwise the variance between the affidavit and the bill will be fatal: *Ex parte Webster*, 22 Ch. D. 136. Or, an application may be made for rectification of the register under sect. 14 of the Act of 1878, see *post*, p. 815. A bill of sale void for want of renewal cannot be renewed under sect. 14: *Askew* v. *Lewis*, 10 Q. B. D. 477.

Rectification of mistake in bill of sale.

The transferee of a bill of sale must be careful to register every five years, otherwise his security will lapse: *Karet* v. *Koshen Meat Association*, 2 Q. B. D. 361. With regard to the mode of registration it is enacted by the Act of 1878 that:

Form of register.

Sect. 12. "The registrar shall keep a book (in this Act called 'the register') for the purposes of this Act, and shall, upon the filing of any bill of sale or copy under this Act, enter therein in the form set forth in the second schedule (B.) to this Act annexed, or in any other prescribed form, the name, residence, and occupation of the person by whom the bill was made or given (or in case the same was made or given by any person under or in the execution of process, then the name, residence, and occupation of the person against whom such process was issued, and also the name of the person or persons to whom or in whose favour the bill was given), and the other particulars shown in the said schedule or to be prescribed under this Act, and shall number all such bills registered in each year consecutively, according to the respective dates of their registration.

"Upon the registration of any affidavit of renewal the like entry shall be made, with the addition of the date and number of the last previous entry relating to the same bill, and the bill of sale or copy originally filed shall be thereupon marked with the number affixed to such affidavit of renewal.

"The registrar shall also keep an index of the names of the grantors of registered bills of sale with reference to entries in the register of the bills of sale given by each such grantor."

The duties of the registrar, except so far as otherwise expressly provided, are simply ministerial: *Needham* v. *Johnson*, 16 W. R. 346.

The Act of 1878 contains the following further

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provisions with regard to the registration of bills of sale :

Rectification of register.

Sect. 14. "Any judge of the High Court of Justice, on being satisfied that the omission to register a bill of sale or an affidavit of renewal thereof within the time prescribed by this Act, or the omission or mis-statement of the name, residence, or occupation of any person, was accidental or due to inadvertence, may in his discretion, order such omission or mis-statement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for such registration on such terms and conditions (if any) as to security, notice by advertisement or otherwise, or as to any other matter, as he thinks fit to direct.

Entry of satisfaction.

Sect. 15. "Subject to and in accordance with any rules to be made under and for the purposes of this Act (*t*), the registrar may order a memorandum of satisfaction to be written upon any registered copy of a bill of sale, upon the prescribed evidence being given that the debt (if any) for which such bill of sale was made or given has been satisfied or discharged.

Copies may be taken, &c.

Sect. 16. "Any person shall be entitled to have an office copy or extract of any registered bill of sale, and affidavit of execution filed therewith, or copy thereof, and of any affidavit filed therewith, if any, or registered affidavit of renewal, upon paying for the same at the like rate as for office copies of judgments of the High Court of Justice, and any copy of a registered bill of sale, and affidavit purporting to be an office copy thereof, shall in all Courts and before all arbitrators or other persons, be admitted as *prima facie* evidence thereof, and of the fact of date of registration as shown thereon."

And by the Act of 1882, sect. 16, it is enacted that :

Inspection of registered bills of sale.

"Any person shall be entitled at all reasonable times to search the register, on payment of a fee of one shilling, or such other fee as may be prescribed, and subject to such regulations as may be prescribed, and shall be entitled at all reasonable times to inspect, examine, and make extracts from any and every registered bill of

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(*t*) The power to make rules is given by sect. 21 of the Act of 1878. The rules now in force under the authority of this section are contained in the Rules of the Supreme Court Act, 1883, Ord. LXI. rr. 23—27, and relate to searches and certificates of search, to the persons to act as registrars, and to entering memoranda of satisfaction. A form of affidavit on registration has also been issued : see last note.

sale without being required to make a written application, or to specify any particulars in reference thereto, upon payment of one shilling for each bill of sale inspected, and such payment shall be made by a judicature stamp: Provided that the said extracts shall be limited to the dates of execution, registration, renewal of registration, and satisfaction, to the names, addresses, and occupations of the parties, to the amount of the consideration, and to any further prescribed particulars."

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Mortgage of Debts.]—Debts whether secured or unsecured may be the subject of mortgage. Unsecured debts are not generally a very eligible security, but debts secured by mortgage are often the subject of assignments by means of mortgages, which are termed sub-mortgages. There was formerly some doubt as to the effect of a sub-mortgage on the power of sale in the original mortgage: see *Cruse* v. *Nowell*, 2 Jur. N. S. 536. But inasmuch as the statutory powers of sale given by the Conveyancing and Law of Property Act, 1881 (*post*, p. 919), may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money, it is conceived that such powers of sale will pass by a sub-mortgage. In taking an assignment of a debt, by way of security, three precautions are necessary.

Precautions to be observed by persons taking an assignment of a debt as a security.

1st. To ascertain, by previous communication with the debtor, that the whole sum alleged to be due is due; of which a written admission should, if possible, be obtained (*u*).

2ndly. In preparing the deed to insert a clause, providing, that it shall not be incumbent on the mortgagee to sue for the debt, unless he thinks proper.

3rdly. Immediately to give to the debtor notice of the mortgage.

By neglecting the first, the mortgagee exposes himself to the danger of being engaged in a dispute with the debtor, as to the amount actually due: see

Admission of state of amount.

(*u*) So also, it is advisable in transferring a mortgage, that the concurrence of the mortgagor should, if possible, be obtained by his being made party to the instrument of transfer, or otherwise, see *post*, p. 960.

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Matthews v. *Walwyn*, 4 Ves. 118; *Chambers* v. *Goldwin*, 9 Ves. 264.

Clause as to liability to sue.

By neglecting the second, he subjects himself to any loss which may arise from his delay to enforce the security against the debtor.

Notice of assignment.

By neglecting the third of these precautions, the mortgagee incurs the risk of the debtor paying the debt to the mortgagor, which he would, of course, be justified in doing before notice: *Jones* v. *Gibbons*, 9 Ves. 410; see *Norrish* v. *Marshall*, 5 Mad. 475; *Williams* v. *Sorrell*, 4 Ves. 389; *Re Lord Southampton's estate*, 16 Ch. D. at p. 187; or of his selling or mortgaging it to any other person, whose earlier notice would carry precedence: see *post*, Ch. VII. As to the assignment of a debt proved or proveable in bankruptcy, see *Ex parte Taylor*, 2 Gl. & J. 66; *Ex parte Dickenson*, 2 Dea. & C. 520; *Ex parte Richards*, 2 Dea. & C. 190; *Ex parte Holder*, 1 Mon. & A. 518; *Re Breechloading Armoury Co.*, L. R. 5 Eq. at p. 285. Choses in action other than debts due to the bankrupt in the course of his trade or business are not within the "order and disposition" clause of the Bankruptcy Act, 1883, sect. 44, see *ante*, p. 771.

Indorsement of receipt on bond.

Where an obligor pays any portion of a bond debt, a receipt should be endorsed on the bond, in order to prevent the possibility of the obligee assigning it as a subsisting security for the whole debt; though it is clear that the assignee of the bond would, in such a case, take it, subject to the deduction of the sum paid; at least if the payment were made after the bond became due: this is the rule even in the case of bills of exchange, the transfer of which, when over due, is much favoured for the convenience of commerce.

Protection of assignee against obligation to get in the debt.

Where a debt is assigned as a security, it is always proper to insert a clause to the effect that it shall not be incumbent on the assignee to sue for the debt: for without it, if the assignee neglect to put in force the remedies for its recovery, and the money is lost by this neglect, the loss will fall on the mortgagee: Lord *Thurlow*, in *Ex parte Mure*, 2 Cox, 73, stated the doctrine so strongly as to render it extremely dangerous for a person to take even a mortgage-debt

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as a security, without an indemnity of the nature above suggested; he said in the course of his judgment, "I think it very difficult to conceive a case where there has been anything like forbearance to the debtor without the concurrence of the assignor, without involving the assignee in the consequences of such a conduct." See *Williams* v. *Price*, 1 Sim. & S. 581, in which the Court seemed to think that some part of the above positions might be open to qualification.

This reasoning certainly applies with less force where the debt is secured by a mortgage, than where it is secured by a bond or covenant only; but in *every* case it is safer to protect the assignee by an express provision. It ought never to be omitted when securities are vested in trustees.

As to giving a mortgagee power to compound for the debt.

Sometimes it may be convenient, in the assignment of a debt by way of mortgage, to give the mortgagee a power to compound or accept any composition or security for the payment. Such a power, however, should be given with caution, and perhaps can scarcely ever be reasonably required, unless the mortgagor's absence from the kingdom will prevent him from concurring in any such arrangement.

Power of attorney.

A power of attorney in an assignment of an equitable *chose en action* is altogether unnecessary. Sect. 25, sub-sect. 6, of the Judicature Act, 1873 (36 & 37 Vict. c. 66), making choses in action assignable, applies only to absolute assignments not purporting to be by way of charge only (*x*). When, therefore, a debt which is recoverable at law is assigned by way of mortgage (*y*), such a power is still requisite; because, as the assignee can only sue in the name of the assignor, he ought to be authorized to use his name for such purpose: see *National Provincial Bank* v. *Harle*, 6 Q. B. D. 626; but where a debt or *chose en action* is so assigned which is re-

(*x*) An absolute assignment in trust to pay off a debt, and pay the surplus to the assignor, is an "absolute assignment" within this section, and the assignee may accordingly sue in his own name: *Burlinson* v. *Hall*, 12 Q. B. D. 347.

(*y*) See as to mortgages of policies of assurance, *post*, p. 831.

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coverable only in equity, since the assignee may sue in his own name, the power is useless, and need not be inserted.

A power of attorney given on an assignment by way of mortgage of a legal debt, being for valuable consideration, may be made irrevocable: see the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), sect. 8; but the section is not retrospective.

Pledges by factors.

Pledges by Factors.]—A factor having no authority to bind his principal except by sale, his *pledge* was tortious and void at common law: *Newson* v. *Thornton*, 6 East, 13; and operating as a forfeiture of any right of lien which the factor himself had, did not confer upon the pledgee even the right to stand in his debtor's place in respect of such lien: *De Bouchout* v. *Goldsmid*, 5 Ves. 211; *Daubigny* v. *Duval*, 5 T. R. 604; *Kuchin* v. *Wilson*, 4 B. & Ad. 443; *M'Combie* v. *Davies*, 7 East, 5. And a factor was not even allowed to pledge goods consigned to him for the purpose of answering bills drawn upon him by his principal, and to be provided for out of the proceeds of the goods: *Gill* v. *Kymer*, 5 Moo. 503.

Factors' Acts; 4 Geo. 4, c. 83; 6 Geo. 4, c. 94.

Agents having goods in possession deemed owners for certain purposes.

The law respecting factors has been materially altered by the enactments of the stat. 4 Geo. 4, c. 83, amended by the 6 Geo. 4, c. 94, which provides that a person entrusted with goods for the purpose of consignment or sale shall be deemed the true owner thereof, so far as to entitle the consignee of such goods to a lien thereon in respect of any money or negotiable security for advances to the person in whose name the goods are shipped: sect. 1; and so far, also, as to give validity to any contract for sale or deposit or pledge of the goods of which he has the bill of lading or wharfinger's certificate or warrant or order of delivery as a security for any money or negotiable interest advanced on the faith of such documents by any person not having notice that the person so entrusted is not the owner: sect. 2. The security by pledge of goods if made for an antecedent debt of the factor, is not to extend beyond the factor's interest: sect. 3. Sect. 4 gives validity to dealings with "agents entrusted with goods" in the

Pledges by Factors.

ordinary course of business, or out of that course if within the agent's authority, notwithstanding notice of his being an agent. And sect. 5 enacts, that persons may accept goods or any such document as aforesaid in pledge from a factor, notwithstanding notice of his being such; but in such case [*i.e.* in case of notice of his being a factor] shall acquire only such interest in the goods or document as the factor had at the time of the pledge. By sect. 6 the true owner is empowered to recover from the factor or his assignees [now trustee] in bankruptcy the price or (on payment of advances secured by them) the goods from a pledgee. And sect. 8 provides that the acceptance of bills of exchange by an agent, on account of his principal, shall not be considered as constituting any part of the debt due from such principal within the Act so as to excuse the consequence of any pledge, unless such bills be paid when due: see *Fletcher* v. *Heath*, 7 B. & C. 517; *Blandy* v. *Allen*, 3 C. & P. 447; *Robertson* v. *Kensington*, 5 Ma. & Ry. 381.

Bills accepted by agent on account of principal.

Where goods were consigned, and the bill of lading indorsed to a factor, who landed and warehoused the goods, taking the wharfinger's certificates and dock-warrants in his own name, and afterwards pledged such certificates and dock-warrants for money advanced on his own account, it was held that the transaction was not protected by the second section of the Act: *Close* v. *Holmes*, 2 M. & Rob. 22.

Pledge of wharfinger's certificates, and dock-warrants, not protected.

A delivery of goods by a factor having a lien, to operate under sect. 5 as a pledge to the extent of such lien, must be made expressly as a pledge: *Thompson* v. *Farmer*, 1 Moo. & M. 48.

As to the effect of laches by the principal, after notice of a pledge void under the Act, see *Robertson* v. *Kensington*, 5 Ma. & Ry. 381.

A sale or pledge of the bill of lading passes the right to the possession of the goods at law; but in the case of a pledge, subject to the principal's right of redemption, which extends to stoppage *in transitu*: *In re Westzinthus*, 5 B. & Ad. 817.

In the last-mentioned case it was also decided that the principal, being considered as a surety for his

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agent's debt, could oblige the pledgee to have recourse in the first place to any goods belonging to the agent himself deposited with him, in case of the surety.

Stat. 5 & 6 Vict. c. 39.

By the Factors Act, 1842 (5 & 6 Vict. c. 39), after reciting that advances on the security of goods and merchandize had become an usual and ordinary course of business, and it was expedient and necessary that reasonable and safe facilities should be afforded thereto, it was enacted that—

Bonâ fide advances to persons intrusted with the possession of goods, &c., though known to be agents, protected.

Sect. 1. "From and after the passing of this Act, any agent who shall thereafter be entrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be the owner of such goods and documents, so as to give validity to any contract or agreement by way of pledge, lien, or security *bonâ fide* made by any person with such agent so entrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof, and such contract or agreement shall be binding upon and good against the owner of such goods, and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent."

What are documents of title.

The term "document of title" includes bills of lading, India warrants, dock warrants, warehousekeeper's certificates, delivery orders, and other documents usually accepted by delivery or indorsement authorizing the holder to transfer or receive goods: see sect. 4. But it does not include certificates of railway stock: *Freeman* v. *Appleyard*, 32 L. J. (N. S.) Ex. 175.

Who is a factor.

A factor is an agent entrusted with the possession of goods for purposes of sale, and the fact that the price is fixed by the principal makes no difference to his character as factor; a factor can sell in his own name as against his principal, whatever restriction there may be in his instructions: *Stevens* v. *Bullen*, 25 Ch. D., at p. 38. But the Acts only apply to agents coming within the description contained in their enactments; and purchasers, &c., without notice, from such persons only are protected by it. A

Who are factors, &c., within the Act.

Pledges by Factors.

wharfinger was held not to be an "agent entrusted with goods" within sect. 4 of the stat. 4 Geo. 4, c. 83; and a purchaser without notice from a wharfinger, who received flour in that capacity without authority to sell, was not protected, though the wharfinger was in the habit of acting as a flour-factor: *Monk* v. *Wittenburgh*, 2 B. & Ad. 484. See *Wilkinson* v. *King*, 2 Camp. 335; *Jaullery* v. *Britten*, 5 Scott, 655.

Notice of agency.

Notice of the fact of agency is constituted by knowledge acquired in any manner, but not by a slight suspicion only: *Evans* v. *Trueman*, 2 B. & Ad. 886: 1 M. & Rob. 10; *Lang* v. *Smith*, 5 M. & P. 78; and see *Mildred* v. *Maspons*, 8 App. Ca. 874.

Contracts &c. made *bonâ fide*.

The Acts only protect transactions entered into *bonâ fide*, without notice that the agent pledging is acting *malâ fide*, or without authority: see sect. 3 of the Act of 1842. The question of *mala fides* is for the jury: *Gobninol* v. *Administrator-General of Bengal*, 15 Moo. P. C. 230. If documents of title are delivered to a factor as such, the owner has no remedy against a *bonâ fide* purchaser or mortgagee: *Vickers* v. *Hertz*, L. R. 2 Sc. App. 113. But the *primâ facie* evidence arising from possession of the documents is liable to be rebutted by proof that they were not intrusted to the pledger in the character of an agent, or that the person who delivered them to him was not the true owner: *Van Castel* v. *Booker*, 18 L. J. Ex. 4. The doctrine of constructive notice, however, does not apply to pledges by factors: *Kaltenbach* v. *Lewis*, 24 Ch. D. 54. The stat. 24 & 25 Vict. c. 96, protects principals from fraudulent pledges by their agents with bills of exchange and other negotiable instruments.

Advance.

There must be an actual advance; a general lien on the balance of the proceeds of cargoes after payment of specific advances cannot be claimed under the Factors' Acts, either by virtue of an express agreement, or by mercantile usage: *Kaltenbach* v. *Lewis*, 24 Ch. D. 54: see also *Mildred* v. *Maspons*, 8 App. Ca. 874.

Owner's right of redemption.

The Act also provides that nothing therein contained shall prejudice the right of the owner of the

Mortgage of Fund in Court.

goods to redeem them upon repayment of the amount of the lien, or restoration of the securities, or his right to recover the balance of the proceeds of sale of such goods; and in case of the bankruptcy of the agent, the owner may prove for the amount paid for redemption, or for the value of the goods if unredeemed: see sect. 7.

By the Factors' Act, 1877 (40 & 41 Vict. c. 39), sect. 1, where any agent or person has been entrusted with the possession of goods or documents of title to goods within the meaning of the Factors' Acts, the revocation of his entrustment or agency is not to prejudice or affect the title or rights of a purchaser or mortgagee without notice of the revocation.

Written hypothecations accompanying pledges by factors are not to be within the Bills of Sale Acts: see *ante*, p. 769. See further as to pledges by factors, Coote Mort. 608 *seq.*; Fisher Mort. 28 *seq.*

Stop orders.

Mortgage of Fund in Court.]—The proper course where a fund in Court is assigned by way of security, or otherwise, is, for the assignee to obtain a stop order under Ord. XLVI. of the Rules of the Supreme Court, 1883. If there are several assignees of the same fund in Court, the assignee who first obtains a stop order will be entitled to preference: *Greening* v. *Beckford*, 5 Sim. 195. Notice to the trustees of a fund in Court is of no avail against a stop order obtained subsequently to such notice: *Pinnock* v. *Bailey*, 23 Ch. D. 497. Where, however, two assignees obtained a stop order on the same day, it was held, that one of them who had previously given notice to the trustees, was entitled to rank in priority over the other: *Timson* v. *Ramsbottom*, 2 Keen, 35. The priority obtained by a stop order is not affected by the fund being distributed and carried to separate accounts: *Lister* v. *Tidd*, L. R. 4 Eq. 462. Where part only of a fund is in Court, a stop order will give priority over that part, and notice to the trustees will give priority over the remainder: *Mutual Life Assurance Co.* v. *Langley*, 26 Ch. D. 686. Until the Court has in some way dealt with the fund, notice must be given to the

trustees: *Warburton* v. *Hill*, Kay, 470; *Matthews* v. *Gabb*, 15 Sim. 51; *Thompson* v. *Tomkins*, 2 Dr. & S. 8.

Mortgage of Fund in Court.

A stop order does not decide the rights of parties, but merely prevents payment out of Court without notice to the party, in order that he may then appear and support his rights: *Lucas* v. *Peacock*, 9 Beav. at p. 181. The order can only be granted on an admission, or on proof of the incumbrance, and will not be granted "without prejudice to the validity of the charge:" *Winchelsea* v. *Garrety*, 1 Beav. 223. A stop order operates only as to the particular charges in respect of which it has been obtained: *Macleod* v. *Buchanan*, 4 De G. J. & Sm. 265.

Operation and effect of stop orders.

On a petition by a judgment creditor of a party to a suit who had obtained an order on a fund in Court to which the party was entitled, the Court refused to order the fund to be paid out to the petitioner without the party's consent: *Whitfield* v. *Prickett*, 13 Sim. 259.

A cheque of the Paymaster-General in favour of a party entitled to a fund in Court, until it has been delivered out, is not the property of that party so as to be liable to seizure by the sheriff under 1 & 2 Vict. c. 110, sect. 12, but the judgment creditor may obtain a stop order on the fund: *Courtoy* v. *Vincent*, 15 Beav. 486. If the cheque, having been delivered out, again comes into the hands of the Paymaster-General, the proper course is to apply to the Court for leave to seize it: *Watts* v. *Jeffryes*, 3 Mac. & G. 422.

The provisions of Ord. XLVI. with regard to stop orders are as follows:—

Order XLVI., r. 12.

R. 12. "Where any moneys or securities are in Court to the general credit of any cause or matter, or to the account of any class of persons, and an order is made to prevent the transfer or payment of such moneys or securities or any part thereof, without notice to the assignee of any person entitled in expectancy or otherwise to any share or portion of such moneys or securities, the person by whom any such order shall be obtained on the shares of such moneys or securities affected by such order, shall be liable, at the discretion of the Court or a judge, to pay any costs, charges,

Costs of stop order without notice to assignee of person entitled in expectancy.

Mortgages of Stock.

and expenses which, by reason of any such order having been obtained, shall be occasioned to any party to the cause or matter, or any persons interested in any such moneys or securities.

Service on parties to cause dispensed with.

R. 13. "Any person presenting a petition or taking out a summons for any such order as aforesaid, shall not be required to serve such petition or summons upon the parties to the cause or matter, or upon the persons interested in such parts of the moneys or securities as are not sought to be affected by such order."

It is, nevertheless, necessary to shew generally the title of the assignor, and also to prove the assignment, either by proving the execution, or by the admission of the assignor: *Wood* v. *Vincent*, 4 Beav. 419; *Quarman* v. *Williams*, 5 Beav. 133. And the assignor must, therefore, be served, though a party to the cause: *Parsons* v. *Groome*, 4 Beav. 521.

See further, as to Stop Orders, Coote Mortg. p. 837 *seq.*; Fisher Mortg. 132 *seq.* As to Charging Orders on stock or shares, see *post*, notes to Precedent L.

As to mortgages of money in the funds.

Stock.]—Stock in the public funds is only transferable by the stockholder in person, or under the authority of a letter of attorney, according to the form prescribed by the Bank of England. Express trusts for sale are not necessary in mortgages of stock, or rather in the instruments of defeazance executed by the transferee; since it has long been settled, that, after the default of the mortgagor in performing the proviso, the mortgagee may sell without commencing an action for foreclosure: *Tucker* v. *Wilson*, 1 P. Wms. 261; *Lockwood* v. *Ewer*, 2 Atk. 303. But the mortgagee must account for any surplus: *Harrison* v. *Hart*, Com. 393. He may, however, foreclose if he prefers it, whether his mortgage be legal or equitable, and whether the mortgaged interest in the stock be in possession or reversionary: *Slade* v. *Rigg*, 3 Ha. 35; *Wayne* v. *Hanham*, 9 Ha. 62; *Stamford, &c., Banking Co.* v. *Ball*, 4 De G. F. & J. 310.

Foreclosure.

As to stock mortgages by trustees, see *post*, p. 845.

As to securities on policies

Mortgages of Life Policies.]—It is principally as

Mortgages of Life Policies.

an auxiliary security that policies of life assurance are resorted to; for, unless accompanied by a fund yielding an immediate income adequate to the payment of the premiums, it is obvious that they constitute a very precarious and ineligible security, since if the mortgagor neglects to keep up the insurance, the mortgagee must do so, and may thus be obliged, for the preservation of his security, to make advances for premiums, in addition to the original debt, which the policy may be insufficient to cover. The risk is, of course, diminished in proportion as the policy has been long effected.

of life insurance, &c.

By stat. 14 Geo. 3, c. 48, it is enacted—

Stat. 14 Geo. 3, c. 48.

Sect. 1. "That no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or any other event or events (*z*) whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest (*a*), or by way of gaming or wagering; and that every insurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever.

No life insurance to be valid unless the assured has an interest.

Sect. 2. "That it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person's or persons' name or names interested therein, or for whose use or benefit, or on whose account, such policy is so made or under-wrote.

Names of persons interested to be stated.

Sect. 3. "That, in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events."

No greater sum recoverable than the value of the interest.

Sect. 4 provides that the Act shall not extend to insurances *bonâ fide* made on ships, goods, or merchandizes, as to which see stat. 19 Geo. 3, c. 37.

Marine and fire insurances excepted.

(*z*) See, as to what transactions are within the statute, *Roebuck* v. *Homerton*, Cowp. 737; *Good* v. *Elliott*, 3 T. R. 693; *Paterson* v. *Powell*, 9 Bing. 320; *Morgan* v. *Pebrar*, 4 Scott, 230: 3 Bing. N. C. 457.

(*a*) Whether any other than a *pecuniary* interest is sufficient to support a policy, see *Halford* v. *Kymer*, 10 B. & C. 725; *Read* v. *Royal Exchange Assurance Co.*, Peake, Add. C. 70; *Wainwright* v. *Bland*, 1 M. & W. 32.

Mortgages of Life Policies.

Creditor has an insurable interest in his debtor's life.

It has long been settled, that a creditor has an insurable interest in the life of his debtor, to the extent of his debt, as the chance of obtaining payment is considered to be diminished by the debtor's decease : and the circumstance that the creditor has a real security does not vary the rule : see *Anderson* v. *Edie*, Park on Insurance, 640.

As the creditor's claim, by virtue of the policy, is commensurate only with his interest actually existing at the time of such claim, it was formerly thought that, if the debt was paid from other sources, either before or after the death, his remedy upon the policy was gone : *Godsall* v. *Boldero*, 9 East, 71 ; and policies were accordingly generally effected in the name of the debtor ; see *Ashley* v. *Ashley*, 3 Sim. 149. But *Godsall* v. *Boldero* is now overruled, and it is well settled that a policy is a contract not merely of indemnity, but for payment at a future time of a fixed sum calculated with reference to the value of the premiums which are to be paid in order to purchase the postponed payment : *Law* v. *London Indisputable Life Policy Co.*, 1 K. & J. at p. 228 ; see also *Dalby* v. *India and London Life Ass. Co.*, 15 C. B. 365 ; *Robson* v. *M'Creight*, 25 Beav. 272.

Policies effected by way of mortgage security are accordingly now frequently effected in the name of the mortgagee, which avoids the risk of avoidance of the policy by the suicide of the assured, &c. (*b*), and renders an assignment unnecessary, though a deed will still be requisite for the purpose of making the mortgagor covenant for payment of the money advanced and interest thereon, and of premiums, &c.

Bonus.

An assignment of the sum assured, as well as of the policy, has been held to carry bonuses : *Courtney*

(*b*) A condition in a policy effected by a person on his own life, that the policy shall not be void on the execution of the assured for felony, or on his suicide, is bad, for reasons of public policy : *Amicable Assurance Society* v. *Ballard*, 4 Bli. N. S. 194 ; unless such condition is limited to the interest of a *bonâ fide* assignee : *Jones* v. *Consolidated Investment Co.*, 26 Beav. 256 ; and see *City Bank* v. *Sovereign Assurance Co.*, W. N. 1884, p. 61 ; 32 W. R. 658.

v. *Ferrers*, 1 Sim. 137 ; *Parkes* v. *Bott*, 9 Sim. 388. It is well, however, to avoid all question by expressly mentioning bonuses in the assignment : see *Gilly* v. *Burley*, 22 Beav. 619 ; *Roberts* v. *Edwards*, 33 Beav. 259. **Mortgages of Life Policies.**

Where a creditor insures the life of his debtor, and charges him with the premiums, and the debt is subsequently paid by the debtor, the policy or the balance of the insurance monies belongs to the debtor : *Holland* v. *Smith*, 6 Esp. 11 ; *Phillips* v. *Eastwood*, Cl. & G. tem. Sugd. 289 ; *Morland* v. *Isaac*, 20 Beav. 389 ; *Lea* v. *Hinton*, 5 De G. M. & G. 823 ; *Courtenay* v. *Wright*, 2 Giff. 337. Who is entitled to policy.

If the creditor receives any sum from the insurance office, it will not necessarily go in part liquidation of a claim which he has against a third person. Whether the sum received by a creditor upon a policy goes in discharge of the debt.

This was early decided upon a fire-insurance in the case of *Mason* v. *Sainsbury*, 3 Doug. 61 ; 2 Marshall on Insurance, 796, which was an action brought against the Hundred on the Riot Act, 1 Geo. 1, c. 5, s. 6, to recover satisfaction for the damage sustained by the plaintiff by the demolition of his house in the riots of 1780. Lord *Mansfield* and the other judges held that the Hundred, being *primarily* liable, was not discharged by the circumstance that an insurance office had paid the plaintiff the amount of his loss, without action. The same point was decided on the 2 Geo. 1, c. 22, in *Clark* v. *The Inhabitants of Blything*, 2 B. & Cr. 254.

In a case in Ireland, it was held, that a judgment-creditor, who had insured the life of his debtor, and had received the amount (which was less than the total debt due) from the office, could not, in a foreclosure suit by a mortgagee, whose security was subject to the judgment, be obliged to set-off against the debt the sum received under the insurance, minus the amount of the premiums paid by him : *Humphrey* v. *Arabin*, 1 Ll. & F. Cas. tem. Plunkett, 322.

It is a general principle, that interest is not allowed by law, even upon money lent, except upon mercantile securities, or where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade, or No interest recoverable on a policy of life insurance.

Mortgages of Life Policies.

other circumstances (and now, under the stat. 3 & 4 Will. 4, c. 28, in cases where the jury shall allow interest); and, therefore, in an action of covenant upon a policy of life insurance, no interest was allowed from the time when the sum secured by the policy became due: *Higgins* v. *Sargent*, 2 B. & C. 348: see also *Bushnam* v. *Morgan*, 5 Sim. 635; *Lord Penrhyn* v. *Hughes*, 5 Ves. 106; *Webster* v. *British Empire, &c. Co.*, 16 Ch. D. 169.

Interest as trustee sufficient to support insurance.

An interest as trustee is sufficient to support the validity of a policy: *Tidswell* v. *Ankerstein*, Peake, N. P. Cas. 151; see *Ex parte Houghton*, 17 Ves. 253.

Gaming, debts, &c.

It has been decided that a debt for money illegally won at play will not support a policy: *Dwyer* v. *Edie*, 2 Park. 914; but it seems that a debt contracted during minority is sufficient for the purpose, as the plea of infancy cannot be made by third persons: *ibid.*

Effect of misrepresentation.

It may be observed, that, where a person insures the life of another, any misrepresentation of the latter, as to the state of his health, will vitiate the contract, though the assured was not privy to the misrepresentation: *Duckett* v. *Williams*, 2 C. & M. 341; *Anderson* v. *Fitzgerald*, 4 H. L. C. 484; *Casenove* v. *British Equitable Ins. Co.*, 6 Jur. N. S. 826. A mortgagee who advances money on the security of a policy of life insurance, ought, therefore, to satisfy himself of the accuracy of the representations respecting the age and state of health on which the validity of the policy depends, and also if the policy is not in the name of the *cestui que vie*, that the assured had an insurable interest at the time when the policy was effected.

Order and disposition.

Under the former bankruptcy law, in order to take a policy of insurance out of the "order and disposition" of a bankrupt, it was necessary that notice of the assignment should be given to the office; but now, policies of assurance being "things in action" are not within the order and disposition clause: *Ex parte Ibbetson*, 8 Ch. D. 519; and see *ante*, p. 771.

Notice necessary to complete title.

Notice by the assignee of a policy of assurance to the office is now, however, necessary to complete

his title irrespective of the law of bankruptcy: and such notice must be given for that purpose, whatever may be the practice of the office: *Williams* v. *Thorp*, 2 Sim. 257. Formerly, a verbal notice to the secretary would have been sufficient; *Alletson* v. *Chichester*, L. R. 10 C. P. 319. But by the stat. 30 & 31 Vict. c. 144, sect. 3, it is enacted that:— Mortgages of Life Policies.

"No assignment made after the passing of this Act of a policy of life assurance shall confer on the assignee therein named, his executors, administrators, or assigns, any right to sue for the amount of such policy, or the moneys assured or secured thereby, until a *written notice* of the date and purport of such assignment shall have been given to the assurance company liable under such policy, at their principal place of business for the time being, or in case they have two or more principal places of business, then at some one of such principal places of business, either in England or Scotland, or Ireland, *and the date on which such notice shall be received shall regulate the priority of all claims under any assignment;* and a payment *bonâ fide* made in respect of any policy by any assurance company before the date on which such notice shall have been received shall be as valid against the assignee giving such notice as if this Act had not been passed." Notice of assignment to be given.

By sect. 1 of the same Act, an assignee, who has given notice in accordance with its provisions, may sue in his own name for recovery of the monies, without the concurrence of the mortgagor, such as was formerly necessary in the absence of a power of attorney: see *Webster* v. *British Empire Ass. Co.*, 15 Ch. D. 169.

Mortgages of Ships and Freight.]—Ships do not pass, like ordinary chattels, by delivery; nor does the possession of a ship prove the title thereto. A ship is not within the Bills of Sale Acts. There is no market overt for ships: *per Turner*, L. J., in *Hooper* v. *Gumm*, L. R. 2 Ch. A. at p. 290.

Mortgages of British ships have long been subject to special statutory provisions, but all previous enactments were repealed by the Merchant Shipping Repeal Act, 1854 (17 & 18 Vict. c. 120). And the law on the subject was amended and consolidated

Mortgages of Ships, Freight, &c.

by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), which provides that every British ship shall be registered in manner prescribed by the Act, except, (1) ships already duly registered; (2) river and coasting vessels not exceeding 15 tons burden; and (3) vessels partially decked and not exceeding 30 tons burden, used for purposes of fishing or trading along the coasts of Newfoundland and the Gulf of St. Lawrence.

This Act contains the following enactments bearing upon the subject of mortgages of ships:

No notice taken of trusts.

Sect. 43. "No notice of any trust express, implied, or constructive, shall be entered in the register book, or receivable by the registrar; and, subject to any rights and powers appearing by the register book to be vested in any other party, the registered owner of any ship or share therein, shall have power absolutely to dispose in manner hereinafter."

Custody of certificate.

Sect. 50. "The certificate of registry shall be used only for the lawful navigation of the ship, and shall not be subject to detention by reason of any title, lien, charge, or interest whatsoever which any owner, mortgagee, or other person may have, or claim to have, on or in the ship described in such certificate (*c*)."

Transfer of ships or shares therein.

Sect. 55. "A registered ship, or any share therein, when disposed of to persons qualified to be owners of British ships, shall be transferred by bill of sale; and such bill of sale shall contain such description of the ship as is contained in the certificate of the surveyor, or such other description as may be sufficient to identify the ship to the satisfaction of the registrar, and shall be according to the form marked E in the schedule hereto, or as near thereto as circumstances permit, and shall be executed by the transferee, in the presence of, and be attested by, one or more witnesses."

Mortgage of ships and shares therein.

Sect. 66. "A registered ship, or any share therein, may be made a security for a loan or other valuable consideration; and the instrument creating such security, hereinafter termed a 'mortgage,' shall be in the form marked I. in the schedule hereto, or as near thereto as circumstances permit; and, on the production of such instrument, the registrar of the port at which the ship is registered shall record the same in the register book."

(*c*) The remainder of the section imposed a penalty on any person detaining the certificate when its delivery is required by any person entitled thereto for purposes of navigating the ship.

Mortgages of Ships, Freight, &c.

Sect. 67. "Every such mortgage shall be recorded by the registrar in the order of time in which the same is produced to him for that purpose; and the registrar shall, by memorandum under his hand, notify on the instrument of mortgage, that the same has been recorded by him, stating the date and hour of such record."

Mortgages to be registered in order of time of production.

Sect. 68. "Whenever any registered mortgage has been discharged, the registrar shall, on the production of the mortgage deed, with a receipt for the mortgage money indorsed thereon, duly signed and attested, make an entry in the register book to the effect that such mortgage has been discharged; and upon such entry being made the estate (if any) which passed to the mortgagee, shall vest in the same person or persons in whom the same would, having regard to intervening acts and circumstances (if any) have vested, if no such mortgage had ever been made."

Entry of discharge of mortgage.

Sect. 69. "If there is more than one mortgage registered of the same ship, or share therein, the mortgagees shall, notwithstanding any express, implied, or constructive notice, be entitled in priority one over the other, according to the date at which each instrument is recorded in the register books, and not according to the date of each instrument itself."

Priority of mortgages.

Sect. 70. "A mortgagee shall not by reason of his mortgage be deemed to be the owner of a ship, or any share therein, nor shall the mortgagor be deemed to have ceased to be owner of such mortgaged ship or share, except in so far as may be necessary for making such ship or share available as a security for the mortgage debt."

Mortgagee not to be deemed owner.

Sect. 71. "Every registered mortgagee shall have power absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase-money; but if there are more persons than one registered as mortgagees of the same ship or share, no subsequent mortgagee shall, except under the order of some Court capable of taking cognizance of such matters, sell such ship or share without the concurrence of every prior mortgagee."

Mortgagee to have power of sale.

Sect. 72. "No registered mortgage of any ship, or of any share therein, shall be affected by any act of bankruptcy committed by the mortgagor after the date of the record of such mortgage, notwithstanding such mortgagor at the time of his becoming bankrupt may have in his possession and disposition and be reputed owner of such ship or share thereof; and such mortgage shall be preferred to any right, claim, or interest in such ship, or any share thereof, which may belong to the assignees of such bankrupt."

Rights of mortgagee not affected by any act of bankruptcy of mortgagor.

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Transfer of mortgages.

Sect. 73. "A registered mortgage of any ship, or share in a ship, may be transferred to any person; and the instrument creating such transfer shall be in the form marked K in the schedule hereto; and, on the production of such instrument, the registrar shall enter in the register book the name of the transferee as mortgagee of the ship or shares therein mentioned, and shall by memorandum under his hand record on the instrument of transfer that the same has been recorded by him, stating the date and hour of such record."

Transmission of interest of mortgagee by death, bankruptcy, or marriage.

Sect. 74. "If the interest of any mortgagee in any ship, or in any share therein, becomes transmitted in consequence of death, bankruptcy, or insolvency, or in consequence of the marriage of any female mortgagee, or by any lawful means other than by a transfer according to the provisions of this Act, such transmission shall be authenticated by a declaration of the person to whom such interest has been transmitted, made in the form marked L in the schedule hereto, and containing a statement describing the manner in which and the party to whom such property has been transmitted; and such declaration shall be made and subscribed, if the declarant resides at or within five miles of the house of the port of registry, in the presence of any registrar, or of any justice of the peace, and shall be accompanied by such evidence as is hereinbefore required, to authenticate a corresponding transmission of property from one registered owner to another."

Entry of transmitted mortgage.

Sect. 75. "The registrar, upon the receipt of such declaration and the production of such evidence as aforesaid, shall enter the name of the person or persons entitled under such transmission in the register book as mortgagee or mortgagees of the ship or share in respect of which such transmission has taken place."

Rules as to certificates of mortgage.

Sect. 80. "The following rules shall be observed as to certificates of mortgage (that is to say):

"(1.) The power shall be exercised in conformity with the directions contained in the certificate:

"(2.) A record of every mortgage made thereunder shall be indorsed thereon by a registrar or British consular officer:

"(3.) No mortgage *bonâ fide* made thereunder shall be impeached by reason of the person by whom the power was given dying before the making of such mortgage:

"(4.) Whenever the certificate contains a specification of the place or places at which, and a limit of time not exceeding twelve months within which, the power is to be exercised, no mortgage *bonâ fide* made to a mortgagee without notice shall be impeached by reason of the bankruptcy or insolvency of the person by whom the power was given:

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"(5.) Every mortgage which is so registered as aforesaid on the certificate shall have priority over all mortgages of the same ship or share created subsequently to the date of the entry of the certificate in the register book; and if there be more mortgages than one so indorsed, the respective mortgagees claiming thereunder shall, notwithstanding any express, implied, or constructive notice, be entitled one before the other to the date at which a record of each instrument is indorsed on the certificate, and not according to the date of the instrument creating the mortgage:

"(6.) Subject to the foregoing rules, every mortgagee whose mortgage is registered on the certificate shall have the same rights and powers, and be subject to the same liabilities as he would have had and been subject to if his mortgage had been registered in the register book instead of on the certificate:

"(7.) The discharge of any mortgage so registered on the certificate may be indorsed thereon by any registrar or British consular officer, upon the production of such evidence as is hereby required to be produced to the registrar on the entry of the discharge of a mortgage in the register book; and upon such indorsement being made, the estate, if any, which passed to the mortgagee shall vest in the same person or persons in whom the same would, having regard to intervening acts and circumstances, if any, have vested if no such mortgage had been made:

"(8.) Upon the delivery of any certificate of mortgage to the registrar by whom it was granted he shall, after recording in the register book in such manner as to preserve its priority any unsatisfied mortgage registered thereon, cancel such certificate, and enter the fact of such cancellation in the register book; and every certificate so cancelled shall be void to all intents."

Provision for cases of infancy or other incapacity.

Sect. 99. "If any person interested in any ship or any share therein is, by reason of infancy, lunacy, or other disability, incapable of making any declaration or doing anything required or permitted by this Act to be made or done by such incapable person in respect of registry, then the guardian or committee, if any, of such incapable person, or, if there be none, any person appointed by any court or judge possessing jurisdiction in respect of the property of incapable persons, upon the petition of any person on behalf of such incapable person."

Registration of mort-

By sect. 11 of the Merchant Shipping Amend-

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ment Act, 1854 (18 & 19 Vict. c. 91), bills of sale or mortgages of ships, or shares therein, made in any other form, or containing any other particulars than those prescribed by the Merchant Shipping Act, 1854, are not to be registered except with the express direction of the Commissioners of Customs.

gages not in the prescribed form.

By sect. 3 of the Merchant Shipping Acts Amendment Act, 1862 (25 & 26 Vict. c. 63), it is enacted that:—

Equities not excluded by Merchant Shipping Act.

"The expression 'beneficial interest,' whenever used in the second part of the principal Act, includes interests arising under contract and other equitable interests; and the intention of the said Act is that, without prejudice to the provisions contained in the said Act for preventing notice of trust from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the said Act on registered owners and mortgagees, and without prejudice to the provisions contained in the said Act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein, in the same manner as equities may be enforced against them in respect of any other personal property."

Bills of sale and mortgages of ships, and shares therein, are not within the Bills of Sale Acts: see *ante*, p. 792.

Jurisdiction.

The Admiralty Division of the High Court of Justice has jurisdiction over claims in respect of duly registered mortgages of ships, whether the ship, or the proceeds thereof, are under arrest or not: see stat. 24 & 25 Vict. c. 10, sect. 11. And the Court will enforce equities between the owner and the mortgagee, having regard to all the circumstances of the transaction: *The Cathcart*, L. R. 1 A. & E. 314.

Variance between mortgage and register.

A mere clerical error creating a variance between the mortgage and the register as to the name of the ship will not vitiate the mortgage if the identity of the ship is not thereby placed in doubt: *Bell* v. *Bank of London*, 3 H. & N. 730.

Registration of discharge by mistake.

If a discharge of a mortgage has been duly registered, the mortgage cannot be revived by a marginal

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entry of the registrar that the discharge was given by mistake: *Bell* v. *Blyth*, L. R. 4 Ch. A. 136. But when the Court is satisfied that a discharge has been registered by mistake, it has jurisdiction to order a purchaser from the mortgagee to be registered as owner of the ship. *The Rose*, L. R. 4 A. & E. 6. The Merchant Shipping Acts do not empower the registrar to erase entries of mortgages on their discharge: *Charteauneuf* v. *Capeyron*, 7 App. Ca. 127.

Action of covenant may be brought on an unregistered bill of sale.

An unregistered bill of sale, though inoperative to transfer the ownership in the ship, is not void for other purposes: thus, an action may be brought on a covenant to pay money, contained in such an instrument: *Kerrison* v. *Cole*, 8 East, 231; see *Lister* v. *Payn*, 11 Sim. 348; and if it profess to be an assignment of the ship, and also of the freight, it will be good as to the latter, though void as to the ship: *Mestaer* v. *Gillespie*, 11 Ves. 629, 636; *Davenport* v. *Whitmore*, 2 My. & C. 177.

Rights, &c., of mortgagee in possession.

The mortgagee of a ship, whether in or out of possession, is not liable for repairs or accessories, unless ordered by his authority: *Briggs* v. *Wilkinson*, 7 B. & C. 30; *The Troubadour*, L. R. 1 A. & E. 302. And if a mortgagee pays necessary expenses in order to obtain possession of the ship, he is entitled to recover the money from the person liable to pay such expenses: *Johnson* v. *Royal Mail Co.*, L. R. 3 C. P. 38.

Sale.

The duty of a mortgagee who has taken possession of a ship is to sell as soon as conveniently may be, but he is justified in employing the ship for a reasonable time to avoid selling at a loss: *Marriott* v. *Anchor Reversionary Society*, 3 De G. F. & J. 177; *De Mattos* v. *Gibson*, 1 J. & H. 83.

Mortgagee's right to freight.

A mortgagee who takes possession of the ship during a voyage becomes entitled to receive the freight earned in that voyage: *Kerswill* v. *Bishop*, 2 Cr. & J. 529; 2 Tyrw. 602; *Dean* v. *M'Gee*, 12 Moo. 185; *contrà*, where he is not in possession: see *Chinnery* v. *Blackman*, 3 Doug. 391; *Case* v. *Davidson*, 2 Br. & B. 379. But the earnings of a ship in the hands of a mortgagee are liable for the

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expenses of the voyage: *Green* v. *Biggs*, 6 Ha. 395; *Alexandra* v. *Sims*, 5 De G. M. & G. 57.

Employment of ship.

Until the mortgagee takes possession the mortgagor has full liberty to deal with the ship as he pleases, consistently with the security, and may enter into such contracts as he thinks fit as to her employment: *The Innisfallen*, L. R. 1 A. & E. 72; *Johnson* v. *Royal Mail Co.*, L. R. 3 C. P. 38; *Keith* v. *Burrows*, 2 App. Ca. 636. The mortgagor is entitled to incur all expenses necessary to maintain the ship in proper condition, and a shipwright's lien for repairs ordered by a mortgagor while in possession will prevail against the mortgage: *Williams* v. *Allsopp*, 10 C. B. N. S. 417; see *Collins* v. *Lamport*, 4 De G. & S. 505.

Order and disposition in bankruptcy.

Duly registered mortgages of ships are not within the order and disposition clause of the Bankruptcy Act, 1883, sect. 44 (see *ante*, p. 771); see sects. 66, 72, of the Merchant Shipping Act, 1854, *ante*, pp. 832, 833. A registered mortgage deposited by the mortgagees with the bankers was held not to be in the order and disposition of the mortgagee; *Lacon* v. *Liffen*, 4 Giff. 75.

An unfinished ship in a building yard is not within the clause: *Holderness* v. *Rankin*, 2 De G. F. & J. 258; *Swainston* v. *Clay*, 3 De G. J. & S. 558; *McBain* v. *Wallace*, 6 App. Ca. 588.

Mortgage of freight.

A mortgage of freight apart from the ship will not require registration, and an unregistered mortgage of a ship and freight may be good as to the freight; *Mestaer* v. *Gillespie*, 11 Ves. 637; *Davenport* v. *Whitmore*, 2 My. & Cr. 177; see *Gardener* v. *Lachlan*, 4 My. & Cr. 129.

A valid assignment by way of mortgage may be made of the freight to be earned during a future voyage; *Langton* v. *Horton*, 1 Ha. 549; so also such an assignment of all future earnings by way of freight: *Curtis* v. *Aubon*, 1 J. & W. 526; see *Lindsay* v. *Gibbs*, 22 Beav. 522; and such assignment will prevail against the owner's trustee in bankruptcy, at all events so far as relates to freight earned previously to the bankruptcy: *Leslie* v. *Guthrie*, 1 Bing. N. C. 697; *Retcher* v. *Capper*, 4 Man. & Gr. 502.

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Mortgage of cargo.

The cargo, in the absence of stipulation to the contrary, belongs to the mortgagor, not the mortgagee: *Alexandra* v. *Sims*, 5 De G. M. & G. 57. As to the effect of an assignment of a ship "with its appurtenances," see *Langton* v. *Horton*, 5 Beav. 9; *Gale* v. *Laurie*, 5 B. & C. 162. A valid assignment may be made of future cargo which will prevail against a subsequent execution by a judgment creditor: *Langton* v. *Horton*, 1 Ha. 549. An assignment of cargo does not require registration: *Langton* v. *Horton*, 5 Beav. 9.

See further as to mortgages of ships, &c., and as to bottomry bonds, and *respondentia*, Coote Mortg., p. 618 *et seq.*; Fisher Mortg., 66 *et seq.*

Mortgages by Companies.]—Companies generally, and except so far as their powers are limited or controlled by their instrument of incorporation, or by statutory enactments hereafter referred to, may dispose of their property by way of mortgage or otherwise, as fully and freely as individuals: *Re Inns of Court Hotel Co.*, L. R. 6 Eq. 82; *Re Patent Tile Co.*, L. R. 6 Ch. A. 83; *Riche* v. *Ashbury, &c., Co.*, L. R. 9 Ex. 264.

In the case of some companies, the nature of their business has been held necessarily to imply the power of mortgaging: as in the case of shipping companies: *Re Australian Steam Clipper Co.*, 4 E. & J. 733; *English Channel Steam Ship Co.* v. *Rolt*, 17 Ch. D. 715: and insurance companies: *Gibbs' Case*, L. R. 10 Eq. 312.

Issue of loan notes by railway companies.

Railway companies are, however, prohibited from issuing loan notes and other securities for monies advanced to them otherwise than under the provisions of Acts of Parliament authorizing such companies to raise such monies: see stat. 7 & 8 Vict. c. 85, sect. 19.

Borrowing powers under stat. 8 & 9 Vict. c. 16.

The Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16, sects. 38—55), contains provisions regulating the borrowing of money by companies to which the Act applies (*d*) on mortgage or

(*d*) Companies to which this Act applies are companies consti-

Mortgages by Companies.

bond. The effect of these provisions may be shortly stated as follows:—Companies authorized by their Special Acts to borrow on mortgage or bond may, subject to the restrictions contained in the Special Act, borrow on mortgage or bond such sums as shall from time to time, by an order of a general meeting of the company, be authorized to be borrowed, not exceeding in the whole the amount prescribed by the Special Act, and for securing the repayment of the money borrowed to mortgage the undertaking, and future calls on the shareholders; or to give bonds: sect. 38. After paying off any money so borrowed (*e*), the company may in like manner re-borrow the amount paid off: sect. 39. The company is restricted from borrowing without production of a justice's certificate that a definite portion of the capital is subscribed or paid up: sect. 40. The mortgage or bond is to be by deed, duly stamped, and wherein the consideration shall be truly stated (*f*), and may be according to the form in the Schedule C. or D. of the Act: sect. 41. Sects. 42 & 44 regulate the priorities of mortgagees and obligees, and sect. 43 provides that no mortgage of future calls shall, unless expressly so provided, preclude the application of such calls for the purposes of the company. A register of mortgages and bonds is to be kept by the secretary: sect. 45. Transfers of mortgages and bonds are to be by deed, duly stamped, and may be according to the form in the Schedule E. to the Act: sect. 46. Transfers are to be registered: sect. 47. Interest is to be payable half-yearly, unless otherwise agreed, and in preference to dividends: sect. 48. Transfers of interest

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tuted by a special Act, *i.e.*, by any Act incorporating a joint-stock company for the purpose of carrying on any undertaking.

(*e*) The authority of a general meeting was necessary under this section, unless the money was re-borrowed to pay off an existing mortgage or bond, but now money may be borrowed to pay off debentures falling due without such authority: see stats. 30 & 31 Vict. c. 127, sect. 26, as to railway companies, and stat. 32 & 33 Vict. c. 48, s. 4, as to other companies.

(*f*) The consideration, if apparent, need not be stated in terms: *Landowners, &c., Drainage and Inclosure Co.* v. *Ashford*, 16 Ch. D. 412.

Mortgages by Companies.

are to be by deed, duly stamped : sect. 49. A time may be fixed for repayment, upon the expiration of which principal and arrears of interest will become payable on demand, and, unless otherwise stipulated, at the office of the company : sect. 50. Where no time is fixed, the principal and any arrears of interest will be repayable after the expiration of twelve months from the date of the mortgage or bond, upon six months' notice in writing or print by either party : sect. 51. Interest is to cease on the expiration of the notice : sect. 52. Sects. 53 & 54 provide for the appointment of a receiver ; and sect. 55 provides that the account-books of the company shall be open to the inspection of mortgagees.

Power of directors to borrow.

The articles of association of a company may authorize the directors to borrow on mortgage (*g*) of the property of the company : *Ex parte Walker*, 18 Jac. 885 ; see *Re Strand Music Hall Co.*, 3 De G. J. & S. 147. The acts of directors in excess of their authority to borrow may be ratified by a general meeting of the company, but such ratification is not an extension of future authority : *Irvine* v. *Union Bank of Australia*, 2 App. Ca. 366. As to the personal liability of directors exceeding their authority, see *Chaples* v. *Brunswick Building, &c., Co.*, 6 Q. B. D. 696 ; *West London Commercial Bank* v. *Kitson*, 13 Q. B. D. 360 : see also *Eaglesfield* v. *Marquis of Londonderry*, 4 Ch. D. 693 ; *Cargill* v. *Brown*, 10 Ch. D. at p. 516 ; *McCollin* v. *Gilpin*, 6 Q. B. D. 516 ; *Yorkshire, &c., Wagon Co.* v. *Cornwall Minerals Railway Co.*, 21 Ch. D. 309.

Debentures (*h*).

The validity and effect of debentures issued by companies by way of security depend upon the terms of the statutory or other powers under which they are issued : *Bryon* v. *Metropolitan Saloon Co.*, 3 De G. & J. 123 : see Coote Mortg. 388.

(*g*) Directors empowered to raise money in such manner as they shall think expedient, may issue debentures at a discount : *Re Anglo-Danubian, &c., Co.*, L. R. 20 Eq. 339. Such debentures may be issued to directors : *Campbell's Case*, 4 Ch. D. 470. As to mortgages of such debentures, see *Re Regent's Canal Ironworks Co.*, 3 Ch. D. 43.

(*h*) See further as to debentures, notes to Precedent LIV., *post*, p. 1145.

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Debentures issued without authority, or for an illegal purpose, cannot be enforced by members of the company, or their transferees: *Re Magdalena, &c., Steam Co.*, Johns. 690. But such debentures will generally be good by estoppel in favour of other holders for value, without notice of the irregularity, and will be enforceable by such holders accordingly: *Webb* v. *Commissioners of Herne Bay*, L. R. 5 Q. B. 642: see also *Halett's Case*, 2 J. & H. 306; *Fountaine* v. *Carmarthen Railway Co.*, L. R. 5 Eq. 316; *Re Cork and Youghal Co.*, L. R. 4 Ch. A. 748; *Ex parte Chorley*, L. R. 11 Eq. 157; *Brunton's Claim*, L. R. 19 Eq. 302; *Shaw* v. *Port Philip, &c., Co.*, 13 Q. B. D. 103; *Carew's Claim*, 24 Ch. D. 85. But debentures issued in excess of the limit authorized by the Act are void, in which case the directors will be personally liable if they have authorized or guaranteed the loan: *Chaple* v. *Brunswick Building, &c., Society*, 6 Q. B. D. 696. So it may generally be assumed that resolutions have been duly passed, and other acts preliminary to the issue of debentures have been duly performed, unless any particular evidence of such performance is prescribed by statute; in which case the lender should require the production of such evidence: *Royal British Bank* v. *Turquand*, 6 E. & B. 327; *Fountaine* v. *Carmarthen Railway Co.*, L. R. 5 Eq. 316.

Where a company, having exhausted their borrowing powers, sold rolling stock and hired it from the purchasers at a rent which would repay the purchase-money with interest in five years, with a stipulation that the company might then re-purchase the rolling stock at a nominal price, it was held, that the transaction, being *bonâ fide* for the requirements of the company, was valid as against the company: *Yorkshire Railway Wagon Co.* v. *Maclure*, 21 Ch. D. 309.

As to the issue of debenture stock by companies, see stats. 26 & 27 Vict. c. 118, sect. 22; 32 & 33 Vict. c. 48, sect. 3; and as to railway companies, see stat. 30 & 31 Vict. c. 127, sects. 24, 25.

See further, as to mortgages, &c., by companies, Coote Mortg., p. 385 *et seq.*

CHAPTER III.

THE POWER TO LEND ON MORTGAGE, AND THE EXTENT OF THE SECURITY.

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1. Mortgages to Trustees.

Mortgages to Trustees.

Power of trustees to invest on mortgage; Stat. 23 & 24 Vict. c. 38.

Power of Trustees to Invest on Mortgage.]—By the stat. 23 & 24 Vict. c. 38, sects. 10, 11, the Court of Chancery (now the Chancery Division of the High Court of Justice) was empowered to issue general orders from time to time as to the investment of cash under its control, and trustees, executors, and administrators, "having power to invest their trust funds upon government securities, or upon parliamentary stocks, funds, or securities, or any of them," are empowered to invest such trust funds "in any of the stocks, funds, or securities, in or upon which, by such general order, cash under the control of the Court may from time to time be invested." And by the Rules of the Supreme Court, 1883, Ord. xxii., Rule 17, cash under the control of the Court may be invested as therein mentioned, "and upon mortgage of freehold and copyhold estates respectively in England and Wales." This power of investment may be exercised by trustees, notwithstanding any restriction or prohibition in the instrument creating the trust: *Re Wedderburn's Trusts*, 9 Ch. D. 112.

Order XXII., r. 17.

Corporations, trustees of charities, &c.;

By the stat. 33 & 34 Vict. c. 34, sect. 1, corporations and trustees holding monies in trust for any public or charitable purpose, may invest the same in

Mortgages to Trustees.

Stat. 33 & 34 Vict. c. 34.

any real securities authorized by or consistent with their trusts, notwithstanding the laws relating to mortmain; and no contract or conveyance for the purposes of such security is to be void by reason of non-compliance with the conditions and solemnities required by the Mortmain Act, 9 Geo. 2, c. 36. By sect. 3, the term real securities includes "all mortgages or charges, legal or equitable, of or upon lands or hereditaments of any tenure, or of or upon any estate or interest therein, or any charge or incumbrance thereon.

On what real securities trustees may invest;

Stat. 22 & 23 Vict. c. 32.

By the stat. 22 & 23 Vict. c. 35 (*a*), sect. 32, "Where a trustee, executor, or administrator shall not, by some instrument creating his trust, be expressly forbidden to invest any trust fund or real securities in any part of the United Kingdom . . . . it shall be lawful for such trustee, executor, or administrator, to invest such trust fund or such securities," if in other respects the investment is reasonable and proper. A trustee is, therefore, justified, unless forbidden by the instrument creating the trust, in investing upon mortgages of realty in England, Wales, or Ireland, but not in the Isle of Man. By sect. 33 of this Act it is provided that it shall not extend to Scotland, and having regard to the difference between the laws of England and Scotland as regards real property, an investment on real securities in Scotland is not to be recommended: see *Re Miles's Will*, 5 Jur. N. S. 1236; Lewin on Trusts (8th ed.), 313.

Where trustees are expressly empowered by the instrument creating the trust to invest in government stock, &c., and also on real securities, and there is a power to vary investments, they may safely sell out Three per Cent. Bank Annuities and invest the proceeds on mortgage of real estate (*b*): see Lewin on Trusts (8th ed.), 323.

(*a*) The operation of this section is rendered retrospective by the stat. 23 & 24 Vict. c. 38, s. 12.

(*b*) In making the change of investment the trustees should pay due regard to the interest of the tenant for life in the income, and accordingly should sell out the stock as soon as possible after the payment of a dividend. If the stock be sold between two dividend days the tenant for life cannot claim any allowance out

Mortgages to Trustees.

Stock mortgages.

Trustees are sometimes pressed by their *cestuis que trust* to sell out stock and lend it on mortgage, with a covenant by the mortgagor to replace the exact amount of stock sold out instead of a covenant for repayment of the advance in cash: such a course involves the exchange of Government security for the risk of a private security, and probably considerable expenses incident to the transaction, and it has been expressly decided that under the usual investment clause with power to vary securities a loan upon a stock mortgage is not to be justified: per *Giffard*, L.J., in *Whitney* v. *Smith*, L. R. 4 Ch. A. at p. 521; see *Pell* v. *De Winton*, 2 De G. & J. 18.

Leaseholds for lives.

Trustees, unless expressly authorized, are not justified in lending on the security of a life interest or of leaseholds for lives, as a policy of assurance on the life of the *cestui qui vie* is a necessary concomitant of such security, and to lend on the security of a policy is to rely on the credit of a private association: see *Lander* v. *Wilson*, 3 Drew. 389; *Fitzgerald* v. *Fitzgerald*, 6 Ir. Ch. Rep. 145. This objection, however, will not apply in cases of leases for lives renewable for ever, which are not uncommon in Ireland. In such a case, however, it has been held that trustees must not advance more than half the value of the property: *Macleod* v. *Annesley*, 16 Beav. 600.

Leaseholds for years.

It would seem that trustees would be justified in lending on *long* leasehold securities at a peppercorn rent without onerous covenants or impeachment of waste (*c*): see *Re Chennell*, 8 Ch. D., at p. 507; see also *Re Boyd's Settled Estates*, 14 Ch. D. 626. But

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of the proceeds by way of apportionment: *Scholfield* v. *Redfern*, 2 Dr. & Sm. 173; *Re Ingram's Trust*, 11 W. R. 980; *Freeman* v. *Whitbread*, L. R. 1 Eq. 266. Such apportionment has, however, been allowed by the Court under special circumstances: *Lord Londesborough* v. *Somerville*, 19 Beav. 295.

Enlargement of long terms.

(*c*) As long leaseholds held on the conditions above referred to can now be enlarged into estates in fee simple under the Conveyancing Acts of 1881 and 1882, it may be well, on the occasion of a mortgage to trustees of leaseholds for long terms of years, that the powers of enlargement conferred by these Acts should be exercised, whereby all question would be obviated as to the propriety of the transaction. As to enlargement of long terms, see *ante*, Vol. II., p. 915 *et seq.*

Mortgages to Trustees.

leaseholds held for short terms, subject to material rents and onerous covenants and provisoes for re-entry, cannot be recommended as proper investments for trustees, unless expressly authorized by the instrument creating the trust: *Townend* v. *Townend*, 1 Giff. 201; *Wyatt* v. *Sharratt*, 3 Beav. 498; *Fuller* v. *Knight*, 6 Beav. 209; *Re Chennell*, 8 Ch. D. 492.

Ground rents.

A power to lend on real securities authorizes a loan on freehold ground rents, and in estimating the value of the security (see *infra*) the value of the houses will be taken into account, inasmuch as if the rents are not paid, the landlord can enter on the houses: *Vickary* v. *Evans*, 3 N. R. 286.

Undivided share or reversion.

There does not appear to be any absolute objection to trustees lending on the security of an undivided share or reversion, but in so doing they should exercise special caution as to the value of the security, and as to the insertion in the mortgage deed of clauses enabling them to concur with co-owners in exercising powers of sale, &c.: see Lewin on Trusts, 328.

Railway mortgages.

A power to lend on real securities does not authorize a loan on a railway mortgage: *Mant* v. *Leith*, 15 Beav. 525; *Harris* v. *Harris* (No. 1), 29 Beav. 107; see also *Mortimore* v. *Mortimore*, 4 De G. & J. 472; nor apparently will a power to lend on "approved securities" justify such a loan: *Re Sanson's Trusts*, 1 J. & H. 89. Where trustees have power to invest on mortgages or bonds of railway or other companies, they may invest on debenture stock: see stat. 34 & 35 Vict. c. 27. And mortgages, bonds, debentures, and debenture stock are among the investments authorized by sect. 21 of the Settled Land Act, 1882.

Personal security.

Trustees may lend on personal security if expressly authorized by the instrument creating the trust, but not otherwise: *Forbes* v. *Ross*, 2 B. C. C. 430; *Paddon* v. *Richardson*, 7 De G. M. & G. 563; see *Pickard* v. *Anderson*, L. R. 13 Eq. 608. But no such authority is to be implied from such expressions in the power as that the trustees may invest at their discretion, &c.: *Pocock* v. *Beddington*, 5 Ves. 794; *Styles* v. *Guy*, 1 Mac. & G. 422; *Potts* v. *Britton*, L. R. 11 Eq. 433; *Bethell* v. *Abraham*, L. R. 17 Eq. 24.

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Even if authorized to lend on personal security, trustees must not make such loans for the purpose of accommodating any person: *Sangster* v. *Ollivant*, 9 Coop. 33; *Boss* v. *Godsall*, 1 Y. & C. C. C. 617. And if the consent of the tenant for life is required to such a loan, they must not lend to him on personal security: *Keays* v. *Lane*, 3 I. R. Eq. 1.

Equitable mortgages.

A loan by trustees on the security of a second mortgage would clearly be a breach of trust: *Norris* v. *Wright*, 14 Beav. 308; *Drosier* v. *Brereton*, 15 Beav. 226; *Robinson* v. *Robinson*, 1 De G. M. & G. 462; *Lockhart* v. *Reilly*, 1 De G. & J. 476; *Re Roberson*, W. N. 1883, p. 110. A mortgagee lending on such security does not get the legal estate, or the title deeds, and may be placed at a serious disadvantage in case of exercise by the first mortgagee of his right of foreclosure or of his power of sale; moreover, he runs the risk of being ousted from his security by tacking (as to which see *post*, p. 941), or as regards mortgages which, or one of which, is made before the 1st of January, 1882, by a consolidation of the mortgage with a mortgage of other property of the same mortgagor. The right of consolidation as regards mortgages made on or after that date is, however, now taken away by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sect. 17: see *post*, p. 940. Charges under the Improvement of Land Act, 1874 (27 & 28 Vict. c. 114), which by that Act take precedence of other charges, are not to be deemed such incumbrances as to preclude trustees from lending on the security of the land subject to such charges: see sect. 61 of that Act. Nor can trustees be advised to lend on equitable mortgages by deposit of deeds, as although a mortgagee having the legal estate would, no doubt, find some difficulty in selling the property without producing the title deeds, yet should he succeed in doing so, a purchaser without notice of the equitable charge would be able to oust the trustees of their security: see *Norris* v. *Wright*, 14 Beav. at p. 308; *Swaffield* v. *Nelson*, W. N. 1876, p. 255.

Title and

Trustees lending on mortgage are bound to pay

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value of security.

particular attention to the title to and value of the proposed security: *Waring* v. *Waring*, 3 Ir. Ch. Rep. 336. Trustees *bonâ fide* accepting a defective title on the advice of their own solicitor would, it is conceived, be protected from personal liability for loss to the estate: see *Speight* v. *Gaunt*, 9 App. Ca. 1; but see *Hopgood* v. *Parkin*, L. R. 11 Eq. 74, which is an express decision of Lord *Romilly*, M.R., to the contrary (*d*). But trustees cannot safely employ a solicitor who acts also for the borrower, having regard not only to the possible conflict of duties on the part of the solicitor, but also to the risks which might arise from the doctrine of implied notice: see Lewin on Trusts, 337.

As regards the nature and value of the property, however, trustees must satisfy themselves by full investigation, even though it may have been recently surveyed: *Bell* v. *Turner*, W. N. 1874, p. 113. They must employ a surveyor of their own, and not only on a report of the mortgagor's surveyor: *Hopgood* v. *Parkin*, L. R. 11 Eq. 74; *Budge* v. *Gummow*, L. R. 7 Ch. A. 719; and they must exercise their own judgment in the selection of such valuer, and not leave the selection to their solicitor: *Fry* v. *Tapson*, 51 L. T. N. S. 326; *S. C.*, 33 W. R. 113.

Amount of advance.

As to the amount which trustees are justified in advancing on mortgage, the general rule is that the sum advanced may not exceed two-thirds of the value if the property consists of freehold, agricultural, or other land: *Stickney* v. *Sewell*, 1 My. & Cr. 8; *Norris* v. *Wright*, 14 Beav. 307; *McLeod* v. *Annesley*, 16 Beav. 600; *Farrar* v. *Barraclough*, 2 Sm. & G. 231; or, say, one-half of the value if the property consists of leaseholds for lives: *McLeod* v. *Annesley*, *supra*; or, of houses and buildings: *Phillipson* v. *Gatty*, 7 Ha. 516; *Stretton* v. *Ashmall*, 3 Drew. 12; *Budge* v. *Gummow*, L. R. 7 Ch. A. 719; *Hoey* v. *Green*, W. N., 1874, p. 236. And trustees will not be justified in lending even one-half on the security of premises

(*d*) This decision was appealed against, but was compromised with the sanction of the Lords Justices on behalf of the infant plaintiff.

used for the purposes of trade or manufacture, or other purposes whereby the value of the property is made to depend on extraneous and uncertain circumstances: *Stickney* v. *Sewell*, 1 My. & C. 8; nor on the security of a builder's mortgage where the houses are unlet: *Fry* v. *Tapson*, 51 L. T. N. S. 326; *S. C.* 33 W. R. 113; see also *Hoey* v. *Green*, W. N., 1874, p. 236. These general rules are, however, not of strict application universally; the true test is, whether the trustees have acted honestly and prudently, having regard to the circumstances of the particular case: *Re Godfrey*, 23 Ch. D. 483; see *Speight* v. *Gaunt*, 9 App. Ca. 1. Mortgages to Trustees.

Trustees must, one and all, retain the control of the trust funds and exercise an impartial judgment as to the choice of investments thereof. They must not therefore mix their trust funds with other funds in a joint mortgage: Lewin on Trusts, 331; or lend on mortgage or otherwise so as to subject the trust money to the control of any one trustee: see *Walker* v. *Symonds*, 3 Swanst. 1; *Salway* v. *Salway*, 2 R. & M. 218; *Clough* v. *Dixon*, 3 My. & Cr. 490. See further as to the duties and liabilities of trustees generally with regard to investments, *post*, tit. SETTLEMENTS. Duty of trustees in lending on mortgage.

A power of sale is now almost invariably either expressly contained or implied by statute in mortgages (see *post*, p. 918). Formerly, however, this was not the case, and it would seem that trustees would not be liable for breach of trust in taking a transfer of an old mortgage which, in accordance with the former practice, does not contain a power of sale: see *Farrar* v. *Barraclough*, 2 Sm. & G. 231. Power of sale.

Trustees are not justified (in the absence of express authority in the instrument creating the trust) in permitting a clause to be inserted in a mortgage deed precluding them from calling in the money before a specified date: *Vickary* v. *Evans*, 2 N. R. 286.

Form of Mortgage.]—Where trust money is lent on mortgage it is a usual practice that the mortgage deed should not disclose the existence of the trust. Non-disclosure of trust.

Mortgages to Trustees.

Formerly, if a mortgagor had notice of the trust he was bound in equity, on paying off the mortgage, to see to the proper application of the money unless expressly or impliedly relieved from such liability; and now, even though the mortgagor is relieved from this liability (see sect. 36 of the Conveyancing and Law of Property Act, 1881), a notice of the trust appearing on the mortgage deed will render the instrument creating the trust a necessary link in the titles both of the mortgagees and mortgagor. It is therefore usual that the money should be expressed in the mortgage deed to belong to the persons who are the trustees, naming them, but not describing them as such (*e*). By the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sect. 61, the effect of this practice as regards mortgages made after the 31st of December, 1881, is as follows :—

Effect of advance on joint account, &c.

Sect. 61.—"(1.) Where in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account, or a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly, and not in shares, the mortgage money, or other money, or money's worth for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, as between them and the mortgagor or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.

Disclosure of trust.

(*e*) If any declaration of trust is necessary, it should generally be made by a separate deed. If however, for any reason, it is thought advisable that the trust should be disclosed in the mortgage deed, the mortgagor should require that it should also contain a statutory acknowledgment by the mortgagee of his right to production of the settlement, so as to satisfy a future purchaser that the estate has been properly discharged; and it is conceived that a trustee-mortgagee could not reasonably refuse to give such an acknowledgment: see Lewin on Trusts, 305. As to the effect of a statutory acknowledgment of a right to production of documents, see *ante*, Vol. I., p. 251.

"(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage, or obligation, or transfer, and shall have effect subject to the terms of the mortgage, or obligation, or transfer, and to the provisions therein contained. Mortgages to Trustees.

"(3) This section applies only to a mortgage, or obligation, or transfer made after the commencement of this Act."

But although the adoption of the course above recommended obviates all inconvenience on payment off of the mortgage debt, or on transfer of the security before any change of trustees occurs, a difficulty must necessarily arise when the mortgage has to be transferred on an appointment of a new trustee. Various expedients have been used to avoid disclosing the trust on the occasion of such transfers. Some conveyancers introduce a declaration that the mortgagees are trustees, and have no beneficial interest, conceiving that this affirmation, which refers to no specific trust, would not render it incumbent on any person paying off the mortgage to inquire into the nature of the trust (*f*). Others recite that the amount of the loan has been paid by the continuing and new trustees to the old trustees, a course open to the objection that the recital is at variance with fact. Others recite that the new and continuing trustees have become entitled to the amount of the loan and the securities for the same, and have required the transfer of the mortgage accordingly. But the fact that no consideration is mentioned for the transfer is such as to create suspicion, and it is not clear that a subsequent purchaser would not be entitled to enquire how it was that the transferees became entitled to the mortgage moneys. The best method is to recite in the transfer that the old trustees are trustees of the moneys for the continuing and new trustees to whom the moneys belong in a joint account, and who are desirous of having the securities for the same vested

(*f*) In the last edition of this work, vol. 6, p. 381, the learned editors expressed their concurrence with the above proposition; but having regard to the doctrine of constructive notice it would clearly be unsafe to rely upon it in practice: see *Jones* v. *Smith*, 1 Ha. 43; *Bridgman* v. *Gill*, 24 Beav. 306.

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in them. This method is recommended by Mr. *Lewin* (see Lewin on Trusts, 8th ed., p. 333), and has recently been judicially approved by *Pearson*, J., as affording a protection to purchasers against any trusts affecting the property: *Re Harman & Uxbridge Railway Co.*, 24 Ch. D. at p. 726.

Precautions to be exercised by trustees.

Trustees in lending on mortgage should be careful not to pay over the money except on delivery of the security. Where trustees sold out stock and handed the proceeds to their solicitor, who was one of the trustees, on his representation that it was to be advanced on mortgage, and it turned out that his representations as to the security were fictitious, and he absconded with the money, it was held that his co-trustees were personally liable to replace the amount of the stock sold, and to account for the dividends, and to pay all costs: *Hanbury* v. *Kirkland*, 3 Sim. 265; see also *Rowland* v. *Witherden*, 3 Mac. & G. 568; *Broadhurst* v. *Balguy*, 1 Y. & C. C. C. 16: see also *Speight* v. *Gaunt*, 9 App. Ca. 1.

2. Mortgages to Bankers, &c. (*ff*).

How far banker's security is affected by alterations in the firm.

Where a security is to extend to the members for the time being of a firm, the intention should be explicitly declared: see *Strange* v. *Lee*, 3 East, 484; *Metcalf* v. *Bruin*, 12 East, 400; *Ex parte Marsh*, 2 Rose, 239; *Pease* v. *Hirst*, 10 B. & C. 122; *Ex parte Loyd*, 3 Dea. 305.

Questions of this nature have generally arisen on securities given by sureties. It has frequently been decided, that a bond for the good conduct of a clerk, &c., does not remain in force after the obligee has taken a partner, or, where the bond is made to partners, after a change in the firm, or after the obligee's death, although his executors carry on the trade: *Wright* v. *Russell*, 2 W. Bl. 934; 3 Wills. 530; *Barker* v. *Parker*, 1 T. R. 287; *Dance* v. *Girdler*, 1 B.

(*ff*) The business of banking may be carried on by a private firm of bankers, consisting of not more than ten partners; or by a joint stock bank constituted under the stats. 7 Geo. 4, c. 46, and 3 & 4 Will. 4, c. 98; or by a banking company incorporated under the Companies Acts.

& P. 34; *Bellasis* v. *Ebsworth*, 3 Camp. 53; and see *ante*, tit. Bonds, Vol. II., p. 305, where this question is fully considered. Similarly, where a bond was given by A., reciting that B. intended to open a banking account with C., D., and E., and the condition was for payment to them of all sums from time to time advanced to B., at the banking house of C., D., and E.: it was held that on C.'s death the obligation ceased, and did not cover advances made after another partner was taken in: *Strange* v. *Lee*, 3 East, 484. See also *Ex parte Watson*, 19 Ves. 459.

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An important question with reference to securities of this nature is,—how far payments made after a change of firm are to be applied in reduction of the balance due at the date of such change? The general doctrine of appropriation of payments in satisfaction of particular debts will be found very clearly expounded by Sir *W. Grant* in *Devaynes* v. *Noble* (*Clayton's Case*), 1 Mer. 605. The question, in the case of distinct isolated debts, is not always of easy determination, but the above case established a clear and simple rule with respect to banking and other current accounts. "In such a case," said this able Judge, "there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side, that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts-current are settled, and particularly cash accounts:" 1 Mer. at p. 608. "If the usual course of dealing was, for any reason, to be inverted, it was surely incumbent on the creditor to signify that such was his intention:" Id. at p. 610. In the above case the claim was made by a *creditor* of a firm after the death of A., one of the partners, and it was held that payments made after the death of A., by the surviving partners, were to be taken in reduction of the balance due at A.'s death, and in exoneration of his estate.

Appropriation of payments. In an account-current, the first item on the *debit* side is discharged by the first item on the *credit* side.

Clayton's case.

In *Bodenham* v. *Purchase*, 2 B. & Al. 39, the

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principle of *Clayton's Case* was fully approved of, and applied to the converse case of a balance in *favour* of the partnership. See on the principle of *Clayton's Case*, *Simson* v. *Cooke*, 1 Bing. 452, and *Brooke* v. *Enderby*, 2 Br. & B. 70, in which latter case it was held that the circumstance, that the banker's having taken a partner was unknown to his customer, made no difference. See also *Pemberton* v. *Oakes*, 4 Russ. 154; *Eytan* v. *Knight*, 2 Jur. 8; *Hooper* v. *Keay*, 1 Q. B. D. 178.

The rule in *Clayton's Case* does not apply where either party has made a different appropriation; and the option of making such appropriation rests in the first place with the debtor, and if not exercised by him passes to the creditor; *Simson* v. *Ingham*, 2 B. & C. 65. So, also, it does not apply where, from the conduct of either party, it is to be inferred that the appropriation contemplated by the rule could not have been intended by such party to have been made: see *Jones* v. *Maund*, 3 Y. & C. 347; *City Discount Co.* v. *McLean*, L. R. 9 C. P. 692. Where some of the items of a claim are illegal, no presumption as to appropriation will arise: *Cunliffe, Brooks & Co.* v. *Blackburn, &c., Building Soc.*, 9 App. Ca. 857. See further on the question of appropriation of payments: *Wilson* v. *Hirst*, 1 Nev. & M. 746; *Walker* v. *Hardman*, 4 Cl. & F. 258; *Merriman* v. *Ward*, 1 J. & H. 371; *Mills* v. *Fowkes*, 5 Bing. N. C. 455.

Compound interest.

Bankers cannot charge compound interest after they have taken a mortgage: *Crosskill* v. *Bowen*, 32 Beav. 86; nor where securities have been deposited with them in respect of specific sums: *London Chartered Bank of Australia* v. *White*, 4 App. Ca. 413.

As to the lien of bankers by usage, see *ante*, p. 643.

3. Mortgages to Solicitors.

Rule under former law.

Formerly a solicitor could not take a mortgage from his client to secure future costs: *Jones* v. *Tripp*, Jac. 322; so it was held that an equitable mortgage would not cover bills of costs not delivered at or before the time of deposit: *Ex parte Laing*, 2 M. &

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A. 381 ; there was, however, no objection to a solicitor taking security for costs actually incurred, and a mortgage was good to this extent, though professing to embrace future costs : *Williams* v. *Piggott*, Jac. 598. So also where a solicitor procured a sum of money for his client on security of a mortgage from a third party it was competent for the solicitor to stipulate that the security should cover not only the money required by the client, but the balance which should be found due to him on an adjustment of accounts : *Chesbyn* v. *Darby*, 2 Y. & C. 170. And of course a solicitor might always receive a mortgage from his client for sums actually advanced or to be advanced, and such a mortgage was good *pro tanto*, though it professed to include future costs : *Pitcher* v. *Rigby*, 9 Pri. 79. Moreover, with respect to future costs, an exception was allowed to the general rule in cases where, "the client being a trustee, agreed with a solicitor that he should not make a demand upon him personally, but that when the funds should come to hand, he should be paid out of those funds such claim as he might have a right to make against them :" *per Wigram*, V.-C., in *Parsons* v. *Spooner*, 5 Ha. at p. 111.

Stats. 33 & 34 Vict. c. 28, and 44 & 45 Vict. c. 44.

But now by the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), sect. 16, "A solicitor may take security from his client for his future fees, charges, and disbursements to be ascertained by taxation or otherwise." And by the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), sect. 16, it is enacted that "any general order under this Act may authorise and regulate the taking by a solicitor from his client of security for future remuneration in accordance with any such order, to be ascertained by taxation or otherwise, and the allowance of interest." By sect. 9 of the same Act it is provided that "the Attorneys and Solicitors Act, 1870, shall not apply to any business to which this Act relates," *i.e.*, conveyancing and other non-contentious business.

See Order 7.

Taxation.

Charges made by a solicitor, though secured by mortgage, have long been open to taxation : *Walmesley* v. *Booth*, 2 Atk. 29 ; *Newman* v. *Payne*,

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4 B. C. C. 350; *Morgan* v. *Lewes*, 4 Dow. 29. And a mortgagor may, under 6 & 7 Vict. c. 73, sects. 38, 41, obtain an order for taxation at any time before payment; or, under special circumstances, even after payment: *Re Carew*, 8 Beav. 150; see *Re Sutton*, 11 Q. B. D. 377.

General doctrine as to transactions between attorney and client.

A solicitor may commence an action for foreclosure before his costs have been taxed, notwithstanding sect. 37 of that Act: *Thomas* v. *Cross*, 10 Jur. N. S. 1163; but he cannot enforce a charge on his client's property pending a reference for taxation of the costs: *Waugh* v. *Waddell*, 16 Beav. 521.

But though a security for moneys actually due cannot be impeached on the mere ground of the relation of attorney and client, yet the Courts watch all such transactions with jealousy. In *Walmsley* v. *Booth*, 2 Atk. 25, Lord *Hardwicke* relieved against a bond given by a person to his attorney, conditioned to bequeath him a legacy of 1000*l.* in consequence of services rendered to the obligor in the course of some prosecutions against him, pending which, and while under the influence of much distress, the bond was given. See also *Newman* v. *Payne*, 4 B. C. C. 350, where Lord *Thurlow* set aside a bond of 1000*l.*, given by a person to his attorney, and certain mortgage securities, for specific sums stated to be due for costs, and directed the master to take an account, and the attorney to reconvey upon payment of what was due. However, in *Horlock* v. *Smith*, 2 My. & Cr. 510, Lord *Cottenham*, in the course of an elaborate review of the authorities, laid it down that a strong case must be made against the solicitor, when the client applies for a taxation of the bill after payment, and when, after proper time and opportunity for investigating the items which the bill contained, he has thought proper to pay it. The utmost that the cases establish is, that, after payment, and the relation of solicitor and client has ceased, the Court will open a bill and have it taxed, upon proof of *specific errors*, so gross as to amount to evidence of fraud; but general allegations are to be disregarded: see *Waters* v. *Taylor*, 2 My. & Cr. 526; *Wragge* v.

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Denham, 2 Y. & C. 117. The rule is thus stated by Lord *Eldon*, "The great rule of the Court is that he who bargains in matter of advantage with a person placing confidence in him is bound to show that a reasonable use has been made of that confidence; a rule applying to trustees, attornies, or any one else:" *Gibson* v. *Jeyes*, 6 Ves. at p. 278. It is therefore incumbent on a solicitor in taking a security from his client, to show that he has taken no advantage of his fiduciary position, but has afforded his client the fullest advice, information, and protection: *Holman* v. *Loynes*, 4 De G. M. & G. 270; *Tomson* v. *Judge*, 3 Drew. 306; *Gibbs* v. *Daniel*, 4 Giff. 1. If there has been concealment or misrepresentation on the part of a solicitor, the transaction will be liable to be set aside, notwithstanding the lapse of years, and deaths of parties: *Charter* v. *Trevelyan*, 11 Cl. & F. 714; *Ward* v. *Sharp*, 32 W. R. 584; see also *Gresley* v. *Moresley*, 4 De G. & J. 96. So, unusual clauses in a mortgage by a client to his solicitor will not be enforced: *Cowdry* v. *Dry*, 1 Giff. 316; *Cockburn* v. *Edwards*, 18 Ch. D. 449.

If, however, a solicitor has acted throughout *bonâ fide*, the mortgage will not be impeached; *Jones* v. *Roberts*, 2 Beav. 419; *Nelson* v. *Booth*, 5 W. R. 722; even though the client is heavily indebted to the solicitor, and gives the mortgage under pressure: *Cheslyn* v. *Dalby*, 2 Y. & C. Ex. 170; see *Johnson* v. *Fesemayer*, 3 De G. & J. 13; *Pearson* v. *Dalby*, 28 Beav. 598. Though a sale by a client to his solicitor of the subject-matter of a suit is void for champerty or maintenance, a security upon such subject-matter is valid, if beneficial to the client: *Wood* v. *Downes*, 18 Ves. 120.

4. Mortgages to Building Societies.

By the stat. 6 & 7 Will. 4, c. 32, reciting that certain societies, commonly called building societies, have been established in different parts of the kingdom, principally among the industrious classes, for the purpose of raising, by small periodical subscriptions, a fund to assist the members thereof in obtaining a small freehold or leasehold property, it

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is provided that societies may be established for the purpose of raising, by subscriptions of the members of not more than twenty shillings monthly, shares not exceeding the value of 150*l.*, a stock or fund for the purpose of enabling each member to receive, out of the funds of such society, the value of his share or shares therein, to erect or purchase one or more dwelling-house or dwelling-houses, or other real or leasehold estate, to be secured by way of mortgage to such society, until the value of his share or shares shall have been repaid to such society with interest and all fines and other payments incurred in respect thereof; and that the majority of the members may make laws, impose fines, &c.: Provided that no member (except on withdrawal), shall be entitled to receive any dividend or profit on any shares until the amount of his share shall have been realized: sect. 1. Rules may be made to provide forms of conveyance, mortgage, &c., which shall be set forth in a schedule to be annexed to the rules of such society: sect. 2. The provisions of the Friendly Societies Acts of 10 Geo. 4, c. 56, and 4 & 5 Will. 4, c. 40, are extended to this Act so far as applicable (*g*): sect. 4. A receipt indorsed by trustees on any mortgage, is to be a sufficient discharge without reconveyance: sect. 5. Nothing in the Act is to authorize any benefit building society to invest any part of its funds in any savings' bank, or with the Commissioners for the reduction of the national debt: sect. 6. The benefit of the Act extends to societies already established: sect. 7. The rules of such societies, and transfers of shares are exempted from stamp duties: sect. 8 (*h*).

(*g*) By the stat. 10 Geo. 4, c. 56, s. 21, all property, including securities for money of friendly societies, is vested in the trustees for the time being, and upon the death or retirement of a trustee, vests in the new trustees without any assignment or conveyance. It has been decided that the provisions of this Act as to the framing of rules, &c., is applicable to benefit building societies: *Malkern* v. *Lord*, 4 App. Ca. 182.

(*h*) This exemption has been taken away by the Building Societies Act of 1874, sect. 41.

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Stat. 37 & 38 Vict. c. 42.

By the Building Societies Act, 1874 (37 & 38 Vict. c. 42), sect. 7, the stat. 6 & 7 Will. 4, c. 32, is repealed, but such repeal is not to affect any subsisting society certified under the repealed Act until such society shall have obtained a certificate of incorporation under the Act of 1874; nor is the repeal to affect the past operation of the repealed Act, or the validity of anything done thereunder, or under the rules of any society certified thereunder. And by the Building Societies Act, 1875 (38 & 39 Vict. c. 9) sect. 2, every society, the rules of which have been certified under the repealed Act, may obtain a certificate of incorporation under the Act of 1874, and thereupon shall be deemed a society under that Act, and its rules, so far as not contrary to that Act, are to remain in force till duly altered or rescinded. By sect. 13 of the Act of 1874, it is enacted that :—

Purpose for which societies may be established.

"Any number of persons may establish a society under this Act, either terminating or permanent, for the purpose of raising by subscriptions of the members a stock or fund for making advances to members out of the funds of the society upon security of freehold, copyhold, or leasehold estate, by way of mortgage; any society under this Act shall, so far as is necessary for the said purpose, have power to hold land with the right of foreclosure, and may from time to time raise funds by the issue of shares of one or more denominations, either paid up in full or to be paid by periodical or other subscriptions, and with or without accumulating interest, and may repay such funds when no longer required for the purposes of the society: Provided always, that any land to which any such society may become absolutely entitled by foreclosure, or by surrender, or other extinguishment of the right of redemption, shall, as soon afterwards as may be conveniently practicable, be sold or converted into money."

Matters to be set forth in rules.

By sect. 16, the rules of every society established under the Act are to set forth (*inter alia*), the terms upon which mortgages may be redeemed; provision for an annual or more frequent audit of the accounts, and inspection by the auditors of the mortgages and other securities belonging to the society; and provision for the safe custody of such mortgage deeds, &c.

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By sect. 19, it is enacted that:—

Rules may be made as to forms of mortgages, &c.

"Any society under this Act, in a schedule to its rules, may describe the forms of conveyance, mortgage, transfer, agreement, bond, security for deposit or loan, or other instrument necessary for carrying its purposes into execution."

The Act of 1874 contains also the following provisions relating to mortgages to building societies:—

Property of the society vested without conveyance.

Sect. 27. "All rights of action and other rights, and all estates and interests in real and personal whatsoever, belonging to or held in trust for any society certified under the said repealed Act, shall, on the incorporation of the society under this Act, vest in the society without any conveyance or assignment whatsoever, save and except in the case of stocks and securities in the public funds of Great Britain and Ireland, and estates in copyhold or customary hereditaments, the title to which cannot be transferred, without admittance."

As to copyholds.

Sect. 28. "Where any society under this Act is entitled in equity to any hereditaments of copyhold or customary tenure by way of mortgage, the lord of manor of which the same are held shall from time to time, if required by the society, admit such persons, not more than three, as the society appoints, to be trustees on its behalf as tenants in respect of such hereditaments, on payment of the usual fines, fees, and other dues payable on the admission of a single tenant, or may admit the society as tenant in respect of the same, on payment of such special fine, or compensation in lieu of fine, and fees as may be agreed upon."

Receipt endorsed on mortgage to be sufficient discharge without reconveyance.

Sect. 42. "When all moneys intended to be secured by any mortgage or further charge given to a society under this Act in England or Ireland have been fully paid or discharged, the society may endorse upon or annex to such mortgage or further charge a reconveyance of the mortgaged property to the then owner of the equity of redemption, or to such persons and to such uses as he may direct, or a receipt under the seal of the society, countersigned by the secretary or manager, in the form specified in the schedule to this Act, and such receipt shall vacate the mortgage or further charge or debt, and vest the estate of and of the property therein comprised in the person for the time being entitled to the equity of redemption, without any reconveyance or re-surrender whatever; and if the said mortgage or further charge has been registered under any Act for the registration or record of deeds or titles, the registrar under such Act, or his deputy or assistant registrar, or the recording officer, as the case may be, or in the case of copyholds of lands of customary tenure, if the mortgage

or further charge has been entered on any court rolls, the steward of the manor or his deputy respectively shall, on production of such receipt, verified by oath of any person, make an entry opposite the entry of the charge or mortgage, to the effect that such charge or mortgage is satisfied, and shall grant a certificate, either on the said mortgage or charge or separately, to the like effect, which certificate shall be received in evidence in all courts and proceedings without any further proof; and which entry shall have the effect of clearing the register or record of such mortgage; and the registrar or recording officer shall be entitled to a fee of two shillings and sixpence for making the said entry and granting the said certificate, and such fee in Ireland shall be paid by stamps, and applied as the other fees of the Registry of Deeds Office and Record of Title Office are now by law directed to be paid and applied."

Mortgages to Building Societies.

5. Securities for Illegal Debts, &c.

By the stat. 16 Car. 2, c. 7, now repealed, judgments, mortgages, &c., for security or satisfaction of money lost at play, were rendered utterly void. The stat. 9 Anne, c. 14, enacted, that securities in consideration, wholly or partly, of money won at play or by betting, or lent for the purpose of playing or betting, shall be utterly void; and such securities, being of lands, tenements, or hereditaments, or such as shall incumber the same, should enure to the benefit of the persons who would be entitled thereto in case the person granting or incumbering the same were dead, as if such security had been made to the persons who would be so entitled; and that all grants, &c., for the purpose of preventing such lands, &c., from devolving on such persons, should be void. By the stat. 5 & 6 Will. 4, c. 41, reciting that *securities and instruments* made void by the said Acts, are sometimes transferred to persons for valuable consideration without notice of the original consideration for which they were given, and the avoidance thereof in the hands of such persons, is often attended with great hardship and injustice, enacts that so much of the Acts above referred to as enacts that any *note, bill, or mortgage*, shall be absolutely void, shall be repealed; but every note, bill, or

Certain securities on illegal considerations not to be

Securities for Illegal Debts, &c.

absolutely void.

mortgage which, if this Act had not been passed, would, by virtue of any of the said Acts, have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration; and the said Acts shall have the same force and effect, as if they had respectively provided that every such note, &c., should be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration; provided that nothing herein contained shall prejudice or affect any note, bill, or mortgage, which would have been good and valid if this Act had not been passed: sect. 1. And, by sect. 2, in case any person shall, after the passing of this Act, make, draw, &c., any bill, &c., for any consideration on account of which the same is declared to be void by the recited Acts, and shall actually pay to an indorser, holder, or assignee of such note, &c., the amount thereby secured, or any part thereof, such money shall be deemed to have been paid on account of the person to whom such note, &c., was originally given upon such illegal consideration, and shall be deemed to be a debt due from such last-mentioned person to the person who shall have so paid such money, and recoverable at law. Sect. 3 repeals so much of the recited Acts of the 9 and 11 Anne, as enacts that the securities therein mentioned shall enure for the benefit of the parties next entitled.

It will be observed, that the Act does not extend to other securities than *notes, bills, and mortgages*, although the recital in the preamble of the mischief intended to be remedied, contemplates securities of every description.

By the stat. 8 & 9 Vict. c. 109, sect. 15, so much of the Act of the 9 Anne as was not altered by the Act of the 9 Will. 4 is repealed.

Money lent to pay bets.

Money lent to enable the borrower to pay bets which he has already lost is not a debt for an illegal consideration within the stat. 5 & 6 Will. 4, c. 41.

The subject of immoral and other illegal securities has already been considered at considerable length: sub tit. BONDS, *ante*, Vol. II., p. 309 *et seq.*

CHAPTER IV.

RIGHTS AND DISABILITIES OF THE MORTGAGOR, AND THOSE CLAIMING UNDER HIM.

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1. INCIDENTS OF AN EQUITY OF REDEMPTION.

General incidents of an equity of redemption.

General Incidents.]—"An equity of redemption has always been considered as an *estate* in the land, for it may be devised, granted, or entailed with remainder, and such entail and remainder may be bound by a fine and recovery, and therefore cannot be considered as a mere *right* only, but such an estate whereof there may be a seisin; the person, therefore, entitled to the equity of redemption, is considered as the owner of the land, and a mortgage in fee is considered as personal assets." "It is certain the mortgagee is not barely a trustee to the mortgagor, but to some purposes, viz., with regard to the inheritance, he certainly is till a foreclosure." *Per* Lord *Hardwicke*, in deciding that an equity of redemption is subject to curtesy: *Casborne* v. *Scarfe*, 1 Atk. 605; and, as to the exercise of powers by the donee after mortgage, see *ante*, p. 722, *et seq.*

Partition. Partition of an estate which is subject to a mortgage of the entirety will be decreed without the mortgagee being joined as a party: *Swan* v. *Swan*, 8 Price, 518; *Waite* v. *Bingley*, 21 Ch. D. 674.

Devise. An equity of redemption is devisable, and alienable by deed: see stats. 1 Vict, c. 26, sect. 3; 8 & 9 Vict. c. 106, sect. 6.

Equity of Redemption.

Renewal of leases.

In the absence of any covenant, it is clear that a mortgagor of renewable leaseholds is not bound to renew; but whether there is any obligation on him, or any express authority to the mortgagee, to renew or not, the mortgagee may, if he chooses, effect a renewal, and the expenses incurred thereby will be a charge upon the property in his hands, with interest: *Manlove* v. *Ball*, 2 Vern. 84; *Lacon* v. *Mertins*, 3 Atk. 4; *Woolley* v. *Drag*, 2 Anst. 561. See as to the effect of renewals or *grafts* in Ireland, by mortgagees, *Nesbitt* v. *Tredennick*, 1 Ball & B. 29.

If the mortgagee renew, he must enter into the lessee's covenants. The only mode of avoiding this is to make the mortgagor take the renewed lease, and assign it to the mortgagee, subject to the equity of redemption subsisting under the mortgage.

A release by a mortgagee of the right to renew will not bind the mortgagor, or his representatives, entitled to the equity of redemption: *O'Reilly* v. *Fetherstone*, 4 Bli. N. S. 161.

If the mortgagor renew, the new lease will be subject to the mortgage: *Moody* v. *Matthews*, 7 Ves. 174; *Hughes* v. *Howard*, 25 Beav. 575; *Gem* v. *Edwards*, 1 De G. & J. 598. And if a lessee of renewable leaseholds having mortgaged them, afterwards acquires the freehold reversion, whereby the lease is merged, the estate in fee simple so acquired will become subject to the mortgage: *Trumper* v. *Trumper*, L. R. 8 Ch. A. 870.

Tenancy of Mortgagor in Possession.]—The proper description of the nature of the tenancy of a mortgagor in possession, has been a subject of much discussion. The result of the cases would seem to be that he will be deemed a tenant at will or by sufferance, or for a term, or a mere trespasser according to circumstances; see Coote, Mortg. 746 (*i*).

Tenancies at will and at sufferance.

(*i*) A tenant at will is one who enjoys the land by the express or implied consent of the owner, without there being any obligation on the part either of the lessor or of the lessee, to continue the tenancy for any certain time. Harg. Co. Litt. 270 b. "A

Equity of Redemption.

Estate of mortgagor in possession.

If a mortgagor in possession under an express agreement that he shall continue in possession until default, hold over after default, without any new agreement, he becomes tenant at sufferance of the mortgagee: *Smartle* v. *Williams*, 1 Salk. 245; see *Thunder* v. *Belcher*, 3 East, 449.

Mortgagor in possession under an agreement to hold until default.

In *Wilkinson* v. *Hall*, 3 Bing. N. C. 508, the plaintiff, on December 5, 1833, mortgaged in fee, with a proviso for redemption, on payment of the principal and interest on the 5th June, 1834; but the mortgagee covenanted not to call in the principal until the 5th December, 1840, if the interest in the meantime was duly paid; and it was agreed that

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tenant at sufferance is where a man cometh to the possession at first lawfully, and holdeth over." Co. Litt. 27 a, Vol. 4, p. 149, 2nd ed. The main distinction between the two kinds of tenancy is, that there is privity, by reason of the express or implied contract between the parties, in the case of a tenancy at will, and none in the other. Both tenants are equally subject to immediate ejection, but, in consequence of the privity in the case of a tenant at will, he is entitled to a previous demand of possession (*Right* v. *Beard*, 13 East, 210; *Doe* d. *Newby* v. *Jackson*, 1 B. & Cr. 448; *Doe* v. *Jones*, 10 B. & C. 718; *Roe* v. *Street*, 4 Nev. & M. 42), and to emblements, Co. Litt. 556: privileges which a tenant at sufferance does not enjoy. But circumstances, as the receipt or demand of rent on the one hand, or the payment of it, or admission that it is due on the other, are sufficient to convert a tenancy, either at will or at sufferance (*Bishop* v. *Howard*, 3 Dow. & R. 293), into a more permanent interest, which, in the absence of any agreement (*Richardson* v. *Langridge*, 4 Taunt. 128), usage, or other circumstance from which a different inference arises, is, by the general custom of England, a tenancy from year to year, determinable at six months' notice. See 7 Bing. 458: *Doe* v. *Weller*, 7 Tr. 478; *Cox* v. *Bent*, 5 Bing. 185; *Cooper* v. *Blandy*, 4 Moo. & Sc. 562; 1 N. C. 145; *Wilkinson* v. *Hall*, 4 Scott, 301; *Doe* v. *Boulter*, 1 Nev. & P. 650; *Simpkin* v. *Ashurst*, 1 C. M. & R. 211; *Doe* v. *Dodd*, 2 Nev. & M. 838; *Doe* v. *Pullen*, 3 Scott, 245; *Doe* v. *Stennell*, 2 Esp. 717; *Knight* v. *Bennett*, 11 Moore, 222; 3 Bing. 361; *Beale* v. *Sanders*, 5 Scott, 58; 3 Bing. N. C. 850. A tenancy at will, or from year to year, arising upon possession under an agreement that does not operate as a demise, is subject to the terms of that agreement in other respects: and therefore the tenant may be ejected at the end of the term contracted for, without notice: *Doe* v. *Stratton*, 1 M. & P. 183; see *Doe* v. *Bell*, 5 T. R. 471; *Richardson* v. *Gifford*, 3 Nev. & M. 325.

Tenant at will entitled to notice to quit.

Tenancy at will or at sufferance how converted into a yearly tenancy.

An actual tenancy between the mortgagee and mortgagor in possession is necessary to enable the mortgagee to recover possession in the County Court under stats. 9 & 10 Vict. c. 95, s. 122, and 19 & 20 Vict. c. 108, ss. 50—56: see *Jones* v. *Owen*, 13 Jur. 261.

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the mortgagor should quietly enjoy the premises until default. It was held, that this agreement amounted to a re-demise to him until the 5th December, 1840: see Bac. Abr. Leases (K.). "Whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it, for such a determinate term, such words, whether they run in the form of a licence, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years."

In *Doe* v. *Giles*, 5 Bing. 421, it was held that, under a mortgage-deed which contained a covenant that the mortgagee might enter after default, the mortgagee, after default might maintain ejectment against the mortgagor, without previously demanding the possession.

Mortgagor in possession without agreement is tenant at sufferance.

If there is no express agreement as to the period of possession, and the mortgagor, being the occupant, remains in possession, if it can be shown that the mortgagee agreed to leave the mortgagor in possession, the mortgagor will apparently be a tenant at will: see *Doe* v. *Pullen*, 3 Scott, 271: but the mere omission to take possession is not evidence of such an agreement; and where there is nothing more, the mortgagor holds possession by sufferance, and may be ejected without previous notice, either by action of ejectment, or by peaceable entry without action: *Jayson* v. *Rush*, 1 Salk. 209; *Turner* v. *Meymott*, 7 Moore, 574; 1 M. & Ry. 221, n. But a mortgagee who had recovered in ejectment, and obtained possession under an irregular writ of possession, was ordered to restore possession: *Doe* v. *Lord*, 7 A. & E. 610. "It is now established, that a mortgagor only holds possession of the land, and receives the rents of it, by the will or permission of the mortgagee, who may, by ejectment, without giving notice, recover against him or his tenant. In this respect the estate of a mortgagor is inferior to that of a tenant at will:" *Per Buller*, J., in *Birch* v. *Wright*, 1 T. R. 378; see *Partridge* v. *Bere*, 5 B. & Al. 604; *Doe* v. *Maisey*, 8 B. & C. 767.

After the devolution of the mortgaged estate on

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a third person, the mortgagor would, of course, hold of such person at sufferance, whether he were before tenant at will or by sufferance; and his heir or devisee entering would, in strictness, be a disseisor. However, it has been held that the assignees in bankruptcy of a mortgagor, who had remained in possession, having removed fixtures, the mortgagee might declare in case against them as *reversioner*: *Hitchman* v. *Walton*, 4 M. & W. 409; see also *Buckwarth* v. *Simpson*, 1 C. M. & R. 834. But the mere payment and receipt of interest, it is now settled, do not amount to such a recognition of the mortgagee's title, and such an acquiescence in the possession of the mortgagor or those claiming through him, as to convert that possession into a tenancy at will: *Doe* v. *Giles*, 5 Bing. 421; *Doe* v. *Cadwallader*, 2 B. & Ad. 473; *Doe* v. *Goodier*, 10 Q. B. 957. But where a tenant of a mortgagor was in possession, and an agent of the mortgagee called on him and demanded payment of interest on the mortgage and received money *eo nomine* as interest, the defendant being required to pay it instead of rent to the mortgagor, it was held that the mortgagee, having recognised and availed himself of the possession of the mortgagor, could not treat his tenant as a trespasser: *Doe* d. *Whittaker* v. *Hales*, 7 Bing. 322.

Leases by mortgagees and mortgagors.

Formerly leases of mortgaged premises were attended with many inconvenient anomalies.

Mortgagees, as persons having the legal estate, might always make good leases at law; but such leases (unless granted by a mortgagee in possession under his statutory powers) are subject to the mortgagor's right of redemption in equity: *Hungerford* v. *Clay*, 9 Mod. 1; and where a mortgagor in possession granted leases without the concurrence of the mortgagee, the lease was void against the mortgagee, who could eject the lessee without notice: *Keech* v. *Hall*, Doug. 21; *Thunder* v. *Belcher*, 3 East, 449; *Gibbs* v. *Cruikshank*, L. R. 8 C. P. 454. Such a lease was, however, good against the mortgagor by estoppel: *Maclaughlan* v. *Wood*, 1 Roll. Abr. 874, pl. 10; *Cuthbertson* v. *Irving*, 6 H. & N. 135.

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Statutory powers of leasing.

The powers of leasing of mortgagors and mortgagees under the old law, and under recent statutory enactments have already been considered: sub tit. LEASES, *ante*, p. 80 *et seq.*

Mortgagor not accountable for past rents.

It is well settled, that a mortgagor is not accountable to the mortgagee for the rents he has received, even though the security should prove insufficient: *Colman* v. *Duke of St. Albans*, 3 Ves. 25; *Drummond* v. *Duke of St. Albans*, 5 Ves. 533; see also *Meed* v. *Lord Orrery*, 3 Atk. 244; *Gresley* v. *Adderley*, 1 Swan. 579; *Hale* v. *Lord Bexley*, 17 Beav. 14; *Life Ass. Co. of Scotland* v. *Siddale*, 3 De G. & J. 271: nor, it seems, even after notice from the mortgagee to the tenant to pay the rent to him; the doctrine that the mortgagor is the bailiff or receiver of the rents for the mortgagee having been long exploded: *Ex parte Wilson*, 2 Ves. & B. 252; see *Thomas* v. *Brigstocke*, 4 Russ. 64.

Mortgagor may cut and remove growing crops.

A mortgagor may, until the mortgagee has demanded possession, but not afterwards, cut and remove growing crops: *Ex parte Temple*, 1 Gl. & J. 216; *Bagnall* v. *Villar*, 12 Ch. D. 812. As to a mortgagor's right to emblements, see *Birch* v. *Wright*, 1 T. R. 383; *Partridge* v. *Bere*, 5 B. & Al. 604; *Doe* v. *Giles*, 5 Bing. 420.

A legal mortgagee who gives notice to the tenants holding under a lease prior to the mortgage to pay the rents to him becomes entitled to the receipt of the rents accrued at the date of the notice and accruing thereafter, provided, of course, that the arrears did not become due before the date of the mortgage: *Moss* v. *Gallimore*, 1 Doug. 279; *Pope* v. *Biggs*, 9 B. & E. 245: and no attornment by the tenant is necessary in this case: see stat. 3 & 4 Anne, c. 16, sects. 9, 10. But in the case of tenancies created subsequently to the mortgage the mortgagee cannot by notice deprive the mortgagor of his right to receive the rents, unless the tenants have attorned: *Evans* v. *Elliott*, 9 A. & E. 342: see Fisher, Mortg. 844.

Mortgagee's right to recover rents.

In *Ex parte Living*, 1 Dea. 1, it was held, that a mortgagee having the legal estate was not entitled to the rents before entry, and that the order in bank-

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ruptcy for a sale was not for that purpose equivalent to entry. In *Thomas* v. *Brigstocke*, 4 Russ. 64, a receiver had been appointed in a suit to carry into effect the trusts of a mortgagor's will, to which suit the mortgagee was not a party (see *Price* v. *Williams*, G. Coop. 31), it was held, that the mortgagee had not, by giving notice to the tenants, acquired a right to the rents, but that he should have moved to discharge the receiver, in which case he would have been entitled to the rents from the date of the application: see also *Gresley* v. *Adderley*, 1 Swan. 573; *Walker* v. *Bell*, 2 Mad. 21; see as to equitable mortgages, *ante*, p. 705.

Rights and duties of tenants.

When the tenant in possession claims under a lease or tenancy prior to the mortgage, of course he cannot be evicted by the mortgagee, who may, however, as the grantee of the reversion, entitle himself, by notice to the tenant, to receive and recover the rent, *vide, ante*, p. 79.

If the tenant pays arrears of ground-rent, he can only deduct from the rent due to the mortgagee so much of such arrears as accrued at the same time with the rent paid to the mortgagee: *Cobb* v. *Carpenter*, 2 Camp. 13 n. Until actual notice from the mortgagee, however, the tenant is justified in paying the rent to the mortgagor, though he may be aware of the transfer of the legal estate to the mortgagee. On the other hand, the tenant is at liberty to set up a mortgage made subsequently to his lease, in defence to an ejectment brought by the mortgagor for a forfeiture; because, by so doing, he does not set up any thing adverse to the right of his landlord to grant the lease, but merely shows that he has parted with his title subsequently: *Doe* d. *Marriott* v. *Edwards*, 5 B. & Ad. 1065. Where, however, the lease or tenancy is *posterior* to the mortgage (unless the demise is made by the mortgagor under an express authority in the mortgage, or comes within the recent statutory enactments, as to which see *ante*, p. 81), it is clear that the mortgagee may treat the tenant in possession as a trespasser, and evict him by ejectment, without a previous notice to quit, or demand of possession: *Doe* v. *Maisey*, 3 Man.

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& R. 110; 8 B. & C. 767; *Doe* v. *Giles*, 5 Bing. 421. And the mere receipt of interest for a period subsequent to the demise would not prejudice the right to recover: *Doe* v. *Cadwallader*, 2 B. & Ad. 473.

As to how far a mortgagee can by notice to the tenant entitle himself to the rent accruing under a lease or tenancy subsequent to the mortgage, see *ante*, p. 79.

A mortgagee should always obtain particular and accurate information as to the terms upon which the tenants in possession of the premises hold the same for his government in any proceedings he may find it necessary to take against them for the recovery of the rent by distress or action, or of the possession by ejectment, with or without a previous notice to quit, according to the circumstances.

Rights of mortgagor and mortgagee to cut timber.

A mortgagee might not formerly cut timber, unless where the security was scanty: see *Withrington* v. *Banks*, Sel. Ca. Ch. 31; *King* v. *Smith*, 2 Ha. 239; but as to mortgages made since the 31st of December, 1881, see *post*, p. 907. As to his right to an injunction to restrain the mortgagor from cutting it under the like circumstances, see *Usborne* v. *Usborne*, 1 Dick. 75; *Farrant* v. *Level*, 3 Atk. 723; *Humphreys* v. *Harrison*, 1 Jac. & W. 581; *Robinson* v. *Litton*, 3 Atk. 210; *Hanson* v. *Derby*, 2 Vern. 293; *Hampton* v. *Hodges*, 8 Ves. 105; *Hippisley* v. *Spencer*, 5 Madd. 422; *Wright* v. *Atkin*, 1 Ves. & B. 314.

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Order of Liability of Mortgagor's Property to Payment of Mortgage Debt.]—The stat. 17 & 18 Vict. c. 113, commonly known as "Locke King's Act," has altered the law with regard to the primary liability of the personalty of mortgagors to payment of mortgage debts, so far as relates to the estates of persons dying after the 31st December, 1854. The administration of estates of persons who died before that date is, however, regulated by the old law (*k*).

(*k*) The question of the order of liability of a mortgagor's property to payment of the mortgage debt under the old law is very

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Before Locke King's Act, unless a contrary intention was shown, the mortgagor's general assets were primarily liable to satisfy the debt in exoneration of the particular property, whether real or personal, comprised in the mortgage which was merely a *collateral* security for the debt: *Howell* v. *Price*, 1 P. Wms. 290. To this general rule there were, however, several exceptions.

In what cases heir or devisee not entitled to have the debt paid out of the personalty.

Thus the claim of the heir or devisee to exoneration out of the personal estate only arose where the personal estate was liable to the debt; that is, where the mortgage money was the *personal debt* of the ancestor or testator: *Waring* v. *Ward*, 7 Ves. at p. 336. Thus where a testator, having mortgaged an estate, devised all his estate and effects to his wife, and appointed her his executrix, and she died intestate without having paid off the mortgage, it was held that the heir had no equity to be paid out of the personal estate: *Scott* v. *Becher*. 5 Madd. 96; see *Bond* v. *England*, 2 K. & J. 44.

So, the *personal* liability to the debt did not pass to a purchaser, heir, or devisee of the estate; *Cope* v. *Cope*, 2 Salk. 449; *Evelyn* v. *Evelyn*, 2 P. Wms. 664; *Perkins* v. *Baynton*, Ib. n.; *Scott* v. *Becher*; nor would the covenant of the heir or devisee to pay the money, when the mortgage was transferred, affect the primary liability of the land in his hands: *Bagot* v. *Oughton*, 1 P. Wms. 347; *Evelyn* v. *Evelyn*, and cases cited, 2 P. W. 664, n.; *Woods* v. *Huntingford*, 3 Ves. 128; although he agreed to pay a larger rate of interest: *Shafto* v. *Shafto*, 1 Cox, 207; borrowed a further sum, or mortgaged other lands as a security for the whole: *Duke of Ancaster* v. *Mayer*, 1 B. C. C. 454; *Earl of Tankerville* v. *Fawcett*, 1 Cox, 237. Of course a direction to pay debts out of real and personal estate applies only to the personal debts of the testator: *Ancaster* v. *Mayer*, *Lawson* v. *Lawson*, 3 B. P. C. 424; *Butler* v. *Butler*, 5 Ves. 534; *Graves* v. *Hicks*, 5 Sim. 405.

So, where the mortgage was made for the purpose

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fully examined in the 3rd edition of this Work, Vol. 5, p. 363 *et seq.*

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of raising portions, debts, or legacies charged upon the estate, whether the mortgagor was the original settlor, or took the estate subject to the charge, his mere bond or covenant to pay the money would not make it his personal debt, if it appeared that the land was the original debtor: *Basset* v. *Perceval*, 2 P. Wms. 664, n.; *Earl of Tankerville* v. *Fawcett*, 2 B. C. C. 57; *Coventry* v. *Coventry*, 2 P. Wms. 222; see *Lechmere* v. *Charlton*, 15 Ves. 193.

Again, the liability of a purchaser of an equity of redemption to indemnify the mortgagor from the debt, did not make himself liable for it to the *mortgagee*, and therefore did not exonerate the land: *Pockley* v. *Pockley*, 1 Vern. 36; *Tweddell* v. *Tweddell*, 2 B. C. C. 101; *Butler* v. *Butler*, 5 Ves. 534.

So also the devisee of a mortgaged estate was not entitled as against the persons taking the residuary personal estate, to call upon the executors to pay off a mortgage upon it, if a clear intention of the testator was evinced that he should take the mortgaged land *cum onere*, but a devise of the land *subject to the mortgage*, was held not to have this effect, the words referring to the incumbrance being considered merely as part of the description of the estate: *Serle* v. *St. Eloy*, 2 P. Wms. 386; *Bickham* v. *Cruttwell*, 2 My. & Cr. 763; see *Halliwell* v. *Tanner*, 1 Russ. & M. 633. In *Hancox* v. *Abbey*, 11 Ves. 179, property was devised in trust to sell and pay a mortgage, and, there being no gift until the mortgage was paid off, it was held that the devisee could not have the mortgage paid out of the personal estate.

What funds must exonerate mortgaged estate.

Mortgaged real estate stood in relation to other real estate of an ancestor or testator in the same situation (in respect of the mortgage debt) as land which was subject to a *general* charge of debts; thus, the *heir*, taking such an estate was entitled to have the debt paid out of the residuary personalty, and out of the estate expressly devised for payment of debts: *Hill* v. *Bishop of London*, 1 Atk. 621. And the *devisee* of such estate was entitled to exoneration out of the residuary personalty, out of lands descended, and out of lands charged with, or expressly devised for payment of, debts: *Serle* v. *St.*

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Eloy, 2 P. W. 386; and, in case of a *general* charge of debts, such devisee was entitled to *contribution* from the other devisees: *Carter* v. *Barnadiston*, 1 P. Wms. 505.

Locke King's Act.

By the stat. 17 & 18 Vict. c. 113, sect. 1, it is enacted as follows;—

Heir or devisee of real estate not to claim payment of mortgage out of personal assets.

"When any person shall, after the 31st day of December, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will, or deed, or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the lands or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof: Provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such land or hereditament to obtain full payment or satisfaction of his mortgage debt, either out of the personal estate of the person so dying as aforesaid, or otherwise (*l*): Provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made, or to be made before the first day of January, 1855."

Application of the Act.

This Act applies to copyholds: *Piper* v. *Piper*, 1 J. & H. 91; but not to leaseholds: *Re Wormsley's Estate*, 4 Ch. D. 665; but see *post*, p. 875.

The Act applies to a mortgaged estate, different portions of which are devised to different persons, and the devisees must contribute rateably according to the value of their respective portions: *Re Newmarch*, 9 Ch. D. 12. Where real and personal estate are comprised in the same mortgage the mortgage debt must be borne rateably as between the devisees and legatees: *Trestrail* v. *Mason*, 7 Ch. D. 655; see

(*l*) This proviso is only for the protection of mortgagees: *Lipscomb* v. *Lipscomb*, L. R. 7 Eq. at p. 503.

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Leonino v. *Leonino*, 10 Ch. D. 460. The Act only applies where property is specifically charged: see *Re Dunlop*, 21 Ch. D. at p. 590. An equitable mortgage by deposit of title deeds is within the Act: *Pembroke* v. *Friend*, 1 J. & H. 132; *Coleby* v. *Coleby*, L. R. 2 Eq. 803; but not a vendor's lien (*l*) for unpaid purchase-money: *Hood* v. *Hill*, 5 W. R. 747; *Harding* v. *Harding*, L. R. 13 Eq. 493: nor a general charge by will of real estate in aid of personalty for payment of debts, until the amount charged has been specifically ascertained, and the devisee has taken such estate subject to the charge: *Hepworth* v. *Hill*, 30 Beav. 496: and land devised upon trust for reversion is apparently not an interest in land within the meaning of the Act: see *Lewis* v. *Lewis*, L. R. 13 Eq. 218.

By the stat. 30 & 31 Vict. c. 69, it is enacted that:—

In construing wills, general direction for payment of debts out of personalty not to include mortgage debts, unless such intention expressed or implied.

Sect. 1. "In the construction of a will of any person who may die after the 31st day of December, 1867, a general direction that the debts, or that all the debts, of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate."

Interpretation of word "mortgage."

Sect. 2. "In the construction of the said Act and of this Act, the word 'mortgage' shall be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator."

What is contrary intention.

A direction for payment of a testator's debts by his executors out of his estate, with a devise of the mortgaged estates, was held by Lord *Campbell*, C., not to amount to a declaration of "contrary intention" within Locke King's Act: *Woolstencroft* v. *Woolstencroft*, 2 De G. F. & J. 347. But in *Mellish* v. *Vallens*, 2 J. & H. 194, where there was a devise of mortgaged real estate *simpliciter*, followed by a bequest of the testator's personal estate subject to

(*l*) But see stats. 30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34, *infra*.

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the payment thereout of his debts, it was held by *Wood*, V.-C., that there was a sufficient indication of contrary intention to exclude the operation of that Act: see also *Eno* v. *Tatum*, 3 De G. J. & S. 443; *Smith* v. *Smith*, 3 Giff. 374; *Allen* v. *Allen*, 30 Beav. 395. A general direction for payment of a testator's debts, &c., not expressly mentioning mortgage debts, out of his personal estate, in exoneration of his real estate, does not show a contrary intention within the meaning of the Act of 1867: *Re Rossiter*, 13 Ch. D. 355; see *Re Newmarch*, 9 Ch. D. 12; nor does a direction to pay all debts out of a mixed fund: *Elliott* v. *Dearsley*, 16 Ch. D. 322; nor a charge of debts on personalty and on residuary realty, or on a specified part of the realty: *Lewis* v. *Lewis*, L. R. 13 Eq. 218; nor a specific devise of the mortgaged lands, with a devise of the remainder to another person with a direction that if the personalty should be insufficient for payment of debts the deficiency should be charged on the residuary realty: *Sackville* v. *Smyth*, L. R. 17 Eq. 153; see also *Rowson* v. *Harrison*, 31 Beav. 207; *Brownson* v. *Lawrance*, L. R. 6 Eq. 1.

Application of Acts 17 & 18 Vict. c. 113, and 30 & 31 Vict. c. 69.

The case of a purchaser dying intestate was not provided for by the Act of 1867, and leaseholds were held not to be within that Act nor within Locke King's Act (*ante*, p. 873); but by the stat. 40 & 41 Vict. c. 34, it is enacted that:—

Sect. 1. "The Acts mentioned in the schedule hereto shall, as to any testator or intestate dying after the 31st day of December, 1877, be held to extend to a testator or intestate dying seised or possessed of, or entitled to any land or other hereditaments of whatever tenure which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase-money; and the devisee, or legatee, or heir, shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate unless (in the case of a testator) he shall within the meaning of the said Acts have signified a contrary intention; and such contrary intention shall not be deemed to be signified by a charge of or a direction for payment of debts upon or out of residuary real or personal estate, or residuary real estate."

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Vendor's lien.

Where a testator, who had contracted to purchase land, by will made in 1881, devised the same to his daughter for life with remainders over, but did not dispose of his personal estate, it was held that a vendor's lien existed and that consequently the devisees were not entitled to have the purchase-money paid out of the personalty but merely to the real estate charged with the unpaid purchase-money: *Re Cockcroft*, 24 Ch. D. 94.

Mortgages by husband and wife.

Mortgages by Husband and Wife.]—Where a husband joined in a transfer of his wife's leasehold house, which had been mortgaged by the wife before the marriage, and covenanted to pay the money, and by gradual payments reduced the debt, it was held that the husband's estate should stand in place of the mortgagee, in respect of the principal paid by the husband out of his own property: *Pitt* v. *Pitt*, T. & R. 180. But the husband, or his representative, cannot recover any interest which he has paid during the wife's life: *Ruscombe* v. *Hare*, 2 Bli., N. S. 192.

The wife is the husband's creditor, in respect of incumbrances created for his benefit.

When the husband and wife pledge the wife's estate for money advanced to him (and in the absence of evidence to the contrary (*m*), the loan will be presumed to be for him), he will in equity be regarded as the principal debtor, and his wife as his surety, and his assets will be liable to exonerate the wife's estate from the charge: *Pocock* v. *Lee*, 2 Vern. 604; *Tate* v. *Austin*, 2 Vern. 689; 1 P. Wms. 264; *Bagot* v. *Oughton*, 1 P. Wms. 347; *Parteriche* v. *Powlet*, 2 Atk. 384; Amb. 150; *Astley* v. *Earl of Tankerville*, 3 B. C. C. 545; *Earl of Kinnoul* v. *Money*, 3 Swanst. 202, n.; subject, however, to the claims of his other creditors: *Tate* v. *Austin*, 2 Vern. 689; see also *Lancaster* v. *Evors*, 4 Beav. 158; *S. C.*, 10 Beav. 134; *Ferguson* v. *Gibson*, L. R., 14 Eq. 385.

(*m*) Parol evidence is admissible for this purpose: *Clinton* v. *Hooper*, 1 Ves. jun. 173.

The rule stated in the text applies to the exercise by the wife of a power of appointment to raise money for her husband: *Thomas* v. *Thomas*, 2 K. & J. 79; but not to a joint appointment by husband and wife, as there is no charge on the wife's estate: *Scholefield* v. *Lockwood*, 4 De G. J. & S. 22.

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But, if the money be borrowed for the use of the wife, or for the purpose of discharging debts owing by the wife while sole, the mortgage will be considered as the debt of the estate, and not of the husband: *Lewis* v. *Nangle*, Amb. 150; *S. C.*, 1 Cox, 240; and the circumstance of the husband having, by covenant or otherwise, made himself liable to the mortgagee, will not vary the rule.

So, where the husband and wife raise a sum of money to pay off a mortgage, which belonged to the estate when it came to the wife, his bond or covenant will not have the effect of making the debt his own: *Bagot* v. *Oughton*, 1 P. Wms. 347.

If it appear that the money was borrowed partly for the husband, and partly to pay debts and legacies owing and bequeathed by the lady's father, the husband will be liable for the former portion of it, and for that alone: *Earl of Kinnoul* v. *Money*, 3 Swanst. 202, n.

By sect. 3 of the Married Women's Property Act, 1882, loans by a wife to her husband are to be treated as his assets in case of his bankruptcy subject to the wife's claim to prove after all claims of other creditors have been satisfied.

Principle of contribution where estates belonging to different persons are included in one mortgage.

Contribution.]—Where several estates, or several parts of an estate comprised in one mortgage, happen upon the death of the mortgagor to devolve, by devise, or descent, or otherwise, to different persons, a question necessarily arises as to the proportions in which the mortgage-debt is to be borne by the respective owners.

The obvious rule in such cases is, to apportion the debt among the several estates, according to their relative values; see *Heveningham* v. *Heveningham*, 2 Vern. 355; *Aldrich* v. *Cooper*, 8 Ves. 390.

But this rule as to apportionment may, of course, be controlled by an indication of intention in the mortgage-deed, that one estate should be the primary, and the other the secondary or auxiliary security only.

As to property being primarily or

The intention, however, must be clearly manifested; and where A. conveyed freehold estates, by

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secondarily liable.

way of mortgage, for 1,300*l.*, and by the same indenture, "for better securing the payment," covenanted for surrender of the copyholds, it was held that these words had not the effect of making the freeholds applicable first: *Aldrich* v. *Cooper*, 8 Ves. 382. But where two freehold estates were mortgaged by the same deed, the demise of the second estate being declared to be for "the further, better, and more effectually securing" the mortgage money, "*and by way of collateral security for the same,*" it was held that the second estate was a subsidiary security only; *Marquis of Bute* v. *Cunynghame,* 2 Russ. 275; see *Stringer* v. *Harper,* 26 Beav. 33. But the use of the words "by way of collateral security" do not necessarily imply that the property so conveyed is to be only secondarily liable: *Re Athill,* 16 Ch. D. 211.

The rule above referred to will not hold good where several estates are devised or descend to the same person: *Stronge* v. *Hawkes,* 4 De G. & J. 654. In order that a right to contribution may exist there must be two properties equally liable, or constituting a common fund: see *Marquis of Bute* v. *Cunynghame,* 2 Russ. 275; *Averall* v. *Wade,* Ll. & G. 252; *Re Dunlop,* 21 Ch. D. at p. 592.

Suggestion.

To avoid disputes, it is always advisable for a person who is disposing by will, or otherwise, of charged estates, among different persons, who are to take *cum onere,* to declare the proportions in which they shall contribute to the incumbrance.

Who entitled to redeem.

Persons entitled to Redeem.]—The party entitled to redeem in equity, is he who, at the time limited by the mortgage-deed, would have been entitled to redeem at law, *e. g.*, the heir at law: *Lloyd* v. *Wait,* 1 Ph. 61; or the *hæres factus* or devisee of the equity of redemption: *Lewis* v. *Nangle,* 2 Ves. S. 431; and, therefore, if an administrator mortgage leaseholds, and die, his personal representative, and not the administrator *de bonis non* of the intestate, is the party to redeem: *Butler* v. *Bernard,* Freem. 139, pl. 176; 1 Ch. Ca. 224; *Skeffington* v. *Whitehurst,* 9 Cl. & F. 219.

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A *cestui que trust* or legatee must redeem through his trustee, unless a special case be made, as that the trustees or executors refuse : *Franklyn* v. *Ferne*, Barn. 30 ; *Troughton* v. *Binkes*, 6 Ves. 573 ; *White* v. *Parnther*, 1 Knapp. 179. Subject to this rule, any person having an actual interest in or lien upon the estate may redeem ; as, a dowress : *Palmer* v. *Danby*, Pre. Ch. 137 ; *Hills* v. *Adams*, 2 Atk. 200 ; but where a widow who had for the purpose of releasing her dower concurred with her husband in a mortgage, whereby the equity of redemption was reserved to the husband, it was held that her right to dower was extinguished, and that she had no right to redeem : *Dawson* v. *Bank of Whitehaven*, 6 Ch. D. 218. A jointress may redeem : *Howard* v. *Harris*, 2 Vent. 363.

So, a lessee may redeem : *Keech* v. *Hall*, Doug. 22. So, also, a subsequent incumbrancer : *Fell* v. *Brown*, 2 B. C. C. 276 ; a surety for payment of the mortgage debt : see *Newton* v. *Chorlton*, 10 Ha. 662 ; *Pearl* v. *Deacon*, 24 Beav. 180 ; *Forbes* v. *Jackson*, 19 Ch. D. 615 ; a bond-creditor : *Acton* v. *Pierce*, 2 Vern. 480 ; a judgment creditor having a lien : *Stonehewer* v. *Thompson*, 2 Atk. 440 ; see *Mildred* v. *Austin*, L. R., 8 Eq. 220 ; *Earl of Cork* v. *Russell*, L. R., 13 Eq. 210 ; a sequestrator : *Fawcett* v. *Fothergill*, Dick. 19 ; a person claiming under a voluntary conveyance : *Thorne* v. *Thorne*, 1 Vern. 182 ; *Rand* v. *Cartwright*, 1 Ch. Ca. 59 ; the trustee of a bankrupt (*n*) : *Francklyn* v. *Fern*, Barn. 30 ; the crown claiming by forfeiture : *Att.-Gen.* v. *Crofts*, 1 B. P. C. 222 ; or a lord, by escheat : *Downe* v. *Morris*, 3 Ha. 394.

Where trustees of an equity of redemption, under an old conveyance in trust for sale and payment of debts, which had long been satisfied, were in receipt of the rents and profits of the estate, and filed a bill to redeem without making the *cestui que trusts* parties, the bill was dismissed with costs : *James* v. *Biou*, 3 Swan. 239.

Where several persons are entitled to redeem,

Where several persons are entitled.

(*n*) An uncertificated bankrupt is incapable of suing : *Motion* v. *Moojen*, L. R. 14 Eq. 202 ; and consequently cannot redeem.

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redemption will be decreed according to their respective priorities: so where there are successive mortgages, the second will be entitled to redeem the first, and the third to redeem the second, &c.: *Archdeacon* v. *Bowes*, McCl. 153. The mortgagor or his heir must be made a party to an action for redemption in this case: *Fell* v. *Brown*, 2 Bro. C. C. 276; see *Palk* v. *Clinton*, 12 Ves. 48. It seems that one of several joint mortgagors cannot redeem alone: *Harper* v. *Godsell*, L. R. 5 Q. B. 422.

Settlement of mortgaged estate.

Where a mortgaged estate is in settlement, the tenant for life in possession has the first right to redeem: *Raffety* v. *King*, 1 Keen, 618; *Wicks* v. *Scriven*, 1 J. & H. 215; though his estate be only equitable: *Haymer* v. *Haymer*, 2 Vent. 343. The remainderman will also be entitled to redeem: *Corbet* v. *Barker*, 1 Anst. 138. But he must give the option of doing so to those who take estates prior to his, according to their respective priorities: *Raffety* v. *King*, 1 Keen, 618. If a tenant for life pays off an incumbrance, the principal money paid off is a charge on the inheritance: *Dolphin* v. *Aylward*, L. R. 4 H. L. 486.

Persons under disability.

A guardian may redeem on behalf of an infant: *Palmer* v. *Danby*, Pr. Ch. 137; and a committee on behalf of a lunatic: *Ex parte Grimstone*, Amb. 706.

The personal representatives of a mortgagor are not entitled to redeem a mortgage of real estate: *Catley* v. *Simpson*, 33 Beav. 551.

Forfeiture of equity of redemption.

By the stat. 4 & 5 Wm. & M. c. 16 (*post*, p. 951), a mortgagor making a second mortgage without discovering to the second mortgagee the prior mortgage forfeits his equity of redemption as against the second mortgagee: see *Kennard* v. *Futvoye*, 2 Giff. 81.

Effect of payment on the day appointed by the proviso for redemption.

Tender of Mortgage-Money.]—Where the mortgage-deed provides, that on payment of the debt on a prescribed day the deed shall be void, if the money is paid or tendered on the day, the estate ceases, and no assurance by the mortgagee is necessary; in such a case the mortgagee should sign a receipt for the money, acknowledging the payment on the day,

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which might be indorsed on the mortgage-deed; and this should be attested by some person who was witness to the payment. It rarely happens, however, that a mortgagor pays the money on the day or days provided in the clause for redemption; nor is such a payment often in the contemplation of the parties when the loan is contracted for. But where it is intended that the loan shall, either absolutely or conditionally, be continued for a definite time, this should invariably be made part of the stipulations of the deed.

As to naming a place of payment in the proviso.

As the mortgage-money is a sum in gross, and not issuing out of the land, tender upon the land is not sufficient: 5 Bac. Ab. 113; Co. Lit. 210 b; but unless a place of payment is mentioned, the mortgagor must seek out the mortgagee, and make the tender to him personally, unless he gives notice of a reasonable place at which the tender will be made, and tender pursuant to such notice has been held to be sufficient: *Gyles* v. *Hall*, 2 P. Wms. 378. If a place of tender be appointed, it is sufficient for him to tender the money at the place. Where a mortgagee had expressed his intention of holding the property, it was held that tender at his house pursuant to notice was sufficient, though made in his absence: *Manning* v. *Burgess*, 1 Ch. Ca. 29. If a time of the day be specified (as, between twelve and two in the afternoon), it is enough for the mortgagor to attend at the appointed place at any time during those hours: see Co. Lit. 212 a; and *Bernard* v. *Norton*, 10 L. T. N. S. 183. For this purpose an hour is considered as one twenty-fourth part of the day, and accordingly when the hour fixed was three o'clock, it was held that attendance at any time before four o'clock was sufficient: *Knox* v. *Simmonds*, 4 B. C. C. 433.

Mortgagee entitled to notice of payment of money.

A mortgagee, whose money is not paid on the day appointed by the proviso, is entitled to six calendar months' notice previously to its being paid: *Sharpnell* v. *Blake*, 2 Eq. Ca. Ab. 603, pl. 34; *Smith* v. *Green*, 1 Col. 555; *Harman* v. *Priestley*, 16 Beav. 569; and therefore, where a trustee for sale is to pay off a prior mortgagee out of the proceeds of the

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sale, he should give the mortgagee the requisite notice, unless he can induce him to accept it without notice. The tender must be made on the precise day of the expiration of the notice; if not, the mortgagee may claim another six months' notice: *Bishop* v. *Church*, 2 Ves. sen. 371. And the notice must not consist of a proposal merely, but must be positive and unconditional, *ibid.*; see also *Evans* v. *Judkins*, 4 Campb. 156; *Glascott* v. *Day*, 5 Esp. 48. If the mortgagee refuse to receive his money after due notice, interest will cease to run from the time of the tender: *Lutton* v. *Rodd*, 2 Ch. Cas. 206; *Manning* v. *Burgess*, 1 Id. 29; unless the ownership of the equity of redemption be doubtful, or in dispute: *Sharpnell* v. *Blake*, 2 Eq. Ca. Ab. 603, pl. 34. See, as to interest after refusal of tender by mortgagee's agent, *Mead* v. *Earl of Bandon*, 2 Dow. 268. In order to stop the interest, the money must continue ready for the mortgagee subsequently to the tender, no profit being made of it; for, if this be not the case, and the money be not forthcoming when the mortgagee demands it, the interest will run on as if no tender had been made: *Gyles* v. *Hall*, 2 P. W. 378; see also *Lutton* v. *Rodd*, 2 Ch. Cas. 206. A surety is liable only to pay principal, interest actually due, and costs: *Letts* v. *Hutchins*, L. R. 13 Eq. 176.

Interest stops after notice and tender.

As to tender of re-conveyance.

The mortgagee is not bound to reconvey until the money is in his own hands—payment into court not being sufficient: *Postlethwaite* v. *Blythe*, 3 Madd. 242. But the mortgagor tendering the money has no right to require the mortgagee at the same time to execute a deed of reconveyance without having previously given him an opportunity of examining it; for which purpose the draft or the engrossment should be sent to the mortgagee's solicitor a reasonable time before the period fixed for the payment of the money: *Wiltshire* v. *Smith*, 3 Atk. 89. If this be not done, the mortgagor can only require the delivery of the title-deeds when he pays his money, and must get the reconveyance executed afterwards.

Bank notes a legal tender, except at the Bank and branch banks.

By the stat. 3 & 4 Will. 4, c. 98, sect. 6, a tender of a note or notes of the Bank of England is a legal tender for all sums above five pounds, on all occa-

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sions; but no such note or notes are to be deemed a legal tender by the Bank of England, or any branch thereof; but the governor and company are not to be liable to pay at any branch bank any note not payable at such branch bank; but they are liable to pay at the Bank of England all their notes, and the notes of any branch bank (*n*). In making a tender the money must be actually produced, unless the creditor expressly dispense with its production, by declaring that he will not accept it if produced. It must also be unconditional: see *Laying* v. *Reader*, 1 Car. & P. 257. And where a mortgagor makes an unconditional tender of the whole amount due, a refusal by the mortgagee to accept it will render him liable to the costs of a subsequent action for redemption: *Harmer* v. *Priestly*, 16 Beav. 569. And if after such a tender a mortgagee exercises his power of sale, the sale will be set aside as against the mortgagee, and also as against a purchaser for value *with notice*, notwithstanding a proviso that the purchaser shall not be concerned to enquire: *Jenkins* v. *Jones*, 2 Giff. 99. Tender of mortgage-money may, of course, be made to an agent, if authorized to receive it: see *Goodland* v. *Blewitt*, 1 Cam. 477; *Moffatt* v. *Parson*, 5 Taunt. 347; *Meade* v. *Bandon*, 2 Dow. 268; *Dickinson* v. *Shee*, 4 Esp. 66. In order to constitute a legal tender, the offer must be of the exact sum, and not of a larger sum, *requiring change*: *Betterbee* v. *Davis*, 3 Camp. 70; *Robinson* v. *Cook*, 6 Taunt. 336; see also *Strong* v. *Harvey*, 11 Moore, 83; *Cottrell* v. *Finney*, L. R. 9 Ch. A. 541.

Notice when not necessary.

The object of requiring notice previously to the payment of the money, is to prevent the mortgagee being taken by surprise, and the money being suddenly forced upon him when he has not the means of employing it to advantage, by which a loss of interest would be incurred. If, therefore, it be paid in pursuance of a demand made by him (and the com-

(*n*) Formerly a doubt was entertained how far a tender in Bank of England notes was sufficient: see the remarks in the 3rd edition of Bythewood and Jarman's Conveyancing, Vol. V., p. 380, and see Coote Mortg. 10.

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mencement of proceedings, either at law or in equity, for the recovery of the money or the land, would clearly amount to such a demand), previous notice is not requisite: *Sharpnell* v. *Blake*, 2 Eq. Ca. Ab. 303, pl. 34; *Letts* v. *Hutchins*, L. R. 13 Eq. 176.

And the same rule, of course, applies where a day is, by mutual consent, appointed for repayment of the money. Thus, where the mortgagee signed a memorandum agreeing to reconvey the mortgaged premises on the payment of the debt on a given day, and (he having died in the interval) it was tendered on that day to his executors, who refused to receive it, they were held not to be entitled to interest after the day: *Austen* v. *Executors of Dodwell*, 1 Eq. Ca. Ab. 318, pl. 9. But if in such a case the money was not tendered on the day, the agreement would be at an end, and the mortgagee would be entitled to the usual notice.

Whether mortgagee can accept interest in advance in lieu of notice.

And it is said that an offer from the mortgagor to pay six months' interest in advance, will be equivalent to a notice: see *Letts* v. *Hutchins*, *supra*. Since the repeal of the usury laws, there is no objection to the acceptance of such a payment in lieu of notice (*o*). Where notice has been given by a mortgagor for payment of the money, and default is made on the day appointed, the mortgagee will be entitled to demand a full additional half-year's interest: *Bartlett* v. *Franklin*, 15 W. R. 1077.

If the mortgagor does not pay the principal and interest on the day appointed by the decree in a redemption suit, he will not be allowed to redeem, although, before any motion to dismiss, he has tendered the amount with subsequent interest: *Faulkner* v. *Bolton*, 7 Sim. 319; unless good cause is shown for enlarging the time: *Nanny* v. *Edwards*, 4 Russ. 124: *Renvoize* v. *Cooper*, 1 S. & S. 364; *Edwards* v.

(*o*) An agreement not to pay off mortgage-money without six months' notice, has been held to mean calendar months: *Dyer* v. *Sweeting*, Willes, 588; and the same construction would probably be given to a notice; though, in this and other cases, certainty, which, as Lord *Coke* says, is "the mother of repose and quietness" (Co. Litt. p. 212 a.), ought always to be aimed at: see *Moore* v. *M'Kay*, 1 Beatt. 287.

Cunliffe, 1 Mad. 287; *Cholmley* v. *Lord Oxford*, 2 Atk. 267; *Novosielski* v. *Wakefield*, 17 Ves. 417; *Lant* v. *Crispe*, 5 B. P. C. 200. The mortgagor is not bound until *decree*, and, therefore, if his action is dismissed for want of prosecution, he may bring another action: *Hansard* v. *Hardy*, 18 Ves. 460; see *Cholmley* v. *Lord Oxford*, 2 Atk. 267. So also the mortgagee retains all his rights as such until the day fixed by the decree for redemption: *Grugeon* v. *Gerrard*, 4 Y. & C. 128. Redemption.

As to consolidation of mortgages and its effect on a mortgagor's right to redeem, see *post*, p. 937. Consolidation.

Bar of Redemption by the Statute of Limitations.]—Prior to the stat. 3 & 4 Will. 4, c. 27, it was settled that adverse possession for twenty years (with the further allowance of ten years in case of disability), was a bar of an equitable right, as much between parties who each claimed a mere equity, as between *cestui que trust* and an adverse possession of the legal estate: *Cholmondeley* v. *Clinton*, 4 Bl. 1. The stat. 3 & 4 Will. 4, c. 27, does not bar the remedy of a *cestui que trust* against his trustee, or any person claiming through him, except in the case of a purchaser for value from the trustee, and then only against the purchaser and his assigns. See as to adverse enjoyment in equity, *Corbet* v. *Barker*, 1 Anstr. 138; 3 Id. 755; *Belch* v. *Harvey*, 2 Sug. Vend. 339; *Blake* v. *Foster*, 4 Bl. 140; 2 Ball & B. 565; *Harrison* v. *Hollins*, Id. 471; *Spurgeon* v. *Collier*, 1 Ed. 55; *Reeve* v. *Hicks*, 2 S. & S. 403; *Ravald* v. *Russell*, 1 You. 9; *Collard* v. *Hare*, 2 Russ. & Myl. 675; *Ashton* v. *Milne*, 6 Sim. 369; *Latter* v. *Dashwood*, Id. 462.

In *Raffety* v. *King*, 1 Kee. 601, it was held that if the mortgagee entered not in his character or right of mortgagee only, but as purchaser of the equity of redemption, he must look to the title of his vendor, and to the validity of the conveyance he takes; and if the conveyance be such as only to give him a life estate, he must take that estate, subject to the duties which are attached to it in the relation which subsists between the tenant for life and the remainder- From what period the statute runs, when mortgagee has purchased a partial interest in the equity of redemption.

Redemption.

man; one of those duties being to keep down the interest of the mortgage, and that time did not run against the remainderman during the continuance of the life estate (*p*). And the doctrine that time will not run under such circumstances, applies under the Statutes of Limitations even where the life estate has been enlarged into a base fee: *Mills* v. *Capel*, L. R. 20 Eq. 692; see also *Lewis* v. *Rees*, 3 K. & J. 132.

The law on this point is now regulated by sects. 24, 25, 26, and 27 of the Statute of Limitations (3 & 4 Will. 4, c. 27), and sect. 7 of the Real Property Limitation Act, 1874 (re-enacting the repealed sect. 28 of the former Act, with the substitution of twelve for twenty years). These provisions will be found stated at length *ante*, tit. Abstracts, Vol. I., pp. 15, 16, 26, and it will be sufficient here to state their general effect. After the 31st of December, 1833, no person claiming land or rent in equity is to bring any suit after the time when, if entitled at law, he might have brought his action. In cases of express trust the right is not to be deemed to have accrued until a conveyance to a purchaser, and then only against such purchaser and persons claiming through him. In cases of fraud, no time is to run while the fraud remains concealed; but this provision is not to prejudice purchasers without notice of the fraud. The equitable jurisdiction of the Court on the ground of acquiescence is expressly saved. When a mortgagee has taken possession of any land, or obtained receipt of the rents and profits of any land comprised in his mortgage, the mortgagor and persons claiming through him are to be barred at the end of twelve years from the time when the mortgagee took pos-

(*p*) The rule as between the tenant for life and remainderman, is, that the latter may compel the former to keep down the interest accruing during his enjoyment: *Lord Penrhyn* v. *Hughes*, 5 Ves. 99; *Hayes* v. *Hayes*, 1 Ch. Ca. 223. See *Tracy* v. *Hereford*, 2 B. C. C. 128. A tenant in tail in possession, of full age, is not bound to keep down the interest for the benefit of the issue or remainderman: *Amesbury* v. *Brown*, 1 Ves. sen. 479. An infant tenant in tail is in the position of a tenant for life in this respect: *Burges* v. *Mawbery*, T. & R. 167.

session or obtained receipt of the rents and profits, or from the last written acknowledgment of the debt. And see Coote, Mortg. 1003 *et seq.* ; Fisher, Mortg. 689 *et seq.* Redemption.

Doubts were formerly entertained whether or not the stat. 3 & 4 Will. 4, c. 27, applied to mortgagees out of possession so as to have the effect of barring them in every case, after the lapse of twenty years from the day of default: see *Doe* v. *Williams*, 6 Nev. & Man. 816; 5 Ad. & E. 297. These doubts have been removed by the stat. 1 Vict. c. 28, which, reciting the former statute, and the doubts respecting its effect, enacts :— Mortgagee of land within the 3 & 4 Will. 4, c. 27, s. 1, may bring action to recover land within twenty years after last payment of principal or interest.

"That it shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said Act, to make an entry, or bring an action at law, or suit in equity, to recover such land, at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in the said act notwithstanding."

By sect. 8 of the Real Property Limitation Act, 1874 (stated *post*, p. 967), all sums of money secured by mortgage, or otherwise charged on land, or rent, are to be deemed satisfied at the end of twelve years, if no interest is paid or acknowledgment given in writing, and duly signed in the meantime.

Formerly the time ran against an administrator only from the date of the grant of the letters of administration : *Jolliffe* v. *Pitt*, 2 Vern. 694 ; *Perry* v. *Jenkins*, 1 My. & C. 118. But time now runs in every instance during the dormancy of the representation : see stat. 3 & 4 Will. 4, c. 27, sect. 6, set out *ante*, Vol. I., p. 10. Claim of administrator.

Inns of Court.]—It seems that in the case of a mortgage of chambers in any of the Inns of Court, the proper course is to apply for redemption to the Benchers of the Inn, and that the Court will not interfere, unless, on application, the Benchers refuse to act : see *Rakestraw* v. *Brewer*, 2 P. Wms. 511. Mortgage of chambers.

CHAPTER V.

RIGHTS AND DISABILITIES OF THE MORTGAGEE.

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1. RIGHTS OF MORTGAGEE GENERALLY.

Rights of Mortgagee Generally.

As to the allowance of conveyancing and other charges between mortgagor and mortgagee.

Mortgagee's Costs and Expenses.]—It has been held, that a mortgagor is not bound to pay the expense of a declaration of trust executed by the mortgagee in favour of a third person, whose money he had advanced: *Ex parte Grubb* (*Martin's Case*), 2 Moo. & P. 240; *S. C.*, 5 Bing. 160. And, upon the same principle, where a mortgagee transfers his security, without the concurrence of the mortgagor, and without first requiring him to pay off the mortgage debt, the latter cannot be required to pay the costs of the transfer: see *Shakleton* v. *Shakleton*, 2 Sim. & S. 242; *Re Radcliffe*, 22 Beav. 201. A mortgagee is entitled to a fair copy of the mortgage deed at the mortgagor's expense, which he may retain until discharge of the debt, but must then deliver up to the mortgagor: *Re Wade & Thomas*, 17 Ch. D. 348. Costs occasioned by the lunacy of the mortgagee must generally be paid out of his estate: *Ex parte Richards*, 1 J. & W. 264; see *Re Thomas*, 1 W. R. 155; *Hawkins* v. *Perry*, 8 De G. M. & G. 439. For exceptions to this rule, see *Re Stuart*, 2 De G. & J. 317; *Re Jones*, 2 De G. F. & J. 554; *Re Lewis*, 1 Mac. & G. 23; *Re Jones*, 2 Ch. D.

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10; *Re Sparkes*, 6 Ch. D. 361. And the devisee of a mortgagee was directed to pay the costs of a foreclosure suit occasioned by the loss of a mortgage deed: *Stokoe* v. *Robson*, 19 Ves. 38; see *Wontner* v. *Wright*, 2 Sim. 541; *Lord Midleton* v. *Eliot*, 15 Sim. 531; *James* v. *Rumsey*, 11 Ch. D. 398.

Costs of re-conveyance.

The general rule is that the costs of re-conveyance must be borne by the mortgagor: *King* v. *Smith*, 1 De G. M. & G. 436. If it appears on the face of the mortgage, that the mortgagee is a trustee, the mortgagor must pay all costs of re-conveyance: *Re Lewis*, 1 Mac. & G. 23; but otherwise the costs of an application under the Trustee Act, 1850, to appoint persons to convey will be payable out of the trust estate: *Re Townsend*, 1 Mac. & G. 686; *Re Jones*, 2 Ch. D. 70. Any increase of expense arising, on the redemption of the mortgage, from the fact of the mortgagee having disposed of the money by way of settlement or otherwise, must fall on the mortgagor, upon the principle that, at law, after a mortgage is forfeited, the estate is the absolute property of the mortgagee, and he may deal with it as his own: and that he is enabled to be indemnified from all costs arising out of his legal acts: *Wetherell* v. *Collins*, 3 Madd. 255. In *Bartle* v. *Wilkins*, 8 Sim. 238, it was held that this rule applied to a foreclosure as well as to a redemption.

Assignment *pendente lite*.

But it is clear that, if the mortgagee assign his security, as he may do, pending a suit for redemption or foreclosure, he must pay the costs of any supplemental proceedings which thus become necessary: *Barry* v. *Wrey*, 3 Russ. 465; *Booth* v. *Creswicke*, 8 Sim. 352; *Coles* v. *Forrest*, 10 Beav. 552. A purchaser *pendente lite* comes in *pro bono et malo*, and may be liable to all the costs in the proceedings from the beginning to the end of the suit: *Anon.*, 1 Atk. 89.

As to costs where the mortgagor is insolvent, see *Weaving* v. *Count*, 6 Sim. 439; *Collins* v. *Shirley*, 1 R. & M. 638; *Peake* v. *Gibbon*, 2 R. & M. 354; *Case* v. *Belcher*, 1 Ha. 310.

Costs of law proceedings allowed to mortgagee.

In ordinary cases, a mortgagee is allowed, as a matter of course, the costs of legal proceedings taken by him to ascertain or maintain his rights, or

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to enforce his securities; thus, the mortgagee will be allowed the costs of an action for ejectment: *Anon.*, Moseley, 45; *Lewis* v. *John*, 9 Sim. 366; *Sandon* v. *Hooper*, 6 Beav. 246; of an action against the mortgagor's surety: *Ellison* v. *Wright*, 3 Russ. 308; of taking out administration: *Ramsden* v. *Langley*, 2 Vern. 536; *Hunt* v. *Fownes*, 9 Ves. 70; see *Millard* v. *Magor*, 3 Mad. 433; of obtaining a stop order upon a fund in Court, if the mortgage deed so provides: *Hoole* v. *Roberts*, 12 Jur. 108; but not otherwise, unless by special direction of the Court; *Waddelove* v. *Taylor*, 6 Ha. 307. So a mortgagee was held to be entitled to be reimbursed his expenses of taking and holding possession of a mortgaged ship, and of effecting insurances, and advertising it for sale, as "just allowances": *Wilkes* v. *Saunion*, 7 Ch. D. 188. So also a mortgagee is entitled, on redemption, to be repaid his expenses of renewing leases; *Lucan* v. *Mertins*, 3 Atk. 4; *Manlove* v. *Bale*, 2 Vern. 84; of necessary repairs: *Hardy* v. *Reeves*, 4 Ves. 480; of preserving the property from deterioration: *Burrows* v. *Molloy*, 2 J. & L. 521; of permanent improvements (*a*), if reasonable, and if the value of the property is thereby increased: *Godfrey* v. *Watson*, 3 Atk. 518; *Hipkins* v. *Amory*, 2 Giff. 233; *Powell* v. *Trotter*, 1 Dr. & Sm. 206; *Sandon* v. *Hooper*, 6 Beav. 246; *Shepard* v. *Jones*, 21 Ch. D. 469. A mortgagee will also be allowed all expenses properly incurred in payment of head rent: *Burrows* v. *Molloy*, 2 J. & L. 521; of redemption of land tax: *Knowles* v. *Chapman*, Set. 1070; of paying fines to a building society: *Provident Permanent Building Society* v. *Greenhill*, 9 Ch. D. 122.

To take a case out of this rule, vexatious or oppressive conduct on the part of the mortgagee must be proved: *Detillin* v. *Gale*, 7 Ves. 583; *Loftus* v. *Swift*, 2 Sch. & L. 657; *Trecothick* v. ——, 2 V.

(*a*) A mortgagee intending to make improvements should be careful to give notice to the mortgagor of such intention: if the mortgagor agrees to, or acquiesces in the outlay, the mortgagee will be entitled to an inquiry as to the increased value: *Shepard* v. *Jones*, *supra*.

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& B. 181. If the mortgagee file a bill for foreclosure or sale, and it appear that nothing was due to him at the time, he must pay all the costs: *Bennington* v. *Harwood*, T. & R. 477; *Morris* v. *Islip*, 23 Beav. 244. See further, as to a mortgagee's paying the costs of his misconduct, *Mocatta* v. *Murgatroyd*, 1 P. Wms. 393; *Baker* v. *Wind*, 1 Ves. Sen. 160; *Morony* v. *O'Dea*, 1 Ball & B. 121; *Lord Midleton* v. *Eliot*, 15 Sim. 531; *Peers* v. *Ceeley*, 15 Beav. 209; *Allen* v. *Knight*, 5 Ha. 272; *Chaplin* v. *Young*, 33 Beav. 330; *Mayer* v. *Murray*, 8 Ch. D. 424; see also Seton, 1060.

Equitable mortgagee.

Generally speaking an equitable mortgagee is entitled to the same costs as a legal mortgagee: see *Lewis* v. *John*, 9 Sim. 366; *Connell* v. *Hardie*, 3 V. & C. 582; *Ward* v. *Ward*, 4 Drew. 602. But an equitable mortgagee will not be allowed the costs of an unsuccessful attempt to defend an action to recover possession by the legal owner: *Dryden* v. *Frost*, 3 My. & C. 675; nor for improvements as against the first mortgagee: *Landowners, &c., Co.* v. *Ashford*, 16 Ch. D. 412. And in bankruptcy, although a memorandum of deposit is not necessary to entitle a mortgagee to an order for sale, he will not be entitled to his costs unless the deposit of the title-deeds is accompanied by such evidence: *Ex parte Trew*, 3 Mod. 372; *Ex parte Moss*, 3 De G. & S. 599; *Ex parte Barclay*, 5 De G. M. & G. 403.

As to whether the costs allowed to a mortgagee are the costs between solicitor and client, or merely the costs between party and party, see *Lomax* v. *Hide*, 2 Vern. 185; *Ramsden* v. *Langley*, Id. 536; *The Kestrel*, L. R. 1 A. & E. 78. The scale of costs is regulated by the amount of the original advance, not by the amount due on commencement of the litigation: *Cotterell* v. *Stanton*, L. R. 9 Ch. A. 514. In actions for redemption, this distinction is to be observed, that if the mortgagee resists the redemption, on any reasonable objection to the title of the person claiming to redeem, he is entitled to his costs, though the objection should turn out to be untenable: *Wilson* v. *Metcalfe*, 3 Madd. 45; but, if he asserts his title to the equity of redemption him-

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self, he does not stand, with respect to the costs incurred by the agitation of that question, in the favourable situation of a mortgagee, which character he has, in fact, renounced; and an improper and probably, in general, an unsuccessful claim, would be followed by his having to pay at least his own costs, if not the costs of the mortgagor: *Baker* v. *Wind*, 1 Ves. 461; *Broughton* v. *Davis*, 1 Pri. 224; *Harvey* v. *Tebbut*, 1 J. & W. 202; *Archdeacon* v. *Bowes*, 1 M'Clel. 149; *England* v. *Codrington*, 1 Eden, 169.

Solicitor mortgagee.

A mortgagee who acts as his own solicitor is only entitled to his costs out of pocket: *Sclater* v. *Cottam*, 3 Jur. N. S. 630; *Gregg* v. *Slater*, 22 Beav. 314.

Insurance when mortgage is made since 1881.

With regard to insurance of mortgaged property as regards mortgages made after the 31st of December, 1881, the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), enacts as follows:

Powers incident to estate or interest of mortgagee.

Sect. 19. "(1.) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

Power for mortgagee to insure.

"(ii.) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money.

Amount and application of insurance money.

Sect. 23. "(1.) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by this Act shall not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, then shall not exceed two third parts of the amount that would be required, in case of total destruction, to restore the property insured.

"(2.) An insurance shall not, under the power conferred by this Act, be effected by a mortgagee in any of the following cases (namely):

"(i.) Where there is a declaration in the mortgage deed that no insurance is required:

"(ii.) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed:

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"(iii.) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is by this Act authorized to insure.

"(3.) All money received on an insurance effected under the mortgage deed or under this Act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

"(4.) Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage."

No allowance for fire insurance under old law.

Under the old law, which still applies to all mortgages and charges prior to the 28th of August, 1860, and to mortgages and charges not made by deed since that date, no allowance can be made to a mortgagee, whether in possession or not, in respect of payments made by him for insuring the property against fire, except in pursuance of express provisions in that behalf in the instrument creating such mortgage or charge: *Dobson* v. *Land*, 8 Ha. 216; *Bellamy* v. *Brickenden*, 2 J. & H. 137. And even where there was a covenant by the mortgagor to insure, it was held that a mortgagee insuring without an express power in his mortgage, could not be allowed premiums paid by him for fire insurance as against a subsequent incumbrancer: *Brook* v. *Stone*, 13 W. R. 401.

Stat. 23 & 24 Vict. c. 145, s. 11.

By the stat. 23 & 24 Vict. c. 145, sect. 11, mortgagees were empowered where principal money was secured by deed made after the 28th of August, 1860 (see sect. 34 of that Act), on any hereditaments, at any time after the expiration of one year from the time when such principal money had become payable, or after any interest was in arrear for six months, or after any omission by the mortgagor to pay premiums pursuant to the deed, to insure and keep insured against fire, the whole or any part of the property, and to add the premiums paid for insurance to the principal money secured at the same rate of interest. This enactment is now re-

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pealed by the Conveyancing and Law of Property Act, 1881, but so as not to affect the validity, operation, or effect of any interest executed or made, or anything done or suffered before the commencement of the repealing Act: see sect. 71, and Sched. II. of that Act.

Provisions of the Acts compared.

In comparing the provisions of the two Acts, it will be seen that several of the restrictions imposed by the former Act on the exercise of a mortgagee's power of insuring are now removed; but on the other hand a new restriction is imposed, whereby a mortgagee is empowered to insure only to the extent of two-thirds of the amount necessary to restore the property, unless otherwise provided by the mortgage deed.

Suggestion.

It will therefore be prudent for mortgagees whose security comprises buildings to require, by way of substitution or supplement to the statutory provisions as to insurance now in force, that the deed shall contain an express covenant by the mortgagor to insure, or at all events a proviso that the insurance effected by the mortgagee in exercise of his statutory or express power, shall be for the whole amount required to restore the insurable property comprised in the mortgage, and other clauses for the protection of the mortgagee: see *post*, p. 980.

Indemnity.

A fire insurance is merely a contract of indemnity, and accordingly, the general rule is, that if the insured recovers compensation from other sources, the insurer is entitled to recover from him the amount received in excess of the loss actually sustained; *North British, &c. Ins. Co.* v. *London, &c. Ins. Co.*, 5 Ch. D. 569; *Darrell* v. *Tibbits*, 5 Q. B. D. 560; *Rayner* v. *Preston*, 18 Ch. D. 1.

Statutory obligations as to application of insurance moneys.

By the stat. 14 Geo. 3, c. 78, sect. 83 (perpetuated by the stats. 7 & 8 Vict. c. 84, and 18 & 19 Vict. c. 122), directors of insurance companies are in certain cases authorized and required to apply insurance moneys in restoring buildings destroyed or damaged by fire: see *Ex parte Goreley*, 4 De G. J. & S. 477; *Sampson* v. *Scottish Union Ins. Co.*, 1 H. & M. 618.

Compound interest.

Interest.]—A mortgagor and mortgagee may turn

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interest actually accrued into principal: *Ossulston* v. *Yarmouth*, 4 Salk. 449; *Brown* v. *Barkham*, 1 P. W. 654; provided there is no extortion on the part of the mortgagee: *Thornhill* v. *Evans*, 2 Atk. 330. But before the repeal of the laws against usury an agreement, *ab ante*, between mortgagor and mortgagee, that interest should after a certain period be considered as principal, and carry interest, was illegal and void: *Ossulston* v. *Yarmouth*, Salk. 449; for it was considered as tending to usury, and oppressive: *Le Grange* v. *Hamilton*, 2 H. Bl. 144; *Chambers* v. *Goldwin*, 9 Ves. 271.

Now, however, any stipulations between a mortgagor and mortgagee as to compound interest, and converting future interest into capital, are valid in the absence of fraud or oppression: see *Moss* v. *Banbridge*, 18 Beav. 478. So, in a mortgage of a reversionary interest a covenant that interest in arrear should be capitalized, was held to be good and valid: *Clarkson* v. *Henderson*, 14 Ch. D. 348.

Arrears of interest converted into principal are regarded by the Court as a fresh advance, and as a mortgagee with notice of a subsequent incumbrancer is not allowed to tack a further advance, so any arrangement for converting interest into capital must be without prejudice to any subsequent incumbrance of which the mortgagor had notice at the date of the agreement: *Digby* v. *Craggs*, Amb. 612; and see Coote Mortg. 943. So, also, on an assignment of a mortgage, arrears of interest cannot be converted into principal, without the concurrence of the mortgagor; *Macclesfield* v. *Fitton*, Vern. 169; *Ashenhurst* v. *James*, 3 Atk. 271: see also *Cottrell* v. *Finney*, L. R., 9 Ch. A. at p. 548; though the rule was formerly different; see *Chesterfield* v. *Cromwell*, 1 Eq. Ca. Ab. 286, pl. 1.

Intention must be clear.

The intention of the parties to convert interest into principal must be clearly indicated or expressed.

In *Rufford* v. *Bishop*, 5 Russ. 346, land mortgaged to bankers, to secure a current balance, was charged with a balance partly made up of interest converted into principal, by rests, sometimes taken annually, and sometimes half-yearly, although there

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was no written agreement; such being the custom of the trade (*b*). But generally speaking the rule is that the agreement must be expressly stated in writing, and signed by the parties; the mere signing an account by the mortgagor, by which the interest is admitted to be due, does not make it carry interest: *Brown* v. *Barkham*, 1 P. W. 652.

Enlargement of time for payment.

In taking a mortgage account, though the practice was formerly different (see *Bickham* v. *Cross*, 2 Ves. sen. 471; *Crease* v. *Hunter*, 2 Ves. jun. 159), the rule now is, that the time for paying what is found due on the mortgage is enlarged upon payment of the interests and costs found due, and the subsequent interest on the principal only; and subsequent costs are directed to be computed and taxed: *Whatton* v. *Cradock*, 1 Kee. 269. A distinction has been taken between a decree for sale and payment of incumbrances according to their priorities, and a decree for foreclosure. Thus, Lord *King*, in *Neal* v. *Att.-Gen.*, refused to give interest upon the whole sum reported due for principal, interest, and costs, to a prior, against a subsequent, incumbrancer: Mos. 246; see *Harris* v. *Harris*, 3 Atk. 722; *Monkhouse* v. *Corporation of Bedford*, 17 Ves. 380.

But in the case of a sale made in an administration suit, Lord *Langdale*, M. R., said, that it would only be proper to direct costs on the aggregate amount of principal, interest, and costs, where the Court, for any special cause, should think fit to enlarge the time without ordering any immediate payment: *Brewin* v. *Austin*, 2 Kee. 211.

As to the rate of in-

Where the Court allows interest on the interest and

Bankers.

(*b*) Compound interest will not be allowed in the case of a banking account after the account is closed: *Ex parte Bevan*, 9 Ves. 223; *Fergusson* v. *Fyffe*, 8 Cl. & F. 140. Nor will simple interest be allowed independently of the stat. 3 & 4 Wm. 4, c. 42: *Attwood* v. *Taylor*, 1 Man. & Gr. 300. A banker cannot charge compound interest after he has taken a mortgage: *Crosskill* v. *Bower*, 32 Beav. 86; nor in respect of securities deposited with them not on a general account, but in respect of specific sums: *London Chartered Bank of Australia* v. *White*, 4 App. Ca. 413.

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costs, the rate is not regulated by the rate of interest which the principal sum secured by the mortgage carries; for the Court will only allow its rate of interest, viz., 4 per cent., though larger interest on the principal may have been reserved by the mortgage: *Bickham* v. *Cross*, 2 Ves. sen. 471. But a mortgagee is allowed interest on money disbursed by him in relation to the mortgaged property, &c., at the rate reserved upon the principal sum, as for renewal fines: *Woolley* v. *Drag*, 2 Anst. 551; premiums on life policies: *Hodgson* v. *Hodgson*, 2 Kee. 704; money spent in defending the title: *Godfrey* v. *Watson*, 3 Atk. 518; or in improvements, where expenditure on improvements would be allowed: *Quarrell* v. *Beckford*, 1 Mad. 281; or in redemption of land tax: *Knowles* v. *Chapman*, cit. Set. Dec. 1070; and other similar expenses, as to which, see *ante*, p. 890.

terest allowed by the court.

Proviso for the reduction of interest on punctual payment.

It was formerly much questioned in regard to clauses providing for a reduction of interest on punctual payment, whether a court of equity would relieve against the larger rate of interest if payment be not made within the prescribed period.

The distinction adopted in most of the cases, and which may now be considered as established, is this: that if interest be reserved, with an agreement for a reduction on punctual payment, the condition must be complied with, or the higher rate of interest will become payable as well in equity as at law; but if the lower rate of interest be first reserved, with an agreement that if it be not paid within a given time larger interest shall become payable, equity regards such a stipulation in the nature of a penalty, and will relieve: *Jory* v. *Cox*, Pre. Ch. 160; *Lady Holles* v. *Wyse*, 2 Vern. 289; *Strode* v. *Parker*, Id. 316; *Nicholls* v. *Maynard*, 3 Atk. 519. See also *Sexton* v. *Slade*, 7 Ves. 273; *Wallingford* v. *Mutual Soc.*, 5 App. Ca. 685.

If any condition is attached to a proviso for reduction of interest as to time or otherwise, such condition must be strictly observed: *Bonafous* v. *Rybot*, 3 Bur. 1394.

Whether condition defeated by single default.

A question on the construction of a clause of this nature arose in the case of *Stanhope* v. *Manners*,

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2 Ed. 197, where interest on a mortgage was reserved at £5 per cent., with a proviso that interest after the rate of £3 15*s.* per cent., so often as such interest should be paid within the times specified, should be accepted in lieu of the interest before agreed to be paid. Default was made in payment of the first half-year's interest within the three months; the second was tendered within the time, but refused on the ground that the first default put an end to the agreement for the reduction as to the subsequent payments; and it was held that it did not.

Parol agreement.

It has been decided that an oral agreement for the reduction of interest secured by a mortgage deed is good: *Milton* v. *Edgeworth*, 5 Bro. P. C. (Toml. ed.) 313. See as to presuming an agreement for reduction of interest on punctual payment from the acceptance of interest at a lower rate than that named in the mortgage, *Gregory* v. *Pilkington*, 8 De G. M. & G. 616. A trustee is justified in accepting interest at the lower rate after the higher rate has become payable by the strict terms of the contract: *Booth* v. *Allington*, 3 Jur. N. S. 49.

Higher rate of interest in consideration of forbearance, &c.

But it would seem that an independent agreement between the mortgagor and mortgagee stipulating for an increased rate of interest in consideration of forbearance by the mortgagee will be valid, provided the terms of the agreement are not unreasonable: *Brown* v. *Barkham*, 1 P. Wms., at p. 654; see also *Burton* v. *Slattery*, 5 Br. P. C. 233. A mortgagee in possession through the mortgagor's default is entitled, on the accounts being taken, to interest at the higher rate: *Union Bank of London* v. *Ingram*, 16 Ch. D. 53. Where a mortgage debt is repayable by instalments, a stipulation may be inserted in the mortgage deed for payment of a commission on default of punctual payment of instalments: *General Credit, &c., Co.* v. *Glegg*, 22 Ch. D. 549. A mortgagor will not be entitled to relief against a stipulation that the principal shall not be called in before a specified date, provided the interest is punctually paid: *Hicks* v. *Gardner*, 1 Jur. 541.

Statutes of Limitations.

By the stat. 3 & 4 Will. 4, c. 27, sect. 42, a mortgagee can recover as against the land only six years'

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arrears of interest; but by the stat. 3 & 4 Will. 4, c. 42, sect. 3, he may recover on the covenant in his mortgage twenty years' arrears: see *ante*, pp. 760, 761; the latter enactment being deemed an exception to the operation of the former: *Paget* v. *Foley*, 2 Bing. N. C. 679; *Strachan* v. *Thomas*, 12 A. & E. 536; *Lewis* v. *Duncombe*, 29 Beav. 175. The effect of sect. 8 of the Real Property Limitation Act, 1874 (*post*, p. 967), would seem to be to reduce the limit to at most twelve years: see *Sutton* v. *Sutton*, 22 Ch. D. 511 (*b*).

Mortgagee's right to title-deeds.

Delivery, Custody, and Production of Title-Deeds.] —A mortgagee in fee of freeholds is entitled to possession of the deeds and documents of title: *Austin* v. *Croome*, Car. & M. 653; *Harrington* v. *Price*, 3 B. & Ad. 170. But a mortgagee of a term of years is not entitled to deeds, &c., relating to the freehold except by special agreement: *Wiseman* v. *Westland*, 1 Y. & J. 117. A mortgagee of leaseholds is, however, entitled to delivery of the lease and all other documents relating to the leasehold title: *Hooper* v. *Ramsbottom*, 6 Taunt. 12. The right of a legal mortgagee of a life estate in freeholds is subject to the remainderman's right to have them brought into Court, or otherwise placed in safe custody: *Garner* v. *Hannyngton*, 22 Beav. 627; *Jenner* v. *Morris*, L. R. 1 Ch. A. 603. Where the mortgaged property was originally part of a larger estate, the owner of which holds the greater part of the documents of title, the mortgagor will have at all events the conveyance to himself, and a covenant for or acknowledgment of his right to production of the earlier documents, to delivery of which the mortgagee will be entitled. A mortgagee should be careful to require delivery to him of the deeds and documents of title to which he is entitled on or before completion of the mortgage. The possession of them by the mortgagor does not indeed prove

Mortgagee should require delivery of deeds.

(*b*) Mr. Fisher is of opinion that only six years' arrears of interest on a mortgage are now recoverable in any case: see Fisher, Mortg. 900. The question cannot be regarded as settled.

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that he is the owner in fee of the property, inasmuch as a legal tenant for life of a settled estate is entitled to hold them, subject to the rights of the remainderman above referred to. But such possession raises a strong presumption that the mortgagor has not previously incumbered his interest in the property, as in that case the deeds would naturally be in the possession of the mortgagee; and the absence of the deeds raises an equally strong presumption the other way.

Possession of the title deeds is also of great importance to a mortgagee, whether legal or equitable, inasmuch as it may become the sole test of priority if it should turn out that there are several incumbrancers, none of whom can claim priority over the others on the ground of legal estate, or of equity: see *Hopgood* v. *Ernest*, 3 De G. J. & S. 116; so where A. borrowed money from B. to complete a purchase, covenanting to convey the purchased property to B. by way of mortgage to secure the loan, but such mortgage was never executed, and A. subsequently borrowed another sum of money from C. upon security of a deposit of the title-deeds, it was held that B.'s mortgage must be postponed to that of C.: *Layard* v. *Maud*, L. R. 4 Eq. 397; see also *Rice* v. *Rice*, 2 Drew. 73; *Roberts* v. *Croft*, 2 De G. & J. 1; *Keate* v. *Phillips*, 18 Ch. D. 571. This question will be further considered hereafter in treating of the priority of mortgages, *post*, Chap. VII., p. 955.

Production of title-deeds.

As to mortgages made after the 31st of December, 1881, the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sect. 16, enacts as follows:—

Power for mortgagor to inspect title-deeds.

"(1.) A mortgagor, as long as his right to redeem subsists, shall, by virtue of this Act, be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee."

"(2.) This section applies only to mortgages made after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary."

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But as regards mortgages made before that date the mortgagee, whether legal or equitable, is entitled to refuse to produce the title-deeds, except upon actual payment or tender of all principal, interest, and costs due to him upon the security; and payment into Court is not sufficient: *Senhouse* v. *Earl*, 2 Ves. sen. 450; *Sparke* v. *Montriou*, 1 Y. & C. Ex. 103; *Schlanker* v. *Moxey*, 1 Car. & P. 178; *Mills* v. *Oddy*, 6 Car. & P. 178; *Greenwood* v. *Rothwell*, 7 Beav. 293; unless the relation of solicitor and client exists between the parties: see *Davis* v. *Parry*, 4 Jur. N. S. 431. And a remainderman has no right to production, except on the terms above referred to, where a mortgage is made in exercise of a power: *Chichester* v. *Marquis of Donegal*, L. R. 5 Ch. A. 497. The rule extends to drafts or copies of documents of title in the mortgagor's possession: *Bycroft* v. *Sibel*, 1 W. R. 96. A mortgagee's refusal to produce title-deeds may often occasion great hardships to the mortgagor, by preventing him from obtaining a loan from third persons to enable him to pay off the mortgage: see *Damer* v. *Earl of Portarlington*, 15 Sim. 380.

Relief where deeds missing.

Liability of Mortgagee for Loss of Deeds, &c.]—A mortgagee will not lose the benefit of his security by reason of the loss of some or all of the documents of title: *Baskett* v. *Skeel*, 11 W. R. 1019; see *Walmsley* v. *Child*, 1 Ves. sen. 344. But if some documents are lost by or stolen from a mortgagee, an inquiry will be directed in an action either for foreclosure or redemption as to what title-deeds were delivered to the mortgagee, and what has become of them: *Smith* v. *Bicknell*, 3 V. & B., at p. 52, note; see also *Stokoe* v. *Robson*, 3 V. & B. 51; *Bentinck* v. *Willink*, 2 Ha. 1. The mortgagor will be entitled to bring an action for redemption in order to put the loss on record, and so clear his title, and for a proper indemnity against all loss, costs, damages, charges, and expenses, and other consequences which the mortgagor may incur by reason of the loss of the deeds, and the mortgagee must pay the costs of the action: see *Lord Middleton* v. *Eliot*, 15 Sim., at p. 537; see also *East India Co.* v. *Boddam*, 9 Ves. 464; *James* v.

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Compensation and indemnity.

Rumsey, 11 Ch. D. 398. For form of indemnity, see Seton, 1335. And the mortgagee having lost the deeds will be liable to make compensation for the damage done to the estate by such loss, the amount to be ascertained and deducted from the mortgage debt: *Hornby* v. *Matcham*, 16 Sim. 325. See *Woodman* v. *Higgins*, 14 Jur. 846; *Baskett* v. *Steel*, 11 W. R. 1019.

The measure of compensation will be the expenses necessary for obtaining office copies of the order and proceedings in the action, which will thenceforth form part of the title; but the Court will refuse to take into consideration the speculative damages which the title or marketable value of the estate may sustain upon any future dealing with it by reason of the absence of the deeds: *Brown* v. *Sewell*, 11 Ha. 49.

Costs.

The mortgagee will generally be liable for all costs occasioned by the loss or destruction of title-deeds by his default: *Stokoe* v. *Robson*, 3 V. & B. 51. But if he has been robbed of them, or if they are missing notwithstanding due care on his part, he will not be liable otherwise than to give an indemnity: see *Jones* v. *Lewis*, 2 Ves. sen. 240; *Shelmardine* v. *Harrop*, 6 Mod. 39; *Woodman* v. *Higgins*, 14 Jur. 846; *Job* v. *Job*, 6 Ch. D. 563.

Mortgagee should see that rent is paid, buildings kept in repair, &c.

Repairs, Insurance, &c.]—It is not enough that a mortgagee sees that his interest is regularly paid. Prudence also requires that he ascertain that the property, of which his security consists, is undergoing no deterioration. It sometimes happens, owing to neglect in this particular, that when from the failure in payment of the money secured, a mortgagee proceeds to take possession of the property, he finds the buildings in so dilapidated a state as to require a large expenditure to make them productive, and, if the property is leasehold, the reserved rent in arrear, and himself exposed to eviction by the mortgagor's neglect to perform the covenants in the lease. A mortgagee should always ascertain that the rent (if any) is regularly paid; and, if the mortgage be of buildings,

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that they are insured and kept in repair; and unless this is the case, he should take these payments upon himself. Any sums he may expend for these purposes, will be allowed him with interest: *Hardy* v. *Reeves*, 4 Ves. 466; see also *Quarrell* v. *Beckford*, 1 Mad. 282.

2. Mortgagee in Possession.

Principle upon which accounts are settled between mortgagor and mortgagee who has been in possession.

In settling the accounts between the mortgagor and mortgagee, where the latter has been in possession and receipt of the rents, it often becomes a question of importance, whether the account shall be taken simply by ascertaining the aggregate amount of principal, interest, and costs due to the mortgagee at the period of redemption, on the one hand, and the aggregate amount of rents received by him, on the other; or whether rests shall from time to time be made, and interest computed on the balance so ascertained. Where the rents have exceeded the interest, it is obvious that the former mode of settling the account operates greatly in favour of the mortgagee, as the interest runs on the whole principal sum to the time of its complete liquidation; whereas, by making rests from time to time, the surplus rents are applied in gradual reduction of the principal, and the interest is diminished in the same proportion. The rule on this point is, that the Court will adopt one or the other mode of taking the account, as the justice of the case requires. If the interest was *not* in arrear when the mortgagee took possession, the Court will direct rests: *Shepherd* v. *Elliott*, 4 Madd. 254; see also *Robinson* v. *Cummins*, 2 Atk. 410; *Scholefield* v. *Lockwood*, 32 Beav. 439. But, if the interest was considerably in arrear at that time, so that he has himself lost interest by the delay, the Court will not direct annual rests to be taken against him, from the time that the amount of rents received discharged the interest due, though the rents received by him for several years afterwards greatly exceeded the interest: *Wilson* v. *Cluer*, 3 Beav. 136; *Moore* v. *Painter*, 6 Jur. 903. Rests cannot be made for a broken period;

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they must be from the beginning, or not at all: *Davis* v. *May*, Coop. 238; 19 Ves. 383; *Latter* v. *Dashwood*, 6 Sim. 462: and they are never made but when the effect upon the whole would be beneficial to the mortgagor; for, to make rests in other cases, would be to give the mortgagee more than the interest on his principal sum, in contravention of the rule which excludes him from compound interest. For the same reason, if the mortgagee, in the interval between two annual rests, receives a sum exceeding the interest then due, a rest is made at that time, and the subsequent rests are computed from the rest so made: *Binnington* v. *Harwood*, T. & R. 477; see *Raphael* v. *Boehm*, 11 Ves. 92. It has been decided, that annual rests cannot be made without a special direction: *Webber* v. *Hunt*, 1 Madd. 111; see also *Donovan* v. *Fricker*, Jac. 165: but the pleadings may now be amended after the hearing: see Rules of the Supreme Court, 1883, Ord. XXXIII. If a *mortgagee* remains in possession after his principal and interest are discharged, the Court will compel him to pay interest on the balance: *Quarrell* v. *Beckford*, 1 Madd. 269; *Trimleston* v. *Hamill*, 1 Ball & B. 385; the rate of interest will generally be (as in the case of executors retaining balances) 4 per cent.: *Archdeacon* v. *Bowes*, M'Cl. 147; see *Thorneycroft* v. *Crockett*, 2 H. L. C. 239; and with annual rests: *Wilson* v. *Metcalfe*, 1 Russ. 530. Bankers improperly retaining moneys overpaid to them as mortgagees are chargeable with interest: *London Chartered Bank of Australia* v. *White*, 4 App. Ca. 413.

Suggestions to mortgagees in possession as to keeping accounts, &c.

A creditor in possession of property held by him as a security, is chargeable, "not only with what he actually receives, but with what he might have received, but for his own wilful default or neglect": *Williams* v. *Price*, 1 Sim. & S. at p. 587; see *Anon.* 1 Vern. 45; *Metcalf* v. *Campion*, 1 Moll. 238; *Chaplin* v. *Young*, 33 Beav. 300; see also (as to a business) *Rowe* v. *Wood*, 2 J. & W. 536. So long as there is a possibility of the right of redemption being exercised, the mortgagee's attention will, of course, be especially directed to the keeping of regular and correct accounts, showing, in detail,

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every item of receipt and expenditure, and supported by proper vouchers. The observance by tenants of the terms of their tenancies should be enforced; and if the premises are leasehold, it should be seen that no forfeiture is incurred by the non-observance of the covenants of the lease. By precautions such as these, and others which prudence will suggest, and by evincing a readiness (which every honest man must feel) to deliver up to the proper owner the subject of the pledge when his debt is discharged, a mortgagee, however protracted his possession, will probably prevent the litigation to which the winding up of a mortgagor's and mortgagee's accounts, under such circumstances, too commonly leads. But, with all the care that can be taken, the situation of a mortgagee in possession is not to be coveted; and where a mortgage creditor has a power of sale, which is now an ordinary concomitant of such securities, he generally chooses to exercise that power, rather than to enter into possession with a view to the gradual liquidation of his debt out of the annual rents, which is an inconvenient mode of receiving it. Indeed, a mortgagee should never take possession while a reasonable prospect of obtaining his money from any other source is open to him, particularly where, from the nature of the property, he is likely to be involved in a complicated account of receipts and expenditure. To explain and prove the particulars of such an account, after a great lapse of time, is necessarily a task of difficulty. The objection here suggested obviously applies with increased force to the acceptance of a security from a mortgagee who has been already in possession, and for whose conduct, in regard to antecedent management (as well as for his own as to future management), the transferee would become responsible.

Points respecting a mortgagee in possession.

If the mortgagee enter into the personal occupation of the property, he will be liable for the annual value, as an occupation rent, for which he must account in the same manner as if he had received so much money; and rests will be made in the account on this principle: *Wilson* v. *Metcalfe*, 1 Russ. 530. And if the mortgagee enter under a lease from the

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mortgagor, he will still be charged as mortgagee in possession, as against a second mortgagee whose security was prior to the lease: *Gregg* v. *Arrott*, Ll. & G. tem. Sugd. 246. A mortgagee is not chargeable for occupation rent, for letting a purchaser into possession, without paying rent, before completion: *Shepard* v. *Jones*, 21 Ch. D. 469; nor in respect of improvements effected by him, unless his expenditure in effecting them is allowed; *Bright* v. *Campbell*, 53 L. T. 428.

Leases from mortgagors to mortgagees.

Leases granted by mortgagors to mortgagees, which are sometimes made, are regarded in equity with suspicion, as tending, if the lease be beneficial, to give something to the mortgagee *ultra* his principal and interest, and as springing from that influence which the mortgagee's situation is supposed to give him over the other contracting party, whose necessities often place him under a disadvantage in any such dealing with his mortgage creditor: *Gubbins* v. *Creed*, 2 Sch. & Lef. 212; *Webb* v. *Rorke*, Id. 661. It behoves, therefore, a person taking a lease under such circumstances, to be prepared with proof of the *bona fides* of the transaction. If no unfair advantage has been taken, and an adequate rent is reserved, the lease is clearly unimpeachable on the grounds suggested. And such a lease will not be set aside because the value of the property subsequently increases: *Hickes* v. *Cooke*, 4 Dow. 24; *Morony* v. *O'Dea*, 1 Ball & B. 109. As to a loan made by a lessee, contemporaneously with the granting of the lease, or, as it is commonly termed in Ireland, lease and loan, see *Prior* v. *Dumphy*, 1 Ball & B. 27; *Wilton* v. *Brown*, Id. 125; *O'Brien* v. *Grierson*, 2 Id. 323; *Moore* v. *M'Kay*, 1 Beatt. 291.

Mortgagee not entitled to commission.

It is a general rule that mortgagees are not allowed to make any charge for their personal trouble: *Godfrey* v. *Watson*, 3 Atk. 517; *Longstaffe* v. *Fenwick*, 10 Ves. 405; *Robertson* v. *Norris*, 1 Giff. 428; *Nicholson* v. *Tutin*, 3 K. & J. 159; *Eyre* v. *Hughes*, 2 Ch. D. 148. This question has frequently arisen with regard to mortgagees of West India estates.

West Indian mortgages.

"The grounds on which a person lending money on a West Indian estate is allowed the benefit of a

covenant for the consignments, are two-fold: first, because it furnishes him a security for his debt; and secondly, because the commission which he receives is supposed to be only a fair compensation for his trouble": *Per* Lord *Eldon* in *Banbury* v. *Winter*, 1 Jac. & W. at p. 261; see also *Bunbury* v. *Innes*, 1 My. & K. 294; *Sayers* v. *Whitfield*, 1 Knapp, 133. In the above cases the mortgagee was not in possession; and, in a case which received much consideration, Lord *Brougham*, C., disapproving of those decisions, refused to apply them to the case of a mortgagee in possession, and decided that a mortgagee of a West Indian estate, in possession, was not entitled to commission on payment of bills, costs, and insurance of supplies shipped for the use of the estate, &c., but stood in the same situation as the mortgagee of an English estate: *Leith* v. *Irvine*, 1 Myl. & K. 277; see also *Chambers* v. *Goldwin*, 9 Ves. 271; *Forrest* v. *Elwes*, 2 Mer. 68; *Bertrand* v. *Davies*, 31 Beav. 429. **Mortgagee in Possession.**

As to the appointment of consignees by the Court, see *Bowersbank* v. *Collasseau*, 3 Ves. 164; *Forbes* v. *Hammond*, 1 Jac. & W. 83; *Att.-Gen.* v. *Day*, 2 Mad. 252. A mortgagee not taking possession will not be appointed consignee by the Court, unless the deed contains a covenant for that purpose: *Cox* v. *Champneys*, Jac. 576. An assignee appointed by the Court will not be allowed to resort to the *corpus* of the estate for payment of balances due to him: *Farquharson* v. *Balfour*, 8 Sim. 210. On discharge of the consignee, however, the *corpus* may be resorted to if justice cannot otherwise be done: *Scott* v. *Nesbitt*, 14 Ves. 444.

A mortgagee will not, under any circumstances, be allowed any compensation for his trouble of management: *Bonithon* v. *Hockmore*, 1 Vern. 316; *Chambers* v. *Goldwin*, 9 Ves. 260: *Leith* v. *Irvine*, 1 My. & K. 277; although there be an express agreement for such allowance: *French* v. *Baron*, 2 Atk. 120; *Scott* v. *Brest*, 2 T. R. 238; as stipulations of this nature, if permitted, might lead to fraud and oppression. And, where a person who was in possession under a power of attorney, as **Mortgagee not allowed compensation for management.**

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agent (and being also a creditor) of the constituent party, and as such was entitled to a salary as receiver, took an assignment of a mortgage, it was held, that when his agency was determined, and he became mortgagee in possession, his salary ceased: *Trimleston* v. *Hamill*, 1 Ball & B. 377. It is no excuse to say, that the nature of the property is such as to justify the appointment of a bailiff or receiver at a salary, for the Court will consider the circumstance that no receiver was appointed, as conclusive evidence that none was necessary: see *Langstaffe* v. *Fenwicke*, 10 Ves. 405; *Carew* v. *Johnstone*, 2 Sch. & Lef. 301. But, if the mortgagee actually employ a receiver, under circumstances fairly requiring it, he will be allowed a reasonable sum paid for the receiver's salary; and if the mortgage deed (not being made after the 31st of December, 1881) contains no provision enabling him to appoint a receiver, he may obtain such appointment under the stat. 24 & 25 Vict. c. 124, at the expense of the estate, in any case where the situation or nature of the estate is such that time and trouble must be sacrificed in the receipt of the rents: see *Godfrey* v. *Watson*, 3 Atk. 518; *Chambers* v. *Goldwin*, 9 Ves. 260; *Eyre* v. *Hughes*, 2 Ch. D. at p. 162 (*b*). In *Davis* v. *Dendy*, 3 Mad. 170, a mortgagee was permitted to appoint an agent to collect the rents of property which was vested in a trustee for him who resided on the spot. See as to appointment and powers of receivers under the Conveyancing and Law of Property Act, 1881, *post*, p. 930. As to the rights, duties, and liabilities of a mortgagee in possession, with respect to repairs, see *Godfrey* v. *Watson*, 3 Atk. 518; *Hardy* v. *Reeves*, 4 Ves. 480; *Russell* v. *Smithies*, 1 Anst. 96; *Robinson* v. *Ridley*, 6 Mad. 2; with respect to mines, see *Hughes* v. *Williams*, 12 Ves. 493; *Rowe* v. *Wood*, 2 J. & W. 553; *Thorneycroft* v. *Crockett*, 16 Sim. 445; *Millett* v. *Davey*, 31 Beav. 470; *Norton* v. *Cooper*, 25 L. J. Ch. 121; and see *Elias* v. *Griffiths*, 8 Ch. D.

Mortgagee may appoint a receiver at a salary, in what cases.

Liabilities of mortgagees in possession as to repairs, &c.

(*b*) The Court has also power under the Judicature Act, 1873 (36 & 37 Vict. c. 66), sect. 25 (8), to appoint a receiver, wherever it is "just and convenient" that a receiver shall be appointed.

521; as to letting, &c., see *Anon.* Vern. 45; *Blacklock* v. *Barnes*, Cas. tem. King, 53; *Metcalf* v. *Campion*, 1 Moll. 238; and as to cultivation, see *Wragg* v. *Denham*, 2 Y. & C. 117. Mortgagee in Possession.

A mortgagee *in possession* should be cautious to whom he transfers his security, and delivers the possession of the estate, for he is accountable for the profits accruing subsequently to the assignment: 1 Eq. Ca. Ab. 328, pl. 2. On the other hand, a mortgagee in possession, paying over the surplus rents to the mortgagor, or any other person, after notice from a puisne mortgagee, or incumbrancer, is accountable for such payments: *Cropping* v. *Cooke*, 1 Vern. 270; *Maddocks* v. *Wren*, 2 Ch. Rep. 109; *Bentham* v. *Haincourt*, Prec. Ch. 30; *Hughes* v. *Williams*, 12 Ves. 493; *Parker* v. *Calcraft*, 6 Madd. 11.

In the case of mortgages made by deed, since the 31st of December, 1881, unless otherwise provided by the mortgage deed, the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sect. 19, sub-sect. 1, confers on mortgagees amongst other powers (*c*)— Timber.

> "(ii.) A power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be computed within any time not exceeding twelve months from the making of the contract."

The proceeds of sale will be applicable as rents and profits, and be liable to be accounted for accordingly. As to what is timber, see *ante*, Vol. II. p. 116 n. As to ornamental timber, see *Baker* v. *Sebright*, 13 Ch. D. 179.

In the case of mortgages, which do not come within the provisions of this section, the old law still applies, and accordingly the mortgagor may restrain the mortgagee in possession from cutting timber, unless the security is shown to be defective:

(*c*) See other parts of this section set out, *post*, p. 919 (power of sale), and p. 930 (receiver).

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Withrington v. *Banks*, Sel. Ca. Ch. 30. And in such a case, the proceeds must be applied in sinking the interest and principal: *Farrant* v. *Lovel*, 3 Atk. 723.

3. Mortgagee's Remedies (*d*).

Trust for sale.

Foreclosure.]—A mortgagee, under a trust to raise money by sale or mortgage, has the remedies of a mortgagee, only in respect of the estate mortgaged to him, and cannot require a further execution of the trust for sale for his benefit: *Palk* v. *Lord Clinton*, 12 Ves. 48.

Mortgagee may pursue all his remedies simultaneously.

A mortgagee may pursue at one and the same time his several remedies against the mortgagor and the estate, unless he has precluded himself by stipulation from enforcing any particular remedy: *Cockell* v. *Bacon*, 16 Beav. 158. He may sue the mortgagor upon the covenant or bond for payment of the money (*e*), and simultaneously bring an action (*f*) for the recovery of the possession, and for the foreclosure of the equity of redemption: *Booth* v. *Booth*, 2 Atk. 343; *Rees* v. *Parkinson*, 2 Anst. 497; see *Garforth* v. *Bradley*, 2 Ves. Sen. 678; *Perry* v. *Barker*, 13 Ves. 205; *Burnell* v. *Martin*, 2 Doug. 417; *Lawton* v. *Newland*, 2 Stark. 72; *Lockhart* v. *Hardy*, 9 Beav. 349. As to who are proper parties to an action for foreclosure, see Coote, Mortg. 1086—1100; Fisher, Mortg. 811 *et seq.*; see also Seton, 1013. And it has been decided that, previously to bringing an ejectment, no demand of possession is necessary: *Doe* v. *Maisey*, 8 B. & C. 767: *Doe* v. *Giles*, 5 Bing. 421. And the fact of the mortgagee having received interest on his debt does not amount to an admission that the mortgagor was at the time of such receipt in lawful possession: *Doe* v. *Cad-*

(*d*) As to the remedies of an *equitable* mortgagee, see *ante*, p. 706.

(*e*) The liability under which covenant does not run with the land: *Canham* v. *Rust*, 2 Moo. 164.

(*f*) The mortgagee's receipt of the rent, is, *primâ facie*, evidence of payment, either of interest or of principal, to stop the Statute of Limitations: *Brocklehurst* v. *Jessop*, 7 Sim. 438; *Fordham* v. *Wallis*, 10 Ha. 217.

wallader, 2 B. & Al. 473. But it would seem that the mortgagee cannot receive his interest by way of rent from the tenant of the mortgagor, and afterwards treat the tenant as a trespasser: *Doe* v. *Hales*, 7 Bing. 322. A mortgagor cannot set up a new title against his mortgagee: *Doe* v. *Vickers*, 6 Nev. & M. 437.

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But the most prudent course for a mortgagee whose security is scanty, is, first to make the most of his personal remedies against the mortgagor, and then to resort to the estate for the unliquidated portion (if any) of the debt; for, if he commence an action for foreclosure first, he will not be permitted, after having made the estate his own by this means, to sue upon the covenant; the advantage, therefore, of taking the proceedings in the order suggested is obvious. Indeed, if the mortgagee sue his debtor, after a foreclosure, while the estate remains in his hands, the effect is to revive the right of redemption; *Dashwood* v. *Blithway*, 1 Eq. Ca. Ab. 317; *Tooke* v. *Hartley*, 2 B. C. C. 125; *Booth* v. *Booth*, 2 Atk. 344. But, if the mortgagee has sold the estate, and thereby precluded himself from opening the foreclosure, equity will restrain him from suing the mortgagor for any part of the mortgage debt, though the sale should have produced less than the sum due: *Perry* v. *Barker*, 8 Ves. 527; *S. C.*, 13 Id. 198; *Palmer* v. *Hendrie*, 27 Beav. 349; *Burrell* v. *Smith*, L. R. 7 Eq. 399. And where the mortgagee had deposited the title-deeds with an attorney, who claimed a lien upon them, the mortgagee was restrained from proceeding against the mortgagor, on his collateral security: *Schoole* v. *Sall*, 1 Sch. & Lef. 176. Nor is this the only instance in which a mortgagor, against whom, *as defendant*, an action of foreclosure is instituted, has an advantage, which is denied him when he comes as *plaintiff* to claim the aid of the Court in enforcing his equity of redemption. In a foreclosure action, a mortgagor may, upon application, procure the period fixed by the decree for payment of the money to be repeatedly extended: *Anon.* Barn. 221; *Edwards* v. *Cunliffe*, 1 Mad. 287; see also *Renvoize* v. *Cooper*, 1 Sim. &

Suggested order of mortgagee's proceedings.

Difference between action for foreclosure and redemption.

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St. 365; *Nanny* v. *Edwards*, 4 Russ. 124; during which extended period the aggregate amount of principal, interest, and costs, not directed to be immediately paid, carries interest: see *ante*, p. 896. But, in an action for redemption, no such extension is allowed; and if the money is not paid at the day, the right of redemption is gone for ever: *Cholmley* v. *Lord Oxford*, 2 Atk. 267; *Novosielski* v. *Wakefield*, 17 Ves. 417. But the dismissal of an action for redemption for want of prosecution, and not for default of payment, does not preclude a mortgagor from bringing another action: *Hansard* v. *Hardy*, 18 Ves. 460.

Proceedings where equity of redemption is in an infant.

Where the equity of redemption belongs to an infant, the practice formerly was to decree a foreclosure against him, giving him a day after he became of age to show error in the decree: *Goodier* v. *Ashton*, 18 Ves. 82. But the usual course now is to pray either a foreclosure, or a sale: and then it is referred to chambers to ascertain whether a sale would not be for the infant's benefit: *Mondey* v. *Mondey*, 1 Ves. & B. 223; see *Scholefield* v. *Heafield*, 7 Sim. 667; *Price* v. *Carver*, 3 My. & C. 157; *Lewis* v. *John*, 1 C. P. Coop. 8. The heir having come of age before the decree for sale, and not having interfered to prevent it, was held to be bound by it: *Davis* v. *Dowding*, 2 Kee. 245. The reference, however, can only be made with the mortgagee's consent, and if he objects thereto, he is entitled to a decree of foreclosure against the infant; *Gundry* v. *Baynard*, 2 Vern. 479; *Bishop of Winchester* v. *Beavor*, 3 Ves. 317; *Williamson* v. *Gordon*, 19 Ves. 114; *Price* v. *Carver*, 3 My. & C. 157. If the sale produces more than the debt, the surplus goes to the mortgagor; if less, the mortgagee has his remedy for the difference; see *Perry* v. *Barker*, 11 Ves. 205.

Whether sale can be prayed.

Before the passing of the Chancery Amendment Act (15 & 16 Vict. c. 86), there seems to have been some doubt whether, in England, a mortgagee could pray a sale in the first instance. By sect. 48 of that Act the Court was empowered to direct a sale of mortgaged property instead of a foreclosure on such

terms as it might think fit. And now by sect. 25 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), it is enacted that,— Mortgagee's Remedies.

Sect. 25. "(1.) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative. Sale of mortgaged property in action for foreclosure, &c.

"(2.) In any action, whether for foreclosure or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property, on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of sale and to secure performance of the terms.

"(3.) But, in an action brought by a person interested in the right of redemption and seeking a sale, the Court may, on the application of any defendant, direct the plaintiff to give such security for costs as the Court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.

"(4.) In any case within this section the Court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrancers.

"(5.) This section applies to actions brought either before or after the commencement of this Act.

"(6.) The enactment described in Part II. of the Second Schedule to this Act is hereby repealed. 15 & 16 Vict. c. 86, s. 48.

"(7.) This section does not extend to Ireland."

A trustee who is a mortgagee apparently will not be allowed to foreclose, but will only be entitled to a sale: *Simpson* v. *Pattison*, 1 Ha. 533; *Tennant* v. *Trenchard*, L. R. 4 Ch. A. 537.

It is generally advisable to pray for a foreclosure or sale in the alternative: Coote, Mortg., 1074: see *Kerrick* v. *Saffery*, 7 Sim. 317. Where subsequent mortgagees are defendants to a foreclosure bill, and the plaintiff consents to a sale, they are not entitled

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to their costs out of the proceeds if the fund is deficient: *Upperton* v. *Harrison*, 7 Sim. 444; *Cutfield* v. *Richards*, 26 Beav. 241. The decree for foreclosure merely extinguishes the equity of redemption, and leaves the mortgagee to his legal title and legal remedies: *Anon.*, 2 Ch. Cas. 244; see *Shelmardine* v. *Harrop*, 6 Madd. 39; but in the case of a mortgage of copyholds, the mortgagor will, on an order for foreclosure, be ordered to surrender to the mortgagee if no surrender has been made: *Hill* v. *Price*, 1 Dick. 344; and the costs of such surrender must be borne by the mortgagor: *Pryce* v. *Bury*, 2 Drew. 41. See as to proceedings under sect. 25 of the Conveyancing and Law of Property Act, 1881, *Union Bank of London* v. *Ingram*, 20 Ch. D. 463; *Woolley* v. *Coleman*, 21 Ch. D. 169; *Wade* v. *Wilson*, 22 Ch. D. 235.

Proof by secured creditors.

Proof in Bankruptcy, &c.]—The admission of proofs by secured creditors against the estate of a bankrupt or of a compounding or arranging debtor is regulated by rules 9—17 of sched. 2 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), which will be found fully set out, *ante*, Vol. II., p. 437, tit. Composition. In the administration of the estates of deceased persons the rule formerly was that a secured creditor might prove for his whole debt, and also avail himself of his security, provided he did not receive in the whole more than 20*s.* in the pound: see *Mason* v. *Bogg*, 2 Myl. & Cr. 443; *Davis* v. *Dowding*, 2 Kee. 246; *Brocklehurst* v. *Jessop*, 7 Sim. 441; *Kellock's Case*, L. R. 3 Ch. A. 769; *Banner* v. *Johnston*, L. R. 5 H. L. 157.

But in the administration of the assets of persons dying after the 1st of November, 1875, and in the winding up of companies under the Companies Acts, 1862 and 1867, if the assets are insufficient for payment of liabilities, the rules for the time being in force in bankruptcy as to the rights of proof of secured and unsecured creditors respectively, &c., are to be followed: see the Judicature Act, 1875 (38 & 39 Vict. c. 77), sect. 10. The general effect of this enactment is, that a secured creditor can only prove

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for the balance of his debt, after deducting the value of his security. As to the administration in bankruptcy of the estates of persons dying insolvent, see sect. 125 of the Bankruptcy Act, 1883.

As to secured creditor's claim to interest.

The mortgagee of a bankrupt's estate is entitled to interest out of the proceeds of the mortgaged property up to the time of payment if there is a surplus, but if the security is inadequate to pay the full amount of principal and interest, and he claims to prove the deficiency as a creditor against the estate, he stands, with respect to that claim, on an equal footing with the other general creditors, and consequently his interest runs only to the date of the filing of the petition: *Ex parte Badger*, 14 Ves. 165; *Ex parte Lubbock*, 9 Jur. N. S. 854; see also *Re Savin*, L. R. 7 Ch. A. 760.

Remedies of puisne mortgagee for arrears of interest where prior mortgagee has been in possession.

The 42nd section of the stat. 3 & 4 Will. 4, c. 27, which limits a mortgagee's remedies as against the land for arrears of interest to six years (*ante*, p. 760), contains this proviso,—

"That where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage, or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years."

Staying Proceedings on Payment of Principal and Interest.]—In treating of proceedings by a mortgagee against a mortgagor, it is necessary to keep in view the important statute of 7 Geo. 2, c. 20, which enacts that,— Stat. 7 Geo. 2, c. 20.

Action of ejectment by mortgagees may be stayed upon payment of principal and interest;

Sect. 1. "Where any action shall be brought on any bond for the payment of the money secured by such mortgage, or performance of the covenants therein contained, or where any action of ejectment shall be brought in any of his Majesty's courts of record at Westminster, or in the court of sessions in Wales, or in any of the superior courts in the counties palatine of Chester, Lancaster, or

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Durham, or by any mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns, for the recovery of the possession of any mortgaged lands, tenements, or hereditaments; and no suit shall be then depending in any of his Majesty's courts of equity in England, for or touching the foreclosing or redeeming such mortgaged lands, &c.; if the person or persons having right to redeem such mortgaged lands, &c.; and who shall appear and become defendant or defendants in such action, shall, at any time pending such action, pay unto such mortgagee or mortgagees, or in case of his, her, or their refusal, shall bring into the Court where such action shall be depending, all the principal money and interest due on such mortgage, and also all such costs as have been expended in any suit or suits at law or in equity upon such mortgage (such money for principal, interest, and costs, to be ascertained and computed by the Court where such action is or shall be depending, or by the proper officer by such Court to be appointed for that purpose), the money so paid to such mortgagee or mortgagees, or brought into such court, shall be deemed and taken to be in full satisfaction and discharge of such mortgage; and the Court shall and may discharge every such mortgagor or defendant of and from the same accordingly; and shall and may, by rule or rules of the same court, compel such mortgagee or mortgagees, at the costs and charges of such mortgagor or mortgagors, to assign, surrender, or re-convey such mortgaged lands, &c., and such estate and interest as such mortgagee or mortgagees hath or have therein, and deliver up all deeds, evidences, and writings, in his, her, or their custody, relating to the title of such mortgaged lands, &c., unto such mortgagor or mortgagors who shall have paid or brought such monies into the Court, his, her, or their heirs, executors, or administrators, or to such other person or persons as he, she, or they shall, for that purpose, nominate and appoint."

and court may compel mortgagee to re-convey;

and deliver up deeds.

In suits of foreclosure, court may, upon the application of defendant, before the hearing, make such order and decree as if the cause had been brought to a hearing.

Sect. 2. "Where any bill or bills, suit or suits shall be filed, commenced, or brought, in any of his Majesty's courts of equity in England, by any person or persons having or claiming any estate, right, or interest in any lands, tenements, or hereditaments, under or by virtue of any mortgage or mortgages thereof, to compel the defendant or defendants in such suit or suits (having or claiming a right to redeem the same), to pay the plaintiff or plaintiffs in such suit or suits the principal money and interest due on any such mortgage, or the principal money and interest due on such mortgage, together with any sum or sums of money due on any incumbrance or specialty charged or chargeable on the equity of redemption thereof; and in default of payment thereof, to foreclose such defendant or defendants of his, her or their right or

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equity of redeeming such mortgaged lands, &c., such Court and Courts of equity, where such suit or suits shall be depending, upon application made to such Court by the defendant or defendants in such suit, having a right to redeem such mortgaged lands, &c., and upon his or their admitting the right and title of the plaintiff or plaintiffs in such suit, may and shall, at any time or times before such suit or cause shall be brought to hearing, make such order or decree therein, as such Court or Courts might or could have made therein in case such suit or cause had then been regularly brought to hearing before such Court or Courts; and all parties to such suit or suits shall be bound by such order or decree so made, to all intents and purposes, as if such order or decree had been made by such Court at or subsequent to the hearing of such cause or suit."

Act not to extend to cases in which the mortgagee denies the right to redeem, or insists that the premises are chargeable with other sums, &c.

Sect. 3. "Provided always that this Act, or anything herein contained, shall not extend to any case where the person or persons against whom the redemption is or shall be prayed, shall (by writing under his, her, or their hands, or the hand of his, her, or their attorney, agent, or solicitor, to be delivered before the money shall be brought into such Court of law, to the attorney or solicitor for the other side) insist either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other or different principal sums than what appear on the face of the mortgage, or shall be admitted on the other side; nor to any case where the right of redemption to the mortgaged lands and premises in question in any cause or suit shall be controverted or questioned by or between different defendants in the same cause or suit; nor shall be any prejudice to any subsequent mortgagee or mortgagees, or subsequent incumbrancer."

Points decided upon the statute of 7 Geo. 2, c. 20.

In regard to this statute, it has been held that it is not applicable where the right to redeem is disputed: *Goodtitle* d. *Fisher* v. *Bishop*, 1 Y. & J. 344, or unless the amount of principal and interest alleged to be due is admitted: *Huson* v. *Hewson*, 4 Ves. 105. Nor will the statute apply where the defendant is in contempt: *Hewett* v. *M'Cartney*, 13 Ves. 560; nor after the plaintiff is entitled to execution: *Ames* v. *Lloyd*, 3 Ves. & B. 15; and a reference was also refused where it appeared that the defendant had agreed to sell the equity of redemption to the plaintiff, and had declined to complete the contract: *Goodtitle* v. *Pope*, 7 T. R. 185; but see *Skinner* v. *Stacy*, 1 Wils. 80. And the reference will not be made unless all

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the defendants admit the plaintiff's title: *Roe* v. *Wardle*, 3 Y. & C. 70. Where a second mortgagee gave the first mortgagee notice not to part with the title deeds, after the latter had commenced an action against the mortgagor, the mortgagee was, notwithstanding, directed to deliver them up to the mortgagor: *Dixon* v. *Wigram*, 2 Cr. & J. 613. The redemption under the Act is subject to the mortgagee's right of tacking: *Roe* v. *Soley*, 2 W. Bl. 726; as to tacking, see *post*, p. 941 *et seq.*

The act places the suit in the same situation as if it had been regularly brought to a hearing, so that the Court has power to enlarge the time for payment of the money: *Wakerell* v. *Delight*, 9 Ves. 36.

Indeed, as to courts of equity, the act has been stated to have conferred no new power, as those courts had inherent jurisdiction to stay the proceedings in any cause, and in any stage of the cause, whenever the defendant would submit to a decree establishing the full demand made by the bill, and the whole relief prayed in respect of that demand: *Per* Sir *J. Leach* in *Praed* v. *Hull*, 1 Sim. & S. 331. Upon which principle, his Honour, in this case, expressed his willingness to make the same decree, on the motion of the defendant, as the plaintiff would be entitled to at the hearing: see also *Boys* v. *Ford*, 4 Mod. 40; *Damer* v. *Lord Portarlington*, 15 Sim. 380; *Piggin* v. *Cheetham*, 2 Ha. 80.

The application must be made by *all* persons in whose favour redemption would be decreed; and, therefore, where a foreclosure suit had been instituted against a bankrupt mortgagor, and his assignees were subsequently made defendants by a supplemental bill, the Court refused to make an immediate decree at the instance of the assignees *only;* as the decree for redemption would be in favour of the bankrupt also, and therefore his consent was necessary: *Garth* v. *Thomas*, 2 Sim. & S. 188. As to what persons may redeem: see Coote, Mortg. 1159; and *ante*, p. 878.

Express powers of sale.

Sale.]—An express trust or power of sale was formerly inserted as a matter of course in every

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well-drawn mortgage, whereby the mortgagee was enabled to sell the property comprised in the mortgage, on default of payment at the time specified; but it was generally provided that the mortgagee should not sell until default had been made in payment of the principal, after the expiration of a six months' notice to the mortgagor or until the interest should be in arrear for three months.

Stat. 23 & 24 Vict. c. 145.

The stat. 23 & 24 Vict. c. 145, sects. 11—24, contained provisions whereby statutory powers of sale and of appointing a receiver were conferred on mortgagees where the mortgage was by deed, but these powers were seldom relied upon in practice, being less favourable to mortgagees than the express powers of sale usually inserted in mortgages. These sections have been repealed by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sect. 71, and Sched. 2, but without prejudice to the operation or effect of instruments made or to things done or suffered before the commencement of the repealing Act.

Stat. 44 & 45 Vict. c. 41.

As regards mortgages made since the 31st of December, 1881, the Conveyancing and Law of Property Act, 1881, confers on mortgagees statutory powers of sale, which, for the most part, closely correspond to the form in which express powers of sale were usually framed.

The Act enacts as follows:—

Powers incident to estate or interest of mortgagee.

Sect. 19.—"(1.) A mortgagee, where the mortgage is made by deed shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

"(i.) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby.

"(2.) The provisions of this Act relating to the foregoing

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powers, comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act.

"(3.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.

"(4.) This section applies only where the mortgage deed is executed after the commencement of this Act."

Regulation of exercise of power of sale.

Sect. 20. "A mortgagee shall not exercise the power of sale conferred by this Act unless and until—

"(i.) Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default (*g*) has been made in payment of the mortgage money, or of part thereof, for three months (*h*) after such service: or

"(ii.) Some interest under the mortgage is in arrear and unpaid for two months (*h*) after becoming due: or

"(iii.) There has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon."

Conveyance, receipt, &c., on sale.

Sect. 21.—"(1.) A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage; except that, in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed under this section, unless the deed is sufficient otherwise by law, or is sufficient by custom, in that behalf.

"(2.) Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser

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(*g*) A power of sale on default did not of itself give a right to enter before sale: *Watson* v. *Waltham*, 2 A. & E. 485.

(*h*) "Month" means calendar month: see stat. 13 & 14 Vict. c. 21, sect. 4: see also *Freeman* v. *Read*, 11 W. R. 802.

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shall not be impeachable on the ground that no case has arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

"(3.) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into Court under this Act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses, properly incurred by him, as incident to the sale or any attempted sale (*hh*), or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

"(4.) The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money.

"(5.) The power of sale conferred by this Act shall not affect the right of foreclosure (*i*).

"(6.) The mortgagee, his executors, administrators, or assigns, shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this Act or of any trust connected therewith.

"(7.) At any time after the power of sale conferred by this Act has become exerciseable, the person entitled to exercise the same may demand and recover from any person, other than a person having in the mortgaged property an estate, interest, or right in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him."

Mortgagee's receipts, discharges, &c.

Sect. 22.—"(1.) The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this Act, or for any money or securities com-

(*hh*) As to costs of an abortive sale under an express power of sale in a mortgage, see *Farrer* v. *Lacy, Hartland & Co.*, 25 Ch. D. 636.

(*i*) This clause merely affirms the existing rule of law with regard to express powers of sale: see *Slade* v. *Rigg*, 3 Ha. 35; *Wayne* v. *Hanham*, 9 Ha. 62.

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prised in his mortgage, or arising thereunder; and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage.

"(2.) Money received by a mortgagee under his mortgage or from the proceeds of securities comprised in his mortgage shall be applied in like manner as in this Act directed respecting money received by him arising from a sale under the power of sale conferred by this Act; but with this variation, that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale."

Who may exercise the power.

By sect. 2, sub-sect. (vi.), a "mortgagee includes any person from time to time deriving title under the original mortgagee." The statutory power of sale will therefore be exercisable not only by the original mortgagees or mortgagee, but by any person on whom the title has devolved or who is entitled to give a receipt for the mortgage debt (sect. 21, sub-sect. 4, *supra*); *e.g.*, by the survivor of two joint-mortgagees: *Hind* v. *Poole*, 1 K. & J. 383; or by the executors or administrators of a deceased mortgagee: see sect. 61, *ante*, p. 850; who also take the legal estate: see sect. 30, *post*, p. 965; or by their or his assigns.

Assigns.

The comprehensiveness of the definition above referred to is of great importance. Where an express power of sale is not in terms given to assigns, it has been repeatedly held that the devisee of a surviving mortgagee cannot exercise the power and make a title to a purchaser, or, in other words, that the power cannot be delegated by will, unless the assigns are mentioned in the power itself: see *Cooke* v. *Crawford*, 13 Sim. 91, followed in *Wilson* v. *Bennett*, 5 De G. & S. 475; *M'Donald* v. *Walker*, 14 Beav. 556; *Stevens* v. *Austen*, 3 E. & E. 685; *Ashton* v. *Wood*, 3 Sm. & G. 436. The tendency of the Courts in recent times has been to adopt a more liberal construction, and, for that purpose, to draw distinctions where possible, between the case of *Cooke* v. *Crawford* and the cases before them: see the other cases cited.

In the case of *Osborne to Rowlett*, 13 Ch. D. 774,

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Jessel, M.R., after reviewing the authorities, went so far as to express his opinion that *Cooke* v. *Crawford* must be regarded as overruled; but in the subsequent case of *Re Morton and Hallett*, 15 Ch. D. 143, *James* and *Baggallay*, LL.JJ., expressed their dissent from this view. This point will not, however, now arise in mortgages made since the commencement of the Conveyancing and Law of Property Act, 1881, in which the statutory powers of sale thereby conferred are relied on. If for any reason it is thought advisable to substitute for the statutory power an express power of sale, care should be taken to vest it in terms not only in the original mortgagee (or mortgagees and their survivors or survivor), but in his executors or administrators, and his or their assigns.

Several sets of mortgagees.

Where first and second mortgagees alike have powers of sale and of giving receipts, both may concur in selling; one will in such a case give a receipt for so much of the purchase-money as will cover his claims, and the other will give a receipt for the balance: *M'Carogher* v. *Whieldon*, 34 Beav. 107; *Gutteridge* v. *Fletcher*, 13 W. R. 540.

To what mortgages the power applies.

The power of sale and other powers conferred by sect. 19, like the similar powers conferred by the stat. 23 & 24 Vict. c. 145, only apply to mortgages made by deed. In the case of copyholds it is conceived that a covenant to surrender, though necessarily by deed, is not a "mortgage" within the meaning of the Act, and a conditional surrender in pursuance of such covenant, though undoubtedly a mortgage, is not effected by deed, but by copy of court-roll; consequently it would appear that neither the covenant nor the surrender nor both together will give a mortgagee of copyholds a statutory power of sale. The deed containing the covenant to surrender ought therefore to contain a clause expressly charging (*j*) the copyholds, and also a declara-

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Definition of mortgage.

(*j*) "Mortgage includes any *charge* on any property for securing money or money's worth:" Conveyancing and Law of Property Act, 1881, sect. 2, sub-sect. (vi.). This definition is, of course, only for the purposes of this Act.

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tion that the mortgagor holds the copyholds in trust for the mortgagee so as to enable the latter to obtain a vesting order, if he should require it, for the purpose of obtaining the legal estate.

Conditions to exercise of power.

The terms of the present statutory powers of sale are at least as favourable to mortgagees as the ordinary powers formerly inserted in mortgages. Indeed, the provision now is that a mortgagee may sell, after *three* months' notice to pay the mortgage debt, or if the interest is *two* months in arrear, whereas according to the usual practice, the periods were *six* and *three* months respectively.

The statutory power is also exerciseable in case of a breach of any provision in the mortgage-deed or in the Act, other than the covenant for payment of the mortgage-money or interest, and is in this respect more stringent than the common express power of sale.

Notice.

With regard to notices the Conveyancing and Law of Property Act, 1881, sect. 67, contains the following regulations :—

Regulations respecting notice.

Sect. 67.—"(1.) Any notice required or authorized by this Act to be served shall be in writing.

"(2.) Any notice required or authorized by this Act to be served on a lessee or mortgagor shall be sufficient, although only addressed to the lessee or mortgagor by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.

"(3.) Any notice required or authorized by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorized to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine.

"(4.) Any notice required or authorized by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is

not returned through the post-office undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered. Mortgagee's Remedies.

"(5.) This section does not apply to notices served in proceedings in the Court."

Where a mortgage contained a power of sale with a proviso that the mortgagee should not exercise the power without giving notice to the mortgagor or his assigns to pay off the mortgage debt, it was held that a second mortgagee, of whose incumbrance the first mortgagee had notice, was entitled to receive notice of the intended exercise by the first mortgagee of his power of sale, and to damages from him in default of such notice: *Hoole* v. *Smith*, 17 Ch. D. 434. Notice to mortgagor or his assigns.

If the mortgagee desires to have an immediate power of sale without the necessity of first giving the notice prescribed by the Act, he should require a clause to be inserted in the mortgage deed, providing that he shall have the statutory power of sale, either simply, or with such modifications as may be thought proper, but that such power shall be exerciseable by the mortgagee on default of payment on demand and without any preliminary notice. A power to sell without notice has been characterized as oppressive (see *Miller* v. *Cook*, L. R. 10 Eq. 641), but is not unusual; a solicitor-mortgagee, however, must be careful, in reserving to himself such a power, to explain its nature and operation clearly to his client: see *Cockburn* v. *Edwards*, 18 Ch. D. 449. Where an express power of sale is exerciseable upon default after notice to pay without specifying any period during which the notice is to run, the mortgagor will be entitled to reasonable notice: see *Massey* v. *Sladen*, L. R. 4 Ex. 13. Dispensing with notice.

By sect. 21, sub-sect. 2 (*supra*), the purchaser's title is not to be impeachable on the ground that due notice was not given, but the mortgagor's remedy shall be in damages only; under a similar clause in an express power of sale it was held that the Court had no jurisdiction to restrain a sale without notice: *Prichard* v. *Wilson*, 10 Jur. N. S. 330. But a purchaser buying with actual knowledge that the Protection of purchasers.

Mortgagee's Remedies.

notice has not been given will not be protected: *Parkinson* v. *Hanbury*, 1 Dr. & Sm. 143.

A mortgagee with power of sale may, before the expiration of the notice, enter into a conditional agreement to sell the property, if not redeemed meanwhile: *Major* v. *Ward*, 5 Ha. 598.

Under a clause similar to the statutory provision it was held that a *bonâ fide* purchaser without notice was protected, although the security had in fact been satisfied at the time of sale: *Dicken* v. *Angerstein*, 3 Ch. D. 600. But in the case of an express power a mortgagee, unless protected by the terms of the power, or by a special condition of sale, must produce to the purchaser proper evidence that the power has become exerciseable: see *Hobson* v. *Bell*, 2 Beav. 17.

A purchaser with notice that the sale is improper will not be protected by a proviso that irregularities in the sale shall not affect his title: *Jenkins* v. *Jones*, 2 Giff. 99.

As to what amounts to constructive notice of any instrument, fact, or thing so as prejudicially to affect a purchaser or mortgagee (*k*), see Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3, and see *post*, tit. PURCHASES.

Conveyance.

Sect. 21 does not contain a clause hitherto usually inserted in mortgages of leaseholds by demise declaring that the mortgagor shall stand possessed of the nominal reversion upon trust for the purchaser from the mortgagee, whereby such purchaser is enabled to get in the reversion under the provisions of the Trustee Acts (13 & 14 Vict. c. 60; 15 & 16 Vict. c. 55), or by a conveyance from the mortgagor or his representatives: see *Hampshire* v. *Bradley*, 2 Col. 34. It may therefore be advisable to insert this clause in such mortgages, although having regard to the provisions of sect. 14 of the Conveyancing and Law of Property Act, 1881, as to relief against forfeiture, and to the liability of the purchaser to indemnify the mortgagor in respect of the rents and cove-

(*k*) By sect. 1, sub-sect. 4 (ii.), of the above Act, "purchaser" includes mortgagee and intending mortgagee.

Mortgagee's Remedies.

nants of the lease, it is very questionable whether it will often be worth while for the purchaser to get in the reversion: see Fisher, Mortg. 464.

A mortgagee exercising his power of sale can make a perfect title without the concurrence of the mortgagor, and such concurrence cannot be required by a purchaser even though there be an express covenant by the mortgagor to concur in the sale: *Corder* v. *Morgan*, 18 Ves. 344.

Trusts of the purchase-money.

A mortgagee exercising his power of sale before the debt is barred by the Statute of Limitations is a trustee of the surplus proceeds of sale for the mortgagor: *Locking* v. *Parker*, L. R. 8 Ch. A. 30. But a mortgagee who has been in possession for a period sufficient to bar the equity of redemption may make a title and convey under his power of sale, and in that case the mortgagor will have no right to the surplus of the purchase-money.

A mortgagee becomes a trustee of the surplus after discharge of incumbrances only when such surplus is ascertained: see *Banner* v. *Berridge*, 18 Ch. D. 254. But he must be careful to pay the surplus to the person rightfully entitled thereto: *West London Commercial Bank* v. *Reliance Building Society*, 29 Ch. D. 954. The Act does not protect a mortgagee *bonâ fide* paying the surplus to the wrong person, but if in doubt he may pay the money into Court: see *Roberts* v. *Ball*, 24 L. J. Ch. 471. If the mortgagee is intending to misapply the purchase-money he will be compelled to pay it into Court, and a receiver will be appointed: *Southwaite* v. *Rippon*, 8 L. J. Ch. (N. S.) 139; see *Mathison* v. *Clark*, 29 L. J. Ch. 29.

Conduct of sale.

A mortgagee selling under a power of sale, whether express or statutory, must, of course, strictly observe the terms of the power as to the mode of sale. The statutory power is very comprehensive in this respect. If an express power does not specify any particular mode of sale the mortgagee may sell either by public auction or private contract; but if either mode is alone specified it must be adhered to: *Bronard* v. *Dumaresque*, 3 Moo. P. C. 457; *Bonsfield* v. *Hodges*, 33 Beav. 90. If a sale by private contract is authorized, advertisement is not neces-

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sary, provided the sale is *bonâ fide* and for a fair price: *Davy* v. *Durrant*, 1 De G. & J. 535. In selling by public auction a mortgagee, like a trustee, for sale (*l*), should advertise the sale, so as to secure competition: *Jones* v. *Matthie*, 11 Jur. 504.

Mortgagee should previously examine his title.

A mortgagee selling under his power of sale, in common with all other vendors, should have the title of the property investigated, before offering the property for sale, so that he may frame the contract or particulars and conditions of sale accordingly (*m*). Mortgagees may sell under special conditions if not so unnecessarily stringent as to be depreciatory: *Hobson* v. *Bell*, 2 Beav. 17; see *Kershaw* v. *Kalon*, 1 Jur. N. S. 974; *Falkner* v. *Equitable Reversionary Society*, 4 Drew. 352; *Ashworth* v. *Mounsey*, 9 Ex. 175; see as to depreciatory conditions of sale generally, *ante*, Vol. II. p. 729 *et seq.*, sub tit. CONDITIONS OF SALE.

Mortgagee cannot sell to himself.

A mortgagee with a power of sale is under the same disability to purchase the mortgaged estate that attaches to all persons clothed with a fiduciary character, to become the buyers of the property, of which, by virtue of the trust, they are themselves the vendors, or, in other words, to sell to themselves. The propriety of such a rule is obvious. Nothing could be more dangerous than to permit trustees to place themselves in a situation in which their own personal interest is at direct variance with the duties of their office. As sellers, it is their *duty*, on behalf of those whom they represent, to obtain as large a price as possible; as purchasers, it is their *interest* to buy at the lowest price. To prevent, therefore, this conflict of duty and interest, the general doctrine in question declares, that, though the full value has been given for the estate, and the sale has been made by auction, and conducted with the utmost publicity and fairness, yet, being a pur-

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(*l*) See as to this, *ante*, Vol. II., p. 732, sub tit. CONDITIONS OF SALE.

(*m*) See some observations in regard to this precaution, *ante*, Vol. II., pp. 581 *et seq.*

Mortgagee's Remedies.

chase by a trustee from himself, it shall not stand: see *Fox* v. *Mackreth*, 2 Cox, 320, and numerous other cases referred to in Lewin on Trusts, p. 438, *et seq.*

The principle in question applies as well where the purchase is made by one of several trustees, all of whom take part in the sale, as where the purchaser is the only, or only acting, trustee: see *Whelpdale* v. *Cookson*, 1 Ves. sen. 9 (more fully stated in Bell's Sup. 9), in which case, however, as it appeared that the trustee had expended monies in improvements, Lord *Hardwicke* directed that he should be reimbursed these monies with interest at four per cent., as well as his purchase-money.

The effect of this rule as applied to mortgagees is to preclude them and their trustees from purchasing the property comprised in the mortgage unless the sale is made by order of the Court, and the mortgagee obtains leave for himself or his trustee to bid: *Downes* v. *Grazebrook*, 3 Mer. 200; *Re Bloge's Trust*, 1 Mac. & G. 488; see also *National Bank of Australia* v. *United Hand in Hand, &c. Co.*, 4 App. Ca. 391, *infra.*

So also the solicitor or agent of the mortgagee is incapable of purchasing the mortgaged property: *Whitcombe* v. *Minchin*, 5 Mad. 91; *Martinson* v. *Clowes*, 21 Ch. D. 857. And the employment by a purchaser of a clerk of the mortgagee's solicitor to bid has been held to be sufficient to invalidate the purchase, and to render the purchaser liable to the costs of a redemption suit, so far as caused by the sale: *Parnell* v. *Tyler*, 2 L. J. Ch. (N. S.) 195. But a second mortgagee may purchase from the first mortgagee if such purchase is *bonâ fide* and at a fair price: *Shaw* v. *Bunny*, 33 Beav. 494; *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1.

Leave to mortgagee to bid.

Leave to bid will not be given to a mortgagee who is also trustee of the property if the *cestui que trust* objects, unless attempts to sell to others have failed: *Tennant* v. *Trenchard*, L. R. 4 Ch. A. 537.

In *Ex parte Hodson*, 1 Gl. & J. 12, it was held

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that a mortgagee might waive the power of sale in the deed, and come for an order for sale, in his general character of mortgagee; and he was allowed to bid at the sale. See also *Ex parte Davis*, 3 D. & C. 504; *Ex parte Marsh*, 1 Mad. 148; *Ex parte Bunn*, Buck, 245.

The trustee in a bankruptcy will not be allowed to bid at a sale by reason of his fiduciary character: *Ex parte Serle*, 1 Gl. & J. 187. So also the solicitor acting in the bankruptcy is generally incapacitated to bid at a sale: *Ex parte Bennett*, 10 Ves. 381; but where he is mortgagee, he may bid in that character: *Ex parte Towne*, 2 M. & A. 29; see also *Adams* v. *Sworder*, 2 De G., J. & S. 46. As it is for the benefit of the estate to have as many bidders as possible, a mortgagee applying for leave to bid is allowed the costs of the order: *Ex parte Say*, 1 Dea. & C. 32. As to opening the biddings after a sale, see *Ex parte Hutchinson*, 2 M. & A. 727. The mere circumstance that a mortgagee has purchased without having obtained leave to bid, is not sufficient to induce the Court to set aside the purchase: *Ex parte Ashley*, 3 D. & C. 510; *Ex parte Pedder*, Id. 622; but such purchase does not operate to vest an absolute title in the mortgagee: *National Bank of Australia* v. *Hand in Hand, &c., Co.*, 4 App. Cas. 391. A mortgagee who purchases at the sale, must pay the usual deposit: *Ex parte Tatham*, 4 D. & C. 360. Bankruptcy trustees cannot have a reserved bidding where the mortgagee applies for a sale, as, by fixing an unreasonable price, they might prevent a sale: *Ex parte Bernard*, 3 D. & C. 291. Where the mortgagee is also the trustee, a solicitor will be appointed to take the account of his debt and conduct the sale: *Ex parte Cowdry*, 2 Gl. & J. 272; *Ex parte Lees*, 2 D. & C. 361. So in the case of a solicitor-mortgagee another solicitor will be appointed for this purpose: *Ex parte Briggs*, 3 M. & A. 505.

Appointment of Receiver.]—The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41) enacts with regard to mortgages made after the 31st

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of December, 1881, except so far as is otherwise provided in the mortgage deed, as follows :—

Appointment, powers, remuneration, and duties of receiver.

Sect. 19. "A mortgagee, when the mortgage is made by deed, shall, by virtue of this Act, have the following powers to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely) :—

"(iii.) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof."

Sect. 24.—"(1.) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this Act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.

"(2.) The receiver shall be deemed to be the agent of the mortgagor (*n*); and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides.

"(3.) The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts accordingly, for the same.

"(4.) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorize the receiver to act.

"(5) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing under his hand.

"(6.) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such higher rate as the Court thinks fit to allow, on application made by him for that purpose.

(*n*) This clause affirms the general rule of law with regard to receivers appointed by mortgagees irrespective of this Act : see *Jefferys* v. *Dickson*, L. R. 1 Ch. A. 183 ; *Law* v. *Glen*, 2 Ch. A. 641 ; *Ex parte Warren*, 10 Ch. A. 222.

Mortgagee's Remedies.

"(7.) The receiver shall, if so directed in writing by the mortgagee, insure and keep insured against loss or damage by fire, out of the money received by him, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.

"(8.) The receiver shall apply all money received by him as follows (namely) :—

"(i.) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property : and

"(ii.) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver : and

"(iii.) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee : and

"(iv.) In payment of the interest accruing due in respect of any principal money due under the mortgage :

and shall pay the residue of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property."

After a receiver has been appointed under the sections above set out, the mortgagor will not be allowed to distrain for rent : *Bayly* v. *Went*, W. N. 1884, p. 197. Where an action is pending, the appointment of a receiver should be made, not under the Act, but by the Court under the Judicature Act, 1873 (36 & 37 Vict. c. 66), sect. 25, subsect. 8 : *Tillett* v. *Nixon*, 25 Ch. D. 238 : see also *Pease* v. *Fletcher*, 1 Ch. D. 273 ; *Truman* v. *Redgrave*, 18 Ch. D. 547. See further as to judicial appointment of a receiver, Fisher, Mortg. 355 ; Coote, Mortg. 1207.

The subject of the appointment, duties, and liabilities of receivers have already been discussed at considerable length, *ante*, Vol. I., p. 690, *et seq.*, sub tit. ANNUITIES.

CHAPTER VI.

RIGHTS OF THIRD PERSONS.

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2. Rights of the Crown..... PAGE 935

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1. Rights of Landlord of Mortgaged Leaseholds.

Rights of Landlord of Mortgaged Leaseholds.

The assignee of a lease is liable, as such, upon the covenants contained in the lease, although he never enters, and although he is a mere trustee or mortgagee of the term: see *Grey* v. *Cuthbertson*, 4 Doug. 351; *Gretton* v. *Diggles*, 4 Taunt. 766. It was formerly thought that the case of a mortgagee did not come within the general rule: see *Eaton* v. *Jaques*, 2 Doug. 459. But this decision has been expressly overruled on several occasions, and the rule is now fully established that a mortgagee who takes an assignment of the whole unexpired residue of the term, renders himself liable to the lessor for payment of the rent, and performance of the covenants reserved and contained in the lease, although he never actually enters into possession of the premises: see *Store* v. *Evans*, cit. Woodf. L. and T. 244; *Williams* v. *Bosanquet*, 3 Moore, 500; 1 Br. & B. 264: see *Sparkes* v. *Smith*, 2 Vern. 275; *Turner* v. *Richardson*, 7 East, 340 n.; *Mayor of Carlisle* v. *Blamire*, 8 East, 487. And, as to the liability of a mortgagee of a lease, where part only of the premises included in the lease are assigned, see *Merceron* v. *Dowson*, 5 B. & C. 478; *Curtis* v. *Spitty*, 1 Scott, 737.

Mortgagee by assignment of lease liable upon the covenants in the lease.

No liability to the original lessor, in respect of the rent and covenants reserved and contained in the lease, attaches upon an underlessee, where a reversion, of however short a period, is left in the original lessee: *Paterson* v. *Scott*, 2 Str. 776; *Holford* v.

Sub-lessee not liable on covenants in the original lease.

Rights of Landlord of Mortgaged Leaseholds.

Hatch, 1 Doug. 183. See *Cosser* v. *Collinge*, 3 My. & K. 283. But if the underlease is for a period of equal duration to, or longer than, the original term, it amounts to an assignment: *Hicks* v. *Downing*, Lord Raym. 99. See *Palmer* v. *Edwards*, Doug. 186, n.; *Parmenter* v. *Webber*, 2 Moo. 656; 8 Taun. 593; *Baker* v. *Gostling*, 4 M. & Sc. 539; *Earl of Derby* v. *Taylor*, 1 East, 502.

Liability of assignee ceases after assignment over.

As an assignee of a lease is liable upon the covenants, before entry, so he is discharged from all future liability, as soon as he has assigned over to a third person, although he continues in possession, and his assignee does not enter: *Walker* v. *Reeve*, 3 Doug. 19; provided such retainer of possession by the assignee is not fraudulent. See *Fagg* v. *Dobie*, 3 Y. & C. 96; *Barnfather* v. *Jordan*, 2 Doug. 452; *Odell* v. *Wake*, 3 Camp. 394; *Paul* v. *Nurse*, 8 B. & C. 486; *Taylor* v. *Shum*, 1 B. & P. 21; *Valliant* v. *Dodemede*, 2 Atk. 546; *Onslow* v. *Corrie*, 2 Madd. 330. But the lessor's (or lessee's) remedy against the assignee upon the covenants for breaches committed whilst he sustained that character, subsists after he has assigned over; inasmuch as the liability vested while he had the legal estate: *Harley* v. *King*, 2 Cr. M. & R. 18; *Burnett* v. *Lynch*, 5 B. & C. 589; and, on the other hand, the assignee is not liable in covenant for breaches committed before the assignment to him—although he is bound by any forfeiture incurred by his assignor, and not waived by the lessor: *St. Saviour's, Southwark*, v. *Smith*, 3 Burr. 1271; *Treacle* v. *Coke*, 1 Vern. 165.

Equitable mortgagee.

An equitable mortgagee is not liable for the rent or on the covenants of the lease (*a*); and the lessor cannot require the mortgagor to execute, or the mortgagee to accept a legal assignment even though the mortgagee may have entered into possession and paid rent: *Moore* v. *Grey*, 2 De G. & Sm. 304; *Walters* v. *Northern Coal Mining Co.*, 5 De G. M. & G. 629; *Newry Railway Co.* v. *Moss*, 14 Beav. 64;

Disclaimer of mortgaged lease.

(*a*) As to disclaimer by a trustee in bankruptcy of a lease deposited by the bankrupt by way of equitable mortgage, see *Ex parte Buxton*, 15 Ch. D. 289.

Wright v. *Pitt*, L. R. 12 Eq. 408. See also *ante*, p. 707.

Rights of Landlord of Mortgaged Leaseholds.

Where a lease was executed by the lessee, as well as by the landlord, it was held, in ejectment by the landlord on the covenants in the lease, that a mortgagee, to whom the lease had been assigned, was bound to produce the instrument for the inspection of the lessor: *Doe* d. *Morris* v. *Roe*, 1 M. & Welsb. 207. See *Perry* v. *Newnham*, 1 Molloy, 72. But equity will not aid the landlord against a mortgagee, who has not taken possession of the premises: *Sparkes* v. *Smith*, 2 Vern. 275.

Production of lease to lessor.

On the other hand, in *Pilkington* v. *Shaller*, 2 Vern. 374, relief in equity was refused to a mortgagee by assignment of a building lease, who had never taken possession, and had been compelled by the landlord to pay the rent reserved on the lease.

A lessor cannot take advantage of a release from the mortgagee of a covenant to renew, or, it should seem, of any other covenant, without the concurrence of the mortgagor, or other person entitled to the equity of redemption: *O'Reily* v. *Featherstone*, 4 Bligh, N. S. 161.

2. Rights of the Crown.

The conclusion deducible from the authorities on this subject, appears to be, that equities may subsist against the crown in the same manner as against a subject (except that the crown cannot be guilty of laches, want of diligence, &c.), but that equities cannot be enforced agaist the crown, unless the legal estate is outstanding in a subject, who is amenable to the jurisdiction of the Court, or unless by Act of Parliament the Court has jurisdiction over the subject-matter. The only course in other cases is by a memorial to the Treasury.

In *Pawlett* v. *Att.-Gen.*, Hard. 465, the heir of a mortgagee, after default, had been attainted of high treason, whereupon the king seized the lands, and the executor of the mortgagee having extended the mortgagor's lands upon his recognizance, the mortgagor filed his bill to redeem against king and exe-

Rights of the Crown.

cutor. The Court seemed to be clear that the equity existed, but saw no means of compelling a conveyance by the crown; and no relief appears to have been given: see also *Hodge* v. *Att.-Gen.*, 3 Y. & C. 342.

Where any Court has jurisdiction over the subject-matter, the equity may be enforced; so where lands of the crown debtors were sold under an extent of the crown, the Court, being authorized by the stat. 25 Geo. 3, c. 35, to dispose of the proceeds of sale, will satisfy out of such proceeds all such equitable claims as are prior to the lien of the crown: *Casberd* v. *Ward*, 6 Pri. 411; see *R.* v. *Lee*, 6 Pri. 369; *Giles* v. *Grover*, 1 Cl. & F. 72; see also *ante*, p. 675.

When the legal estate is outstanding in a subject, equities attaching upon it are enforceable against the crown: *Prescott* v. *Tyler*, 9 Jur. 470; *Hodge* v. *Att.-Gen.*, 3 Y. & C. 346. In *Reeve* v. *Att.-Gen.*, 2 Atk. 223, it was said that the Court would not decree a foreclosure against the crown, but would direct that the mortgagee should hold and enjoy the mortgaged premises until the crown thought proper to redeem. In *Prescott* v. *Tyler*, a *sale* was ordered, at the suit of equitable mortgagees, the Court observing that their situation as equitable mortgagees, by the ordinary practice of the Court, carried with it a right of sale.

CHAPTER VII.

ALIENATION BY THE MORTGAGOR.

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1. Consolidation and Tacking (*a*).

Consolidation and Tacking, &c.

Consolidation of Securities.]—The law with regard to consolidation has been altogether altered by the Conveyancing and Law of Property Act, 1881, sect. 17 (set out *infra*), as regards mortgages made since the commencement of that Act. Inasmuch, however, as securities made on or before the 31st of December, 1881, are regulated by the old rules of law on this point, it may be useful briefly to consider the leading principles of the doctrine of consolidation as hitherto accepted. It is clear, by a long settled rule, that where there are two distinct mortgages of several estates by the same mortgagor to the same mortgagee, to secure dif-

When there are several mortgages, mortgagor cannot redeem one without the other.

(*a*) In the former editions of this work the doctrine of the consolidation of securities was treated as a branch of the doctrine of tacking, but the two doctrines depend on principles altogether different. This difference is thus explained by Mr. Fisher:—"In tacking, the right is to throw several debts, one or more of which are either lent upon inferior securities on the *same* estate, or are mere specialty debts, upon the protection of the legal estate, the dominion over which is the very foundation of the right; but the right now to be considered [*i.e.* consolidation] depends upon the equitable principle that he who seeks the aid of the court must do equity himself; and it enables a mortgagee to unite, and to hold united, securities on *different* estates until payment of the debts charged on both of them—to make one estate liable for a debt specifically charged on the other."—Fisher, Mortg. p. 597.

Consolidation and Tacking, &c.

ferent debts, the mortgagor cannot redeem one without redeeming the other: *Shuttleworth* v. *Laycock*, 1 Vern. 245: *Pope* v. *Onslow*, 2 Vern. 286; *Margrave* v. *Le Hooke*, Id. 207; *Roe* d. *Kaye* v. *Soley*, 2 W. Bl. 726; *Willie* v. *Lugg*, 2 Eden, 78. And the rule, it seems, applies to the purchaser or incumbrancer of an equity of redemption, even though he had no notice of the mortgage affecting the estate not comprised in his purchase or security, provided the mortgagee has the legal estate in the land which is in question; *Jones* v. *Smith*, 2 Ves. jun. 376.

Rule extends to purchasers.

Where one mortgagor and one mortgagee.

Thus, if A. mortgages Whiteacre for 1000*l.* to B., and afterwards mortgages Blackacre for 500*l.* to B., and then mortgages or sells the equity of redemption in Blackacre to C., without apprising him of the existence of the other mortgage to B., C. could not redeem Blackacre, except upon the same terms as A. could have done, namely, by paying both mortgages: *Tribourg* v. *Lord Pomfret*, cit. Amb. 733; *Ex parte Carter, Ibid.*; *Ireson* v. *Denn*, 2 Cox, 425; see *Jennings* v. *Jordan*, 6 App. Ca. 698.

This is a very important doctrine to purchasers and mortgagees; for it shows that no person can safely buy, or advance money on, an equity of redemption, without ascertaining from the mortgagee that he has no other mortgage from the proposed vendor or mortgagor.

This doctrine applies equally to real and personal property, and where one mortgage is of real and the other of personal property: *Jones* v. *Smith*, 2 Ves. jun. 376. It does not depend like tacking on possession of the legal estate, but applies alike whether the interests in the properties are legal or equitable: *Watts* v. *Symes*, 1 De G. M. & G. 240; *Neve* v. *Pennell*, 2 H. & M. 170; *Cracknall* v. *Janson*, 11 Ch. D. 9.

Union of several mortgages in one transferee.

The rule applies to mortgages originally made to different persons which have become united in the same person; and that whether the first mortgagee in date takes a transfer of the subsequent mortgage, or the subsequent mortgagee takes a transfer of the first mortgage: *Tilley* v. *Davies*, 2 Y. & C. C. C. 399 n.; *Bovey* v. *Skipwith*, 1 Ch. Ca. 201; *Vint* v. *Padgett*, 2 De G. & J. 611; *Tweedale* v. *Tweedale*,

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23 Beav. 341. And it also applies where the mortgagees are trustees, or two different sets of trustees: *Tassell* v. *Smith*, 2 De G. & J. 713.

Union of several equities of redemption in same owner.

If mortgages of properties belonging to several persons are made to the same mortgagee, or become vested by transfer in the same mortgagee, and the equity of redemption of the mortgaged properties subsequently becomes vested in the same owner, the mortgagee will be entitled to consolidate the mortgages; and when the right to consolidate has once arisen, it will not be affected by any subsequent change in the ownership of the properties either by sale, mortgage, descent, or otherwise: *Ex parte Alsager*, 2 M. D. & De G. 328; *Selby* v. *Pomfret*, 1 J. & H. 336; *Watts* v. *Symes*, 1 De G. M. & G. 240.

Doctrine applies to foreclosure.

The doctrine in question is applicable not only where the mortgagor seeks to redeem, but also in the case of a suit of foreclosure instituted against him by the mortgagee: *Selby* v. *Pomfret*, 1 J. & H. 336; *Watts* v. *Symes*, 1 De G. M. & G. 240. The rule also applies to bankruptcy, except where a fraudulent preference would be the result. So a mortgagee, applying for a sale in bankruptcy of distinct estates mortgaged to him for distinct debts, is entitled to have the surplus of one estate applied to make good the deficiency of another: *Selby* v. *Pomfret*, 1 J. & H. 336; *Neve* v. *Pennell*, 2 H. & M. 170: unless one of the securities is an original mortgage taken after notice of insolvency: *Ex parte Hodgkin*, L. R. 20 Eq. 746.

Cases in which the doctrine is not applicable.

But the rule as to consolidation only applies where default has been made on all the securities in respect of which the right is claimed: where, therefore, a mortgagor executed two mortgages to secure distinct advances repayable respectively by instalments, whereby one mortgage would be paid off in 1883, and the other in 1888, and made default in payment of instalments in respect of the latter, but not of those in respect of the former, it was held that the right to consolidate did not arise: *Cummins* v. *Fletcher*, 14 Ch. D. 699. Nor will the right arise, where the mortgagor has assigned the

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property comprised in one mortgage before the creation of the mortgage of the other property: *Jennings* v. *Jordan*, 6 App. Ca. 698 (overruling on this point *Tassell* v. *Smith*, 2 De G. & J. 713); and see *Re Walhampton Estate*, 26 Ch. D. 391.

It is clear also that the rule does not apply except where the mortgaged properties originally belonged and continue to belong to different persons; and therefore, if A. and B. mortgage an estate to C., and A. alone mortgage another estate to C. for a different debt, A. and B. may redeem their mortgage without being compelled to redeem also the separate mortgage of A.: see *Marcom* v. *Bloxham*, 11 Ex. 586; *Cummins* v. *Fletcher*, 14 Ch. D. 699.

And it would seem that a mortgage by three persons cannot be consolidated with a mortgage by two of them in trust for three: see *Re Raggett*, 16 Ch. D. 117, but the point was not decided.

Persons against whom the doctrine will prevail.

Where the right to consolidate exists, it will prevail against the heir or devisee of the mortgagor of either estate, but not against a dowress: *Jones* v. *Griffiths*, 2 Coll. 207. If the mortgagor assigns the equity of redemption of one of the properties, the right to consolidate will prevail against the assignee though without notice of the charge affecting the other property: *Cator* v. *Charlton*, cit. 2 Ves. jun. 376; *Collett* v. *Munden*, *Ibid.*; *Willie* v. *Lugg*, 2 Ed. 78; see *Beevor* v. *Lack*, L. R. 4 Eq. 537.

Consolidation abolished by stat. 44 & 45 Vict. c. 41.

The doctrine of consolidation has been altogether abolished as regards securities made after the 31st of December, 1881 (unless a contrary intention is expressed in the mortgage deeds), by the following provisions of the Conveyancing and Real Property Act, 1881 (44 & 45 Vict. c. 41):—

Restriction on consolidation of mortgages.

Sect. 17.—(1.) "A mortgagor seeking to redeem any one mortgage, shall, by virtue of this Act, be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

"(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them.

"(3.) This section applies only where the mortgages or one of them are or is made after the commencement of this Act." Consolidation and Tacking, &c.

Where an action was brought by a mortgagee for the foreclosure of two mortgages, of distinct estates, both executed by the same mortgagor since the commencement of this Act to secure distinct advances, it was held that the mortgagor could not redeem either estate separately without paying the whole costs of the action: *Clapham* v. *Andrews*, 27 Ch. D. 679.

Tacking (*b*).]—Where a person lent his mortgagor a further sum, he was held not to be entitled to hold the mortgage as a security for the moneys thus advanced, under a parol agreement; for, though equitable mortgages may be created by a mere deposit of title deeds without writing (*ante*, p. 695), yet the principle does not extend to a case in which the deeds are already in the possession of the creditor, as a mortgagee of the legal estate, and not as a depositary merely: *Ex parte Hooper*, 1 Mer. 7. So where a person lends money on the security of a contract for sale of land, *i.e.*, of the purchase-money, he cannot protect the advance by getting in a prior legal mortgage: *Lacey* v. *Ingle*, 2 Phil. 413. Further loan.

The question, however, has been much discussed, whether a mortgagee has a right to tack a bond or other specialty debt not being a lien on the mortgaged property to his security. The affirmative appears to have been held in some early cases: *Halliley* v. *Kitland*, 2 Ch. Rep. 361; *Baxter* v. *Manning*, 1 Vern. 244; but it is now clearly established that, as against the mortgagor himself, the mortgagee cannot tack a bond debt: *Lowthian* v. *Hasel*, 3 B. C. C. Bond debts.

(*b*) By sect. 7 of the Vendor and Purchaser's Act, 1874 (37 & 38 Vict. c. 78), it was provided that no priority or protection should be allowed by reason of legal estates and tacking; but this enactment was repealed, as to England, by the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), sect. 129, except as to anything duly done under the repealed Act before the commencement of the later Act: see *Robinson* v. *Trevor*, 12 Q. B. D. 423. And sect. 73 of the Conveyancing and Law of Property Act, 1881, contains a similar repeal as to Ireland.

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162; see also *Challis* v. *Casborn*, Pre. Ch. 407; *Anon.*, 2 Ves. Sen. 661; 12 Mod. 559; *Jones* v. *Smith*, 2 Ves. Jun. 376; *Hunter* v. *Nockolds*, 1 Mac. & G. 640. And the same rule extends to purchasers of the equity of redemption: *Archer* v. *Snapp*, 2 Stra. 1107; see also *Bayly* v. *Robson*, Pre. Ch. 89; *Troughton* v. *Troughton*, 3 Atk. 659.

But not to the prejudice of creditors.

But this right of tacking, as against the heir or devisee of the mortgagor, is not allowed to operate to the prejudice of the creditors of the mortgagor: *Lowthian* v. *Hasel*, 8 B. C. C. 162. So, if there is a charge of debts upon the real estate, under which the equity of redemption in the mortgaged lands, being equitable assets, would be distributable among all the creditors without distinction, the mortgagee, in respect of his debt not secured by the mortgage, must come in rateably with the creditors at large: *Heams* v. *Bance*, 3 Atk. 630; *Price* v. *Fastnedge*, Amb. 685; *Irby* v. *Irby*, 22 Beav. 217. As the heir or devisee is liable in respect of the lands of the mortgagor to discharge his bond and other specialty debts, such debts may be tacked against them; and as an executor stands in the same situation with respect to personalty, it follows that such debts, as also simple contract debts (*vide infra*), may be tacked against him: *Coleman* v. *Winch*, 1 P. Wms. 775; *Morret* v. *Paske*, 2 Atk. 53; *Bayly* v. *Robson*, *Ibid.* 89; *Troughton* v. *Troughton*, 1 Ves. Sen. 87; 3 Atk. 695; *Adams* v. *Claxton*, 6 Ves. 225; *Rolfe* v. *Chester*, 20 Beav. 610; *Re Haselfoot's Estate*, L. R. 13 Eq. 327.

Simple contract debts may now be tacked against the heir or devisee.

Formerly the mortgagee could only tack, against the representative of the mortgagor, debts by which such representative was bound: thus, he had no such right against an heir or devisee, in respect of a simple contract debt: *Newby* v. *Cooper*, Finch, 379.

But now, by virtue of the Statute of Fraudulent Devises (3 & 4 Will. 4, c. 104), a debt by simple contract may, in all cases, be tacked as against the heir or devisee of real estates (including copyholds), which are not by the will charged with payment of debts; and debts charged by the will upon real estate

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may, of course, be tacked by virtue of the charge: see *Challis* v. *Casborne*, 1 Eq. Ca. Ab. 325, pl. 9; but not against specialty creditors: *Rolfe* v. *Chester*, 20 Beav. 610; *Thomas* v. *Thomas*, 22 Beav. 341; see *Talbot* v. *Frere*, 9 Ch. D. 571 (*c*). For the same reason, if the mortgage were of leaseholds or other personal estate, the mortgagee was always (subject to the claims of creditors and purchasers for valuable consideration) entitled to tack simple contract debts, against the executor or administrator: *Eccles* v. *Thawill*, Pre. Ch. 18; *Demandry* v. *Metcalf*, *Ibid.* 491; 2 Vern. 691; *Coleman* v. *Winch*, 1 P. Wms. 777; *Anon.*, 2 Vern. 177. But, as the mortgagee cannot tack a bond or simple contract debt to the prejudice of creditors, and as the executor is presumed always to sell for the payment of debts, it seems, that a purchaser of the equity of redemption from the executor may redeem on payment of the mortgage-money only: see *Coleman* v. *Winch*, 1 P. Wms. 776.

Mortgage of equity of redemption.

Where a person is about to advance money on an estate which is already in mortgage, he should ascertain from the prior mortgagee the exact amount of his debt (*d*), and see that the mortgage-deed does not extend to future advances; and he ought also to ascertain that there is no mortgage-debt owing from the mortgagor to the mortgagee on any other estate, inasmuch as we have seen that the mortgagee in such a case would be entitled to hold both mortgages (if made before the 31st of December, 1881) until both debts were satisfied (*ante*, p. 937); and, therefore, if the other mortgage were a scanty security for the money due upon it, the present

(*c*) The stat. 32 & 33 Vict. c. 46, whereby in the administration of assets of deceased persons specialty and simple contract debtors are treated as standing in equal degree, is not considered to have enlarged the right of tacking: see Fisher, Mortg. 574; see also as to construing this Act, *Re Williams' Estate*, L. R. 13 Eq. 270.

(*d*) The first mortgagee would clearly be concluded as against the second mortgagee, by the representation so made to him. Upon this principle, if A., being about to lend money on B.'s estate, inquires of C., a prior mortgagee, whether he has an incumbrance upon it, at the same time informing him of the object of the inquiry, and the latter denies having any, C.'s mortgage would be postponed to A.'s: *Ibbotson* v. *Rhodes*, 2 Vern. 554.

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estate would probably be resorted to for the deficiency. A second mortgagee should also immediately give notice of his security, when perfected, to the first mortgagee; for, though he is not bound to do so, and his omission to give notice would not confer any priority on the first mortgagee in respect to subsequent advances, provided they were both upon an equal footing as equitable incumbrancers, the legal estate being outstanding in a third person (*Frere* v. *Moore*, 8 Pri. 475, *infra;* and see *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 494), yet if, as is commonly the case, the first mortgagee had the legal estate, he would be at liberty to tack any subsequent charge to his original security against an intervening mortgagee or judgment creditor, of whose incumbrance he had no notice when he made the farther advance: *Goddard* v. *Complin*, 1 Ch. Cas. 119; *Blackstone* v. *Moreland*, 2 Ch. Cas. 20; *Wrightson* v. *Hudson*, 2 Eq. Ca. Ab. 609, pl. 7. The sums, however, advanced by the first mortgagee must be actually charged upon the estate; and a memorandum merely stating the amount due, would only have the effect of creating a simple contract-debt, and not of charging the lands; and no addition could be made to it by oral testimony: *Ex parte Hooper*, 1 Mer. 7, *ante*, p. 941.

A first mortgagee may also tack a judgment to his mortgage-debt against a mesne mortgage creditor, of whose security he has no notice, *e.g.*, an equitable mortgagee by deposit to secure further advances: *Cooke* v. *Wilton*, 29 Beav. 100; or a subsequent judgment: *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 494; *Shepherd* v. *Titley*, 2 Atk. 352; and the circumstance of the mortgagor having become bankrupt does not affect the right to tack the judgment: *Baker* v. *Harris*, 16 Ves. 397.

So, where a judgment creditor advanced more money to his debtor upon mortgage, without notice of an intervening judgment, he was held entitled to hold the land against such mesne incumbrancer, until his mortgage and judgment-debts were both paid: *Smithson* v. *Thompson*, 1 Atk. 520.

Notice of

But after giving notice of his incumbrance, &c., to

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the first mortgagee or judgment creditor, the second mortgagee is secure against further advances being made by either of them; for a mortgagee or judgment creditor, advancing money after notice (*e*) of an intervening security would be postponed, as to such further advances, to that security: *Cason* v. *Round*, Pre. Ch. 226; *Shepherd* v. *Titley*, 2 Atk. 350; and this rule will apply even where the first mortgage is expressly made to cover future advances: *Hodgkinson* v. *Rolt*, 9 H. L. 514; see *London and County Banking Co.* v. *Radcliffe*, 6 App. Ca. 722.

mesne incumbrance excludes tacking.

Upon the same principle that a first mortgagee, after notice of a second mortgage, cannot make further advances, he is not allowed to turn interest into principal as against the second mortgagee, such a transaction being in fact a further advance *pro tanto*: *Digby* v. *Craggs*, 2 Eden, 200; *S. C.*, Amb. 612.

Mortgagee cannot turn interest into principal against puisne mortgagee.

The right to tack one security to another may be excluded by the apparent intention of the parties, and is confined to mortgages properly so called, and does not apply to conveyances in trust for sale: *Ex parte Pettit*, 2 Gl. & J. 47.

Tacking may be excluded by apparent intention.

Independently of the risk which a second mortgagee incurs, of the first mortgagee making further advances without notice, he has another danger to encounter, against which no vigilance can protect him, and it is this: that, if the mortgagor mortgages the land again to a person without notice of the second mortgage, and the third incumbrancer gets in the first mortgage, by means of which he acquires the legal estate, he will be entitled to hold it against the second mortgagee until both debts are satisfied: *Bovey* v. *Skipwith*, 1 Ch. Ca. 201: see also *Marsh* v. *Lee*, 1 Ch. Ca. 162; 2 Vent. 337; *Belchier* v. *Renforth*, 5 B. P. C. 292.

Subsequent incumbrancer getting in legal estate.

It is not necessary that the incumbrancer, who obtains priority by this means, should have a regular mortgage, purporting to be an immediate conveyance of the lands; any informal instrument

(*e*) Registration of a mesne incumbrance in Middlesex or Yorkshire, not being notice, does not prevent tacking: *Bedford* v. *Backhouse*, 2 Eq. Ca. Ab. 615; *Cator* v. *Cooley*, 1 Cox, 182; see *Arden* v. *Arden*, 29 Ch. D. 702.

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which would amount to a charge in equity will be sufficient; *e. g.*, a memorandum in these terms: "Received of Mr. S. M. 450*l.*, to be secured by mortgage on my H. estate:" *Matthews* v. *Cartwright*, 2 Atk. 347.

Mortgagee must claim both mortgages in the same right.

But the mortgagee must be entitled to both incumbrances in the same right; for if he holds one as trustee, and the other beneficially, he will not be permitted to tack them together: *Morret* v. *Paske*, 2 Atk. 53; *Barnett* v. *Weston*, 12 Ves. 130: see also *Frere* v. *Moore*, 8 Price, 417.

Notice, at what period immaterial.

It is clearly immaterial that the third mortgagee, at the time of his getting in the prior incumbrance, was acquainted with the intermediate charge, if he had no notice of it when he took his security; in fact, it is the discovery of the mesne incumbrance which generally induces him to do so. Nor is it material that the first mortgagee was aware of the second mortgage, when he conveyed to the third mortgagee: *Hawkins* v. *Taylor*, 2 Vern. 29; *Robinson* v. *Davison*, 1 B. C. C. 63. The rule is that the legal estate may be got in for protection, even *pendente lite*, at any time before a decree to settle priorities: *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 491; *Robinson* v. *Davison*, 1 B. C. C. 63; *Belchier* v. *Butler*, 1 Eden, 522. "There is no difficulty upon the point as to a decree to settle priorities. After that, you cannot tack, certainly (*Wortley* v. *Birkhead*, 2 Ves. sen. 571), for there is a judgment for the creditors, that they shall be paid according to their priorities. But you may, as was held in the House of Lords (*Belchier* v. *Renforth*, 6 B. P. C. 28), up to the time of the decree, struggle for the *tabula in naufragio*, and though the decree is, in a sense, only a judgment upon the rights as they stood at the time the bill was filed, yet it was decided in that case, that, until the decree, you might do so:" *per* Lord *Eldon*, *Ex parte Knott*, 11 Ves. 619: see also *Peacock* v. *Burt*, 4 L. J. N. S. Ch. 33. But an equitable mortgagee, who acquires the legal estate from a trustee, or (which is the same thing) from a *satisfied mortgagee*, cannot, even though originally without notice, gain priority over

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the *cestui que trust* of the mortgagor after notice of his rights, for by taking a conveyance with notice of the trust, he himself becomes a trustee, and must not, in order to save himself, be guilty of a breach of trust: *Saunders* v. *Dehew*, 2 Vern. 271: see also *Allen* v. *Knight*, 2 Ha. 272; *Mumford* v. *Stohwasser*, L. R. 18 Eq. 556: see also as to debenture-holders, *De Winton* v. *Mayor of Brecon*, 26 Beav. 533.

The protection of the legal estate extends to the case of a purchase, without notice, from a mere intruder, or person falsely asserting a title, where the falsehood is supported by possession, and could not have been detected by reasonable diligence: *Jones* v. *Powles*, 3 My. & K. 581: see *Robinson* v. *Briggs*, 1 Sm. & G. 188.

First mortgagee postponed if he give false information to second mortgagee.

Although a mortgagee, having the legal estate, may conceal his knowledge of a second mortgage, and enable a third incumbrancer, without notice, to defeat the second mortgagee, he loses his prior equity, and cannot himself take advantage of the legal estate against a subsequent incumbrancer, if, being a party to the subsequent loan, or, being applied to for information by the lender, he conceals the existence of his own incumbrance: *Mocatta* v. *Murgatroyd*, 1 P. Wms. 393; *Berrisford* v. *Milward*, 2 Atk. 49; *Draper* v. *Borlase*, 2 Vern. 370; *Ibbotson* v. *Rhodes*, 2 Vern. 554; *Beckett* v. *Cordley*, 1 B. C. C. 351; *Commissioners of Public Works* v. *Harby*, 2 Beav. 508; *Kettlewell* v. *Watson*, 21 Ch. D. 714. But the rule is different where the mortgagee is merely conusant of the treaty for the subsequent purchase or incumbrance, and does not take a part in it: *Osborn* v. *Lea*, 9 Mod. 96.

Principle of doctrine.

The doctrine, which gives to a mortgagee acquiring the legal estate so decisive an advantage over prior incumbrancers, is founded upon the principle, that, "where there are two persons that have equal equity, he that has the legal title shall prevail, because there is no equity to take from such person the title that he has gained at law." See Lord *Cowper's* judgment in *Oxwick* v. *Plumer*, 5 Bac. Ab., Gwill. ed., 43; *Goodtitle* v. *Morgan*, 1 T. R. 755; *Right* v. *Bucknall*, 2 B. & Ad. 283.

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A mesne incumbrancer cannot, by obtaining administration to a prior judgment creditor, and releasing the judgment, deprive a subsequent incumbrancer, who has got in the judgment, of the benefit of his diligence: *Huntington* v. *Greenville*, 1 Vern. 51.

Judgment creditor.

A judgment creditor could not, before the stat. 1 & 2 Vict. c. 110 (see *ante*, p. 658), by buying in a first mortgage, tack his debt to such mortgage, so as to gain priority over an intervening mortgagee or judgment creditor: see 5 Bac. Ab. 57; *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 491; *Anon.* 2 Ves. sen. 262; Lord *Eldon's* judgment in *Ex parte Knott*, 11 Ves. 617: see *Eaton* v. *Sanxster*, 6 Sim. 522. But since the Act referred to, it would seem that, inasmuch as a judgment creditor is thereby given a specific charge upon the estate, and is thus placed in the position of an equitable mortgagee, he may tack by reason of the change in the nature of his security by virtue of the statute: see Fisher Mortg. 566: see also *Guest* v. *Cowbridge Rail. Co.*, L. R. 6 Eq. 619 (*f*).

Purchase by mortgagee of equity of redemption extinguishes his mortgage.

Merger on Purchase of Equity of Redemption.]—It has been laid down that if a first mortgagee purchase the equity of redemption, he cannot set up his mortgage against subsequent incumbrances of which he had notice: *Greswold* v. *Marsham*, 2 Ch. Cas. 170; *Mocatta* v. *Murgatroyd*, 1 P. Wms. 392. So also in a subsequent case it was held by Sir *W. Grant*, M.R., that a purchaser of an equity of redemption could not set up a first mortgage, which was paid off out of his purchase-money, against a second incumbrancer, of whose security he had actual or constructive notice; but that the mortgage by such payment was extinguished, and the second incumbrance became the primary charge: *Toulmin* v. *Steere*, 3 Mer. 210. So in *Brown* v. *Stead*, 5 Sim. 535, a second mortgagee having taken a conveyance of the equity of redemption in con-

So, where the purchaser pays off an incumbrance.

(*f*) The learned Editors of Mr. Coote's Treatise on the Law of Mortgage are, however, of a different opinion: see Coote Mortg. (5th ed.) pp. 890, 891.

sideration of the debts due to himself and the other mortgagees (which he covenanted to pay), was held to have extinguished his own debt, and was postponed to a third mortgagee. In *Smith* v. *Phillips*, 1 Kee. 694, a term of years was sold under the bankruptcy of the owner, subject to an agreement for a lease to A., and to a prior equitable mortgage to B., of which A. had notice at the time of entering into the agreement. B., having purchased the premises, was held to have thereby extinguished his mortgage, and was decreed to perform the agreement with A.: see *Tyler* v. *Lake*, 4 Sim. 351; *Gregg* v. *Arrott*, Cas. Tem. Sugd. 251.

Merger of Securities.

But in *Watts* v. *Symes*, 1 De G. M. & G. 240, *Knight Bruce*, L.J., expressed some doubt as to the soundness of the doctrine laid down in *Toulmin* v. *Steere*, *supra*, and it was held that a purchaser of an equity of redemption who had paid off a first mortgage on the property was entitled to the benefit of the security as against a subsequent incumbrancer, the intention of the purchaser to retain such benefit being indicated by the contract for purchase. It seems clear that the doctrine in *Toulmin* v. *Steere* will not be extended: see *Adams* v. *Angell*, 5 Ch. D. 634; *Bell* v. *Sunderland Building Society*, 24 Ch. D. 618.

Indication of intention will prevent merger.

And a third person paying off a first mortgagee may lose his priority by neglecting to keep the security on foot, and taking a conveyance *de novo* from the owner of the equity of redemption. Thus, where A. advanced money by which a first mortgage was paid off, and instead of taking a transfer of the security to himself, allowed it to be treated on the face of the deed as a payment to B., the person entitled to the equity of redemption, to whose trustee the legal estate in fee was conveyed; and then by a subsequent deed, reciting that the money paid to the mortgagee was advanced by A., B. in consideration thereof granted to A. an annuity, and his trustee demised the lands to a trustee for A., for securing the annuity; it turned out that there was a second mortgage, of which A. had constructive notice, it was held that the second mortgagee had become the first incumbrancer: *Parry* v. *Wright*, 5 Russ. 142: see *Searle* v. *Colt*, 1 Y. & C. C. C. 36.

Person paying off first mortgagee postponed under circumstances.

Merger of Securities.

Where a first mortgagee acquires the equity of redemption by devise (and the same principle would apply to an heir), in the absence of any indication of intention to the contrary, it will be presumed at his death that the charge has merged in the inheritance: *Forbes* v. *Moffatt*, 18 Ves. 384; *Davis* v. *Barratt*, 14 Beav. 551; *Hatch* v. *Skelton*, 20 Beav. 453; *Swinfen* v. *Swinfen*, 29 Beav. 199. But this presumption may be rebutted by express or implied evidence of intention to keep the charge on foot, and in such case it will be preserved for the benefit of the personal representatives of the mortgagee: *Earl of Clarendon* v. *Barham*, 1 Y. & C. C. C. 688; *Tyrwhitt* v. *Tyrwhitt*, L. R. 8 Eq. 338.

Purchase of incumbrance by trustees, &c.

And here it should be noticed, that though, in the case of a stranger buying an incumbrance, he is entitled to the whole amount secured, without regard to the price given: *Phillips* v. *Vaughan*, 1 Vern. 336; yet that, where a trustee, executor, or other person standing in any confidential relation to the mortgagor, buys an incumbrance for less than the amount due, he cannot, as against subsequent incumbrancers, claim more than the sum paid: see *Morrett* v. *Paske*, 2 Atk. 54; *Darcy* v. *Hall*, 1 Vern. 49; *Bromley* v. *Holland*, 5 Ves. 620, n.; *Powell* v. *Glover*, 3 P. W. 251, n.; *Carter* v. *Palmer*, 8 Cl. & F. 657; *Hobday* v. *Peters*, 28 Beav. 349.

General observations.

The above remarks will serve to show, in many important particulars, the situation in which a second mortgagee stands in relation to prior and subsequent incumbrancers, and they demonstrate some of the perils to which a person, taking for his security land which is subject to a prior mortgage or judgment debt, is exposed. They suggest, too, that the safest course for a person in this situation is, to pay off the prior mortgagee or judgment creditor, and take a transfer of the legal estate or judgment; by which means he will gain a complete protection against the intervening acts of the mortgagor. By acquiring the legal estate from the first mortgagee, he will also thereby become entitled to the possession or rents of the estate. On this subject it should be observed, that a first mortgagee, after notice of a second mortgage, is bound to account to

Merger of Securities.

the second mortgagee for rents received by him, and not applied in liquidation of his own debt; and the charge against him, in such a case, is for what "he had or *might have* received since his entry": *Cropping* v. *Cooke*, 1 Vern. 270; and see *Maddocks* v. *Wren*, 2 Ch. Rep. 209. In a modern case, Lord *Eldon* stated the relative rights of a first and second mortgagee, in regard to the possession, as follows:—"If a man has a *legal* mortgage, he has nothing to do but to take possession. If he has only an *equitable* mortgage, that is, if there is a prior mortgage, then, if the prior mortgagee is not in possession, the other may have a receiver without prejudice to his taking possession: if he is in possession, you cannot come here for a receiver; you must redeem him, and then, in taking the accounts, he will not be allowed any sums he may have paid over to the mortgagor after notice of the subsequent incumbrance": *Berney* v. *Sewell*, 1 J. & W. 649; see also *Bryan* v. *Cormick*, 1 Ch. Cas. 422; *Dalmer* v. *Dashwood*, 2 Cox, 378; *Phipps* v. *Bishop of Bath and Wells*, 2 Dick. 608; *Norway* v. *Rowe*, 19 Ves. 153. And the Court will not take the possession from the first mortgagee, if he will state upon oath that anything remains due to him: *Quarrell* v. *Beckford*, 13 Ves. 377; *Codrington* v. *Parker*, 16 Ves. 469; see *Rowe* v. *Wood*, 2 J. & W. 557.

Stat. 4 & 5 W. & M. c. 16.

Clandestine Mortgages.]—The stat. 4 & 5 Will. & Mary, c. 16, takes away the right of redemption from a mortgagor in certain cases, as a penalty for his fraudulently making securities without giving notice of prior charges. After reciting the mischief, it provides that if any person shall borrow any money, or, for any other valuable consideration, for the payment thereof, give, or suffer any judgment or recognizance, and shall afterwards borrow any other sum of any other person, or, for other valuable consideration, become indebted to such person, and, for securing the repayment thereof, shall mortgage his lands or tenements, or any part thereof, to the second or other lender or creditor, or to any other person, in trust for such second or other lender or creditor, and shall not give notice to the mortgagee of the said judgment,

If any persons mortgage lands without giving notice of prior judgments, &c.

Clandestine Mortgages.

And shall not, upon notice, within six months pay off the judgments, &c.

Such person shall be excluded from his right of redemption.

So, as to persons mortgaging lands without notice of a prior mortgage.

&c., in writing, under his hand, before the execution of the mortgage; unless the mortgagor or his heirs, upon notice to him or them, given by the mortgagee or his heirs, executors, administrators, or assigns, in writing, under his or their hands and seals, attested by two or more witnesses, of any such former judgment, statute, or recognizance, shall, within six months, pay off the said judgments, &c., and all interest and charges due thereupon, and cause the same to be vacated, or discharged by record, that then the mortgagor or his heirs, executors, administrators, or assigns, shall have no benefit or remedy against the mortgagee or his heirs, executors, administrators, or assigns, in equity or elsewhere, for redemption of the said lands and tenements, or any part thereof, but the mortgagee or his heirs, &c., shall enjoy the lands as if the same had been absolutely purchased. And that if any person shall mortgage any lands or tenements for security of money lent, or otherwise accrued or become due, or for other valuable considerations, and shall again mortgage the same lands or tenements, or any part thereof, to any other person for valuable consideration (the said former mortgage being in force and not discharged), and shall not discover to the second or other mortgagee the former mortgage in writing, under his hand, then and in those cases also, the mortgagor or his heirs, &c., shall have no relief or equity of redemption against the second or after mortgagee or his heirs, &c., upon the after mortgage, but that the mortgagee or his heirs, &c., shall hold the lands, estate, and term therein as if the same had been an absolute purchase.

But the Act provides that the sub-mortgagees shall have power to redeem any former mortgage or mortgages, and that the act shall not extend to bar any widow of any mortgagor, not joining with the husband, from her dower.

In *Stafford* v. *Selby*, 2 Vern. 589, a plea of this statute by the assignee of a mortgagee was overruled, on the ground of unfair and dishonest practices on the defendant's part. The Act being penal will be strictly construed: see *Kennard* v.

Futvoye, 2 Gif. 81; *Clark* v. *Hoskins*, 15 W. R 1161.

Notice to Trustees.

2. Notice to Trustees.

Priority gained by notice to trustees.

There is a well established rule as to equitable interests in personal property which is vested in trustees, that where there are several incumbrancers or purchasers of the same fund, he that first gives notice to the person having the legal title will prevail; such notice, in regard to *choses en action*, being considered as tantamount to the delivery of possession of chattels which are capable of manual transfer (*g*). If, therefore, a legatee mortgages or sells an unreceived legacy to two persons in succession; if the second mortgagee or purchaser, not being apprized of the former transaction, gives notice to the executor of his claim before the first, such second mortgagee or purchaser generally acquires a superior title: *Dearle* v. *Hall*, 3 Russ. 1; *Loveridge* v. *Cooper*, 3 Russ. 30; *Foster* v. *Cockerell*, 3 Cl. & Fin. 456; *Martin* v. *Sedgwick*, 9 Beav. 333. But the fact that the trustee or executor or the debtor has acquired knowledge *aliunde* of the prior claim may defeat the purchaser's preference: *Lloyd* v. *Banks*, L. R. 3 Ch. A. 488.

Remarks upon the doctrine of *Dearle* v. *Hall*, and *Loveridge* v. *Cooper*.

It is needless to enforce, by any observations, the propriety which these cases suggest of a proposed incumbrancer or purchaser of an equitable interest in a fund, which is vested in trustees, ascertaining by communication with them, previously to the payment of his money, whether there are any prior incumbrances, and giving notice to them of his charge or assignment immediately on its completion. If trustees, after having had notice of existing incumbrances, represent the property as unincumbered in answer to the inquiry of an intended mortgagee or purchaser (of whose object in making the inquiry they are apprized), they will be liable for the loss consequent on the misrepresentation: *Burrowes* v. *Lock*, 10 Ves. 470; *Browne* v. *Savage*, 4 Drew. 653; *Slim* v. *Croucher*, 1 De G. F. & J. 518. It has been

(*g*) See as to shares in companies, *Re Société Générale de Paris* v. *Walker*, 11 App. Ca. 20.

Notice to Trustees.

suggested that all responsibility might be avoided by a refusal to give any information, or at all events any positive assurance on the subject: see the 3rd edition of this work, Vol. V., p. 465. But it is well settled that a trustee is bound to afford to his *cestui que trust* accurate and complete information as to the state of the trust: *Walker* v. *Symonds,* 3 Swanst. 58; *Clarke* v. *Lord Ormonde,* Jac. 120; *Gray* v. *Haig,* 20 Beav. 219. And it is conceived that the purchaser, as the implied agent of the *cestui que trust,* would in like manner be entitled to require all necessary information: see Lewin on Trusts, 602.

The exclusion of the rule *qui prior est tempore potior est jure,* in the case where the first incumbrancer has altogether neglected to give notice, and the second incumbrancer has not made inquiries but has given notice, will appear to be reasonable, when it is considered that the priority which the Court confers on an incumbrancer who has given notice is a reward for his diligence to prevent imposition on parties who might subsequently have dealings with the equitable owner; and that his making inquiries is a measure of prudence which cannot affect either prior or subsequent claimants, and for the omission of which he ought therefore to be answerable only to himself; the rule being simply this—that the party who omits to give notice, omits to complete his title; when he gives notice his title is complete; and he whose title is first completed has priority: see *Foster* v. *Blackstone,* 1 My. & K. 297; *Meux* v. *Pell,* 1 Ha. 86; see also *Foster* v. *Cockerell,* 3 Cl. & Fin. 456.

Where two incumbrancers obtain stop orders on a fund in Court on the same day, if one of them has also given notice to the trustees he will be preferred: *Simson* v. *Ramsbottom,* 2 Keen. 35.

Rule does not apply to real estate.

The rule as to notice is not applicable to real estate: see *Jones* v. *Jones,* 8 Sim. 633; but charges upon real estate directed to be sold, or upon a fund which is charged upon real estate, are clearly within the principle of *Dearle* v. *Hall,* &c.: *Foster* v. *Blackstone,* 1 My. & K. 497; see *Malcolm* v. *Charlesworth,* 1 Kee. 63.

General remarks and

The proper course is, for the proposed purchaser or mortgagee to apply to all the trustees *seriatim* to

know whether they have received an intimation of any charge upon the property (the most convenient form of which application is by letter, as it calls for a *written* reply, which is always to be preferred to an *oral* communication), informing them at the same time of the object of his inquiry; and a further precaution is, to give to *each* of the trustees a *written* notice of his assignment when executed. If a change has taken place in the trustees, by the retirement of a trustee, inquiry should of course be made of such trustee, as to the fact of his having received intimation of an incumbrance up to the time of his secession from the trust. If any trustee has died, no such information can be obtained, and therefore a degree of risk is necessarily incurred on account of the possibility of notice having been received by such deceased trustee. This risk would not, however, be considerable, unless the deceased trustee were the sole trustee at the time.

Notice to Trustees.

suggestions respecting notices to trustees.

3. Priority with Reference to the Possession of the Title-Deeds.

A prudent mortgagee will take care that the deeds are actually placed in his possession, unless a satisfactory reason is given for their non-production; as, that the mortgagor has a partial interest only in the estate, and the deeds are in the hands of the other owners, or the like. Except in these cases, the absence of the deeds affords ground for a suspicion that the property has been previously encumbered. The custody of the deeds, however, does not completely place a mortgagee beyond the reach of danger of this kind; for, by the doctrine now established, the possession of the deeds would not give him precedence over a prior mortgagee, who had neglected to take, or had parted with, the deeds, unless his negligence were so gross as to amount to evidence of fraud; and, therefore, if the deeds have been withheld, or obtained from a mortgagee, on any colourable pretence, by the mortgagor, he will not, on this account, be postponed to a subsequent incumbrancer, to whom they were delivered. The contrary, indeed, was laid down by *Burnet*, J., in

Importance of mortgagee's obtaining possession of deeds.

Mortgagee not postponed for parting with deeds, unless in cases of gross negligence.

Priority by Possession of Title-Deeds.

Ryal v. *Rowles*, 1 Ves. sen. 360, and also by *Buller*, J., in *Goodtitle* v. *Morgan*, 1 T. R. 735. It is, however, now well established that the mere absence of the title-deeds is not in itself notice of a prior incumbrance, and that fraud, or such gross wilful neglect as to be tantamount to fraud, must be proved against a mortgagee by any person who seeks to deprive him of his priority: see *Evans* v. *Bicknell*, 6 Ves. 174; *Head* v. *Egerton*, 3 P. Wms. 280; *Peter* v. *Russell*, 1 Eq. Ca. Abr. 321, pl. 7; *S. C.* 2 Vern. 726; *Hewitt* v. *Loosemore*, 9 Ha. 449; *Ratcliffe* v. *Barnard*, L. R. 6 Ch. A. 652; *Agra Bank* v. *Barry*, L. R. 7 H. L. 135; *Northern Counties, &c., Insurance Co.* v. *Whipp*, 28 Ch. D. 482.

Cases in which the non-delivery of the deeds is accounted for.

Where the mortgage is made under circumstances which account for and justify the non-delivery of the deeds, the ground for impugning the conduct of the mortgagee in not requiring the possession of them is necessarily weakened. These circumstances may arise from the nature of the mortgagor's interest, as being an equitable estate for life, or a reversion only, as in *Tourle* v. *Rand*, 2 B. C. C. 650; or an aliquot share in the property, or from the mortgage being made by persons in a fiduciary character, who have other trusts to perform, requiring that they should retain the deeds, as in *Harper* v. *Faulder*, 4 Madd. 129; and generally where false information is given to the mortgagee: see *Hunt* v. *Elwes*, 2 De G. F. & J. 578; *Dixon* v. *Muckleston*, L. R. 8 Ch. A. 155; *Manners* v. *Mew*, 29 Ch. D. 725.

Equity will not assist recovery of deeds.

But though equity will not, we have seen, postpone a mortgagee to a second incumbrancer, on the ground merely of his parting with the deeds under the circumstances of the preceding cases, yet it will not assist him in recovering them, but allows the person who has thus gained possession of the deeds to retain such possession: see *Head* v. *Egerton*, 3 P. Wms. 280.

The situation in which the doctrine of the preceding cases places the parties is, that, one having the estate and the other the deeds, each has an unimpeachable right as against the other to retain what he thus possessed. The former, however, has

obviously an advantage over the latter, for the estate without the deeds is susceptible of enjoyment, though not equally marketable for sale; while the deeds, without the estate, are altogether useless, unless the owner of the estate, to whom alone they are of any value, can be induced to give a sum of money for them. Priority by Possession of Title-Deeds.

It has been held that, though in order that the delivery up of the deeds by a mortgagee may not postpone him, some plausible ground must be alleged for requiring them out of his hands, yet, where a person takes a security, *ab origine*, without the deeds, it is not incumbent on him to prove that any reason was assigned for their non-production: see *Plumb* v. *Fluitt*, 2 Anst. 432. But it is now settled that a mortgagee will be deemed to be affected with notice of a prior incumbrance if he absolutely neglects to investigate the title: *Worthington* v. *Morgan*, 16 Sim. 547; or to make inquiry after the title-deeds: *Jones* v. *Smith*, 1 Ha. 43; *Whitbread* v. *Jordan*, 1 Y. & C. 303; *Maxwell* v. *Barton*, L. R. 17 Eq. 15; *Spencer* v. *Clarke*, 9 Ch. D. 137 (*h*).

A., being entitled as devisee to an undivided third part of land, the remaining two-thirds of which had been devised to B., granted an annuity to B., and agreed that all the deeds relating to the estates should be deposited with B., as a security for the annuity. A. afterwards executed a legal mortgage of his third part of the land to C., who had notice that the deeds were in the possession of B., but had no notice of B.'s lien. A. having become bankrupt, the petition of B. for a sale and satisfaction of his claim out of the proceeds, in priority to C., the legal mortgagee, was dismissed with costs: *Ex parte Hardy*, 2 D. & C. 393.

A remark has been already made on the inexpediency of a mortgagee accepting a security without having the deeds, even though the legal estate be, or be professed to be, conveyed. The above decision Danger of taking a deposit security without the legal estate.

(*h*) A person lending money on mortgage to a married woman is not bound to inquire whether a settlement was made on her marriage: *Lloyd's Banking Co.* v. *Jones*, 29 Ch. D. 221. Marriage settlement.

Priority by Possession of Title-Deeds.

demonstrates the danger of the converse case, namely, of relying upon a deposit of title-deeds only, without taking a conveyance of the legal estate: for, after making an equitable mortgage by a deposit of deeds, whether accompanied by a writing or not, the mortgagor may at any time defeat it by conveying the property to a third person without notice, as a security for money advanced, or even for a pre-existing debt. It is lamentable to observe in this and other cases, how often parties are plunged into expensive and protracted litigation, by resorting to expedients for saving a comparatively trifling expense in the first instance.

Effect of notice that deeds are in possession of a stranger.

It should be remarked, that, although the mere non-production of the title-deeds is not alone constructive notice of a prior mortgage, yet if the person dealing with the mortgagor is apprised that they are in the hands of a third person, this is sufficient to charge him with notice, though he may not have known the fact of their being deposited as a security; since he was bound upon the information he received to make further inquiry: *Hiern* v. *Mill*, 13 Ves. 114; *Dryden* v. *Frost*, 3 My. & Cr. 673. But the possession of a client's deeds by his solicitor is so usual and so much in the ordinary course of transactions, that there is nothing in such possession that should put a purchaser of the client's estate on inquiry; and therefore where a solicitor obtains by contract an interest in the estate as equitable mortgagee or otherwise, it becomes incumbent on him to communicate the fact to all persons in the visible ownership of the property: *Bozon* v. *Williams*, 3 Y. & J. 150.

In *Whitbread* v. *Jordan*, 2 Y. & C. 303, the copies of court rolls relating to the title of a publican to a copyhold public-house were deposited by the owner with his brewers, as a security for a loan, and the mortgagor subsequently surrendered the premises by way of mortgage to a third person, who had no notice of the previous deposit, and having applied to the mortgagor for the copies of the court rolls, was told they had been mislaid. It appeared to be a custom in London, known to the second mortgagee,

Priority by Possession of Title-Deeds.

for publicans to deposit their leases with brewers, by way of mortgage. It was held that the second mortgagor had been guilty of such gross negligence as would be a cloak for fraud if permitted, and that he was to be considered as having had constructive notice of the deposit.

Effect of possession of deeds, as between several equitable incumbrancers.

The mere possession of the title-deeds, we have seen, whether obtained before or after the acquisition of the legal estate by the other incumbrancer, without notice, and whether they were originally withheld from him, or were afterwards taken out of his lands, gives the depositary of the deeds no claim against the owner of that estate: but the rule, it should seem, is different as to incumbrancers having *equitable* interests only, with regard to whom the possession of the deeds relating to the legal estate has been held to be equivalent in equity to obtaining a conveyance of it at law, and consequently to have the same effect in giving priority to the person having such possession: *Stanhope* v. *Earl Verney*, Co. Litt. 290 b., Butl. n.; 2 Eden. 81; see also *Maundrell* v. *Maundrell*, 10 Ves. 271; *Ex parte Knott*, 11 Ves. 613.

Declaration of trust.

It has indeed been held that even an express declaration of trust in his favour, to which the trustees are parties, is not for all purposes equivalent to an assignment in protecting him against the fraudulent acts of the mortgagee, in secretly creating other incumbrances: see *Frere* v. *Moore*, 8 Price, 475.

But this decision does not appear to be supported by any other authorities. And it may be regarded as now settled that the custody of a deed creating a term, and an express declaration of trust in favour of a later incumbrancer, without notice of a prior incumbrance, will give him priority over the prior incumbrancer, who has no such declaration, or merely a covenant for production of the deed: see *Stanhope* v. *Earl Verney*, 2 Ed. 81; and see Sugd. Vend. 738. To prevent all question, however, a mortgagee or purchaser should take care that he not only has the deeds, but an actual assignment.

CHAPTER VIII.

ALIENATION BY THE MORTGAGEE.

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1. TRANSFER OF MORTGAGES.

Transfer of Mortgages.

Rights of mortgagor against a transferee.

No person should advance money upon the transfer of a mortgage, unless the mortgagor is a party, or at least without obtaining from him, if possible, a clear admission of the state of the account between him and the mortgagee being as represented by the latter; for the transferee can only claim what is actually owing: *Matthews* v. *Wallwyn*, 4 Ves. 118; *Chambers* v. *Goldwin*, 9 Ves. 264; *Bradwell* v. *Catchpole*, 3 Swanst. 79; *Carew* v. *Johnston*, 2 Sch. & Lef. 296. The mortgagor would be at liberty to set off, against the claim of the transferee, all monies paid to the mortgagee (assuming the time of payment of the mortgage-money to have arrived) before the assignment, or after the assignment and before notice: see *Norrish* v. *Marshall*, 5 Madd. 481; and the registry of the deed of transfer is not notice: *Williams* v. *Sorrell*, 4 Ves. 389. If a transfer is taken from the mortgagee alone, it should contain a covenant or declaration by the mortgagee that the debt is still actually owing, and immediate notice of the transfer should be given to the mortgagor: *Jones* v. *Gibbons*, 9 Ves. 410; see *Allen* v. *Lord Southampton*, 16 Ch. D. 187.

Interest cannot be converted into principal without mortgagor's concurrence.

A rule seems formerly to have prevailed that money paid by the assignee of a mortgage, in liquidation as well of the interest as of the principal due on the subsisting mortgage, carried interest whether the mortgagor was a party to the transfer

Transfer of Mortgages.

or not: *Gladwyn* v. *Hitchman*, 2 Vern. 135; see also *Smith* v. *Pemberton*, 2 Freem. 184; 1 Ch. Cas. 67. But the doctrine of these cases is inconsistent, not only with principle, but with later authorities, which have established that, "where the mortgage is assigned without the consent of the mortgagor, the assignee must take it upon the same terms as the assignor:" *per* Lord *Hardwicke* in *Ashenhurst* v. *James*, 3 Atk. 270; see also *Matthews* v. *Wallwyn*, 4 Ves. 125. The concurrence of the mortgagor, or if he be dead, of his personal representatives, who are liable to pay the amount due to the mortgagee, should be procured for the reason above mentioned. Even the mortgagor's concurrence will not enable the interest to be converted into principal as against subsequent incumbrancers with notice: but it would seem that, notwithstanding notice, the necessary costs of the transaction may be tacked and converted into principal: *Digby* v. *Craggs*, Amb. 612; see, as to tacking costs, *Godfrey* v. *Watson*, 3 Atk. 518; *Manlove* v. *Ball*, 2 Vern. 84.

Purchase of mortgage-debt.

An assignee of a mortgage debt, who pays for it a less sum than the amount actually due, is nevertheless entitled to recover the whole, unless he stand in some confidential relation to the owner of the equity of redemption: *Morret* v. *Paske*, 2 Atk. 53; *Phillips* v. *Vaughan*, 1 Vern. 336; and see *ante*, p. 950.

It may be noticed, that where a mortgagee has assigned his mortgage with the concurrence of the mortgagor, he need not be made defendant to a redemption suit: *Hills* v. *Adams*, 3 Atk. 39; see *Norrish* v. *Marshall*, 5 Mad. 757.

Accounts.

A mortgagee in possession, who delivers the possession of the estate to his transferee, is accountable to the mortgagor for the subsequent profits; *ante*, p. 907.

Donatio mortis causâ.

A mortgage of real estate may be the subject of a *donatio mortis causâ;* the debt being the principal, and the land but the accessory, such a gift is valid and passes the benefit of the security in equity, leaving the legal estate in the donor, transmissible to his representatives: *Duffield* v. *Elwes*, 1 Bligh, N. S. 498, overruling *Duffield* v. *Hickes*, 1 Sim. & St. 239.

Transfer of Mortgages.

Power of attorney no longer necessary.

Before the Judicature Act, 1873, a power of attorney given by the assignor to the assignee was an essential part of a transfer of a mortgage, so as to enable the assignee to sue for the debt at law; but now such a power is no longer necessary, as assignees of legal choses in action are thereby empowered to sue in their own names, and to give good discharges without the concurrence of their assignors, provided the debtor, trustee, or other person liable, has notice of the assignment: see stat. 36 & 37 Vict. c. 66, sect. 25 (6); and see *ante*, p. 819.

Assignment under the Conveyancing Acts.

Formerly, a mortgagee could not be compelled to assign the security either to the mortgagor or a new mortgagee on redemption, or to a purchaser on payment of the mortgage debt out of the proceeds of a sale of the property; he was merely bound to reconvey to the owner of the equity of redemption: see *Smith* v. *Green*, 1 Col. 563; *Dunstan* v. *Patterson*, 2 Ph. 341. Now, however, it is enacted by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sect. 15, that—

Obligation on mortgagee to transfer instead of reconveying.

"(1.) Where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of re-conveying, and on the terms on which he would be bound to re-convey, to assign the mortgage debt and convey the mortgaged property to any third person as the mortgagor directs; and the mortgagee shall, by virtue of this Act, be bound to assign and convey accordingly.

"(2.) This section does not apply in the case of a mortgagee being or having been in possession."

And by the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), sect. 12, it is enacted that—

Reconveyance on mortgage.

"The right of the mortgagor, under section fifteen of the Conveyancing Act of 1881, to require a mortgagee, instead of re-conveying, to assign the mortgage debt and convey the mortgaged property to a third person, shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and, as between incumbrancers, a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer."

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It was held that, under the Act of 1881, where there were successive mortgagees of the same estate, the mortgagor could not require the first mortgagee to assign the mortgage debt and estate to his own nominee, without the consent of the subsequent mortgagee: *Teevan* v. *Smith*, 20 Ch. D. 724; and the Act of 1882 does not seem to affect this decision. Where the mortgagor's position is such that the effect of a proper reconveyance would be to constitute him a trustee of the property upon trusts corresponding to the trusts of a settlement, he cannot require an absolute transfer to his nominee: *Alderson* v. *Elgey*, 26 Ch. D. 567.

As to framing deeds of transfer of mortgage, see notes to Precedent LXXVII., *post*, p. 1198.

2. Devolution of the Mortgaged Estate and Debt.

As a mortgage is a mere security for a debt, of which the transaction, although there is no covenant for payment, is sufficient evidence (*ante*, p. 688), the obligation and benefit of the security follow the nature of the principal; so that the personal representatives of the mortgagee are entitled to the debt, and to the benefit of the mortgaged estate, which, in the hands of the heir or devisee of a mortgagee who died before the commencement of the Conveyancing and Law of Property Act, 1881 (see *post*, p. 965), will be held in trust for them (in whatever form the condition for payment is expressed: *Thornborough* v. *Baker*, 3 Swanst. 628; *Tabor* v. *Tabor*, Id. 636; *Tilley* v. *Egerton*, 1 Cha. Rep. 181), subject to the equity of redemption while it subsists, and, after that is extinguished by release, foreclosure, or lapse of time, absolutely: *Ellis* v. *Greaves*, 2 Ch. Ca. 50; *Canning* v. *Hicks*, 1 Vern. 412; *Tabor* v. *Grover*, 2 Id. 367; *Audley* v. *Audley*, Id. 193; see *Fisk* v. *Fisk*, Pre. Ch. 11. This rule does not, of course, apply in equity, where the mortgage-money was originally trust-money, or where subsequently, or by unequivocal words at the time, trusts are impressed upon it: *Noys* v. *Mordaunt*, 2 Vern. 581. But a gift by will of the mortgaged

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estate and debt in trust for a person and his heirs, does not change the nature of the debt as against his personal representatives: *Sprinkley* v. *Henley*, 2 Ch. Rep. 166. See *Doe* v. *Parrott*, 5 T. R. 152; *Garrett* v. *Evers*, Mos. 364. When once the equity of redemption is released or foreclosed, or barred by lapse of time, the debt is extinguished, *ante*, p. 884; and the mortgaged estate, in the hands of the mortgagee or his representative at the date of such release, foreclosure, or bar, is transmissible, according to its original and proper nature. For this purpose, a final order for foreclosure must, it seems, have been obtained before the death of the mortgagee: *Thompson* v. *Grant*, 4 Madd. 438; see *Garrett* v. *Evers*, Moss. 364, *contra*. See also *Silberschild* v. *Schiott*, 3 Ves. & B. 45; *Att.-Gen.* v. *Bowyer*, 3 Ves. 714: 5 Id. 300; *Att.-Gen.* v. *Vigor*, 8 Ves. 256; and as to the distinction where the mortgagee acquires the equity of redemption by *devise*, see *ante*, p. 950.

The mortgage is equally personal estate in the hands of a transferree as in those of the original mortgagee; but where an estate had been purchased in ignorance of an equity of redemption which existed in respect of it, and was afterwards redeemed, the *heir* of the purchaser was held entitled to the money: *Cotton* v. *Iles*, 1 Vern. 271.

Several mortgagees.

The rights of two or more mortgagees, who have contributed to an advance of a sum of money, are severally proportional to the respective amounts advanced by each; and consequently, upon a transfer or re-conveyance of such a mortgage, the personal representatives of a deceased mortgagee are necessary parties to the receipt for the purchase-money: *Petty* v. *Styward*, 1 Ch. Rep. 58; *Rigden* v. *Vallier*, 2 Ves. Sen., at p. 258; *Morley* v. *Bird*, 3 Ves. Jun. 629; *Vicars* v. *Cowell*, 1 Beav. 529; and a foreclosure or release of the equity of redemption will, in like manner, enure for the benefit of the mortgagees and the personal representatives of such of them as may be deceased, as tenants in common: *Vicars* v. *Cowell*, 1 Beav. 529.

Joint account.

When trust-money is lent upon mortgage by trustees, it is advisable to express in the mortgage

Devolution of the Mortgaged Estate and Debt.

deed that the money is advanced by the trustees out of or as money belonging to them on a joint account, although such expression is not absolutely necessary in order to exclude the right of a deceased trustee's representatives: see sect. 61 of the Conveyancing and Law of Property Act, 1881, set out *ante*, p. 850.

The law with regard to the devolution of trust and mortgage estates in cases of death after the 31st of December, 1881, is altogether changed by sect. 30 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), which enacts as follows:—

Devolution of trust and mortgage estates on death.

"(1.) Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vested in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives, for the time being, of the deceased, shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers.

"(2.) Section four of the Vendor and Purchaser Act, 1874, and section forty-eight of the Land Transfer Act, 1875, are hereby repealed.

"(3.) This section, including the repeals therein, applies only in cases of death after the commencement of this Act."

Copyholds.

This section applies to copyholds, so as to render a vesting order unnecessary in case of intestacy: *Re Hughes*, W. N. 1884, p. 53.

The difficulties which formerly sometimes arose as to who were the proper persons to convey have been already referred to, *ante*, p. 922. By sect. 4 (now repealed, *vide supra*) of the Vendors and Pur-

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chasers Act, 1874, the legal personal representatives of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee had been admitted, were empowered, on payment of all sums secured by the mortgage, to convey or surrender the mortgaged estate (*a*). It would therefore appear that in the case of a mortgagee dying between the 7th of August, 1874, and the 31st of December, 1881, his personal representatives had, up to the latter date, power to reconvey, but that if they did not exercise the power it is now extinguished by the repeal of the section, and the legal estate remains vested in the heir or devisee.

Devise of mortgage estates now unnecessary.

As regards a mortgagee dying since the 31st of December, 1881, the mortgaged estate vests in his personal representative by virtue of the recent enactment, the effect of which is to render unnecessary any devise of mortgage estates. Any such devise, if made, will be nugatory, inasmuch as, "notwithstanding any testamentary disposition" to the contrary, the mortgage estate will devolve on the personal representatives of the mortgagee as "his heirs and assigns" for the purposes of the section.

3. Bar of the Remedy for the Debt by Lapse of Time.

The enactments of the statute 3 & 4 Will. 4, c. 27, s. 42, and 7 Will. 4 & 1 Vict. c. 28, respecting the limitation of actions to recover interest on mortgages and the land in mortgage, have been already stated (*ante*, at pp. 760, 898, and at p. 884): with regard to the debt, it was enacted by the 40th section of the statute 3 & 4 Will. 4, c. 27, that after the 31st December, 1833, no action or suit should be brought for money charged on land, &c., but within twenty years of some payment of prin-

(*a*) It was held that this section must be construed strictly and did not apply to a transfer: *Re Spradbery's Mortgage*, 14 Ch. D. 514; nor to a sale under a power in the mortgage deed: *Re White's Mortgage*, 29 W. R. 820.

Bar of the Remedy by Lapse of Time.

cipal or interest or written acknowledgment of the right thereto. This section is now repealed by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), by sect. 8 of which Act it is enacted as follows :—

No action or suit to be brought for money charged on land, or legacies, after twelve years, if no payment or acknowledgment.

"No action, or suit, or other proceeding, shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon, or payable out of, any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case, no such action, or suit, or proceeding, shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given."

How far creditor's suit bars the statute.

In *Berrington* v. *Evans*, 1 Y. & C. 438, it was held that a judgment creditor who had taken no steps to recover his debt for twenty years, was barred by the stat. 3 & 4 Will. 4, c. 27, notwithstanding a suit instituted within twenty years for the benefit of the specialty creditors of his debtor, under which some of the creditors had received part of their demands, and money was in court available for the payment of the remainder of the debts. In this case, however, it appears that the judgment creditor knew nothing of the prosecution of the suit, and the decision cannot be regarded as establishing a rule that a creditor who delays bringing his action with knowledge of and in reliance on the prosecution of an existing creditor's action for the benefit of creditors generally, would be bound by the statute. The contrary was held in a case before the statute, where it was held that the analogous rule formerly prevailing in equity would not be enforced against a creditor who came in under the decree in a creditor's suit, although his claim was barred at the time of making the decree :

Bar of the Remedy by Lapse of Time.

Sterndale v. *Hawkinson*, 1 Sim. 393. Lord *St. Leonards* in *Bermingham* v. *Burke*, 2 Jo. & L. 699, expressed his opinion that "the principles upon which the Court acts, are correctly laid down in *Sterndale* v. *Hawkinson*, which was decided before the Statute of Limitations;" but his lordship goes on to say that these principles should be applied with caution. See also *O'Kelly* v. *Bodkin*, 2 Ir. Eq. R. 369; *Bennett* v. *Bernard*, 12 Ir. Eq. R. 229. On the other hand, *Jessel*, M.R., is reported to have said that the reasons for the decision in *Sterndale* v. *Hawkinson*, no longer exist: see *Re Greaves*, W. N. 1881, p. 124; but the circumstances of that case are not very fully stated. This question cannot be regarded as being as yet concluded by judicial decision.

Foreclosure order.

An absolute order for foreclosure confers on the mortgagee a beneficial ownership of the property, and accordingly he may bring an action for recovery of possession thereof at any time within twelve years of the date of the order: *Pugh* v. *Heath*, 7 App. Ca. 235. As to judgments, see *Watson* v. *Buile*, 15 Sim. 523; *Farran* v. *Beresford*, 10 Cl. & F. 319; *Farrell* v. *Gleeson*, 11 Cl. & F. 702.

Judgment.

Limitation applies to personal remedy.

The limitation of twelve years applies as well to the personal remedy on the covenant in a mortgage deed as to the remedy against the land: *Sutton* v. *Sutton*, 22 Ch. D. 511; so also to the remedy on a collateral bond for securing the mortgage debt: *Fearnside* v. *Flint*, 22 Ch. D. 579.

Payment of rent by tenant.

The payment of rent by a tenant of part of lands comprised in a mortgage, pursuant to notice from the mortgagee, is not a payment or acknowledgment by or on behalf of the mortgagor, so as to exclude the operation of the Statutes of Limitation, except only so far as regards the premises actually in the tenant's occupation: *Harlock* v. *Ashberry*, 19 Ch. D. 539.

CHAPTER IX.

THE FORMS OF MORTGAGE SECURITIES.

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1. Mortgages of Freehold Lands in Fee Simple.

Mortgages of Freehold Lands in Fee-simple.

Old Forms of Mortgages.]—The mode of preparing securities of freehold lands has undergone a considerable variation. Formerly, the mortgagor merely demised the property to the mortgagee for a long term of years, subject to a proviso for redemption, but without any power of sale in default of payment. Such mortgages were certainly simple, and were attended with two obvious conveniences: First, that they were effected by a single deed, requiring neither inrolment nor livery of seisin; and, secondly, that, on the decease of the mortgagee, the legal estate in the land, and the title to the money, devolved to the same class of representatives. Mortgages of this description, however, were found to be defective in several respects. If the mortgagee was compelled to resort to the estate for payment, and was desirous of acquiring the absolute ownership, he was under the necessity of filing a bill in equity in order to foreclose the right of redemption. And after the tedious and expensive process of a foreclosure suit had been gone through, he found that

Mortgage by demise, and its inconveniences.

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the interest which he had acquired in the land was, for many purposes, less beneficial than the inheritance. Not a few of the long leasehold titles which occur in practice have arisen in this manner.

Powers of sale.

In order to obviate these inconveniences, powers of sale were gradually introduced into mortgages, and were at first commonly vested in one trustee or more, and guarded with many qualifications in regard to notice, &c. The power, however, is now ordinarily reserved to the mortgagee himself. The insertion of a power of sale was a great improvement upon the old plan, as by an exercise of the power, a mortgagee has the means of rendering his security available by a conversion of the property without resorting to a court of equity; and though, for some time, a prejudice existed against titles derived under such powers, this has long since yielded to the authority of decided cases (*a*), which have established, beyond all controversy, the competence of a mortgagee, with a power of sale, to make an effectual and absolute conveyance to a purchaser, without the concurrence of the mortgagor; so that titles of this description are now accepted without hesitation. Indeed, should there be any irregularity in the sale, purchasers are protected, by the strong clauses which usually accompany powers of sale in mortgages, from being affected by it.

Arrangement of clauses in mortgage deeds.

Present Mode of Arrangement of Clauses in Mortgage Deeds.]—In recent times the usual order of arrangement of clauses in mortgage deeds is as follows:—After the names and descriptions of the parties and the recitals (if any) follows the first witnessing part, containing a covenant for the payment of the principal debt and interest. This is succeeded by a further witnessing part conveying the property by way of mortgage, subject to a proviso for redemption. This conveyance is followed by special clauses

(*a*) *Clay* v. *Sharpe*, 18 Ves. 346; *Corder* v. *Morgan*, Id. 344, *ante*, p. 102.

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relating to the payment of the principal and interest. Next come the special clauses relating to the subject matter of the mortgage, such as restrictions on the mortgagor's powers of leasing and covenants by him for maintenance of the mortgaged property. These may be followed by an express power of sale or by clauses modifying or extending the statutory powers of sale and other clauses giving special remedies to the mortgagee. Till recently covenants for title were generally inserted at the end of mortgages, but these are now usually dispensed with in consequence of the statutory enactments hereafter to be considered.

Parties.

In mortgage deeds, as in other conveyances, all persons who are intended to convey or take anything thereby, or to enter into any of the stipulations contained in the deed, must be made parties. For this purpose their names and descriptions will be inserted at the commencement of the deed. They must be named by their full Christian and surnames and described by their places of residence and rank or occupation. In mortgages the parties will usually be the mortgagor of the one part and the mortgagee of the other part. Sometimes the concurrence of other parties will be necessary for purposes of suretyship or of signifying consent to the mortgage, or acknowledging receipt of the mortgage monies, &c. In such a case the mortgagor will be made a party of the first part, next will follow the other concurrent parties, of the second, third, or more successive parts (every person or class of persons having a separate estate or interest being of a separate part), and the mortgagee will be of the last part.

It is sometimes convenient for the purpose of avoiding repetition of the name of the mortgagor or mortgagee throughout the deed to state at its commencement that they will be thereinafter referred to as "the mortgagor" and "the mortgagee" or "the mortgagees" respectively.

Recitals.

Recitals are frequently unnecessary in a mortgage deed, and may be dispensed with where brevity is desired. They are, however, sometimes convenient for the purpose of explaining the matters affecting

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the form and contents of the deed, such as the concurrence of parties, or the nature and incidents of the subject-matter of the security. It may also be thought well sometimes to recite the title of the mortgagor, so as to render the deed a satisfactory root of title on the expiration of twenty years from the execution of the mortgage deed: see *Bolton* v. *London School Board*, 7 Ch. D. 766 (*b*).

Introductory recitals.

Where narrative recitals are inserted, they are in this collection of precedents followed by a short recital of the agreement for the loan, and of the nature of the intended security; but where there are no narrative recitals, the introductory recital is also omitted.

Covenant for payment of principal and interest.

The first witnessing part in mortgage deeds usually contains a covenant for the mortgagor to pay the principal on a specified date (commonly six months after the date of the mortgage deed), together with interest in the meanwhile at a specified rate, and also if the principal should not be paid on that date, to pay interest half-yearly or quarterly, at the same rate until repayment of the principal. This covenant will be expressed to be made in consideration of the receipt by the mortgagor of the mortgage money. Where the advance is made by several persons out of monies belonging to them on a joint account, it is well that this fact should be stated in the mortgage. See sect. 61 of the Conv. Act, 1881, set out *ante*, p. 850.

Statement of consideration, &c.

Where there are several witnessing parts in the same deed the usual and more convenient course is to state the consideration and set out the receipt clause in full in the first witnessing part, and to express the subsequent witnessing parts to be made "for the consideration aforesaid," or "in consideration of the premises."

Receipt.

It was till recently the usual practice, that the receipt by the mortgagor of the money should be acknowledged by a clause in the operative part of the deed, and also by a memorandum of a receipt endorsed on the deed and signed by the mortgagor.

(*b*) See observations on this case, *ante*, Vol. I. p. 677.

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Neither the receipt clause in the body of the deed, nor the indorsed memorandum (*c*) is conclusive in equity so as to exclude evidence that the money was in fact not received: *Coppin* v. *Coppin*, 2 P. Wms. 291; *Winter* v. *Lord Anson*, 3 Russ. 488; *Hawkins* v. *Gardner*, 2 Sm. & G. 441. So also it may be shewn, notwithstanding the receipt, that part of the money was returned: *Baker* v. *Dewey*, 1 B. & C. 704. With regard to deeds executed after the 31st December, 1881, the Conveyancing and Law of Property Act, 1881, 44 & 45 Vict. c. 41, enacts as follows:—

Receipt in deed sufficient.

Sect. 54.—"(1.) A receipt for consideration money or securities in the body of a deed shall be a sufficient discharge for the same to the person paying or delivering the same, without any further receipt for the same being endorsed on the deed.

"(2.) This section applies only to deeds executed after the commencement of this Act."

Receipt in deed or indorsed, evidence for subsequent purchaser.

Sect. 55. "(1.) A receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser, not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof."

"(2.) This section applies only to deeds executed after the commencement of this Act."

Receipt in deed or indorsed, authority for payment to solicitor.

Sect. 56.—"(1.) Where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt.

"(2.) This section applies only in cases where consideration is to be paid or given after the commencement of this Act."

(*c*) The practice of indorsing a memorandum of receipt on mortgage and purchase deeds had become so common that it was held that the absence of such memorandum was sufficiently suspicious as to put a purchaser on enquiry as to whether any and what money had actually passed: *Kennedy* v. *Green*, 3 My. & K. 699; see also *Greenslade* v. *Dare*, 30 Beav. 284.

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The receipt in writing of trustees for monies payable to them under any trust or power is a sufficient discharge for the same, and exonerates the person so paying from seeing to the application thereof. See stat. 44 & 45 Vict. c. 41, sect. 36.

See Trustees' receipts.

Where a tenant for life borrows money for enfranchisement, or for equality of exchange or partition under the Settled Land Act, 1882, the money raised is capital money arising under the Act: see sect. 18; and accordingly, the money, unless paid into Court, should be paid to the trustees of the settlement, whose receipt in writing will be a sufficient discharge to the mortgagee so paying the money: see sect. 40 of that Act.

Form of covenant.

The proper forms of covenants generally have been already considered *ante*, tit. LEASES, p. 235. In the following precedents the form adopted is simply, "A. hereby covenants with B.," without any mention in the operative part of the covenant of the real or personal representatives of either party. But throughout the remainder of the covenant it has been thought on the whole advisable to retain the mention of such representatives: see *Re Watts*, 22 Ch. D. 385.

Conveyance by way of mortgage.

The second witnessing part in a mortgage deed will consist of a conveyance by way of grant, covenant to surrender, assignment, demise, or otherwise, as the case may require, of the property intended to be the security for the mortgage debt. The word "convey" alone is sufficient for the purposes of such assurance, but the several words of conveyance formerly in use according to the nature of the property, are still commonly used, and are here generally retained (*d*). The *habendum* in a mortgage in fee of freeholds may be either to the mortgagee, his heirs, or assigns, or to the mortgagee in fee simple(*e*). General words are not now usually inserted in conveyances, whether by way of sale or mortgage: see sect. 6 of the Conveyancing Act, 1881; and the "all the estate" clause is now also generally omitted as

(*d*) See as to this, Conv. Act, 1881, s. 2, sub-s. (v.), and s. 49; see also *post*, p. 995, note (*i*).

(*e*) See as to this, sect. 51 of the same Act; and see *post*, p. 995, note (*k*).

superfluous: see sect. 33 of that Act; and *Nearne* v. *Moorson*, 3 L. R. Eq. 91.

Mortgages of Freehold Lands in Fee-simple.

The practice of effecting mortgages of freeholds by demise is now almost obsolete, except where it is desired to raise money on the security of an estate tail without barring the entail, so as to leave the remainders subsisting under sect. 21 of the Fines and Recoveries Act (3 & 4 Will. 4, c. 74); see *Re Pares*, 2 Ch. D. 61.

Mortgage for term of years.

In the case of mortgages of freeholds (and also generally in the case of leaseholds), the old form of proviso for redemption has been superseded by a form which is in effect a proviso for reconveyance, if the mortgagor shall repay the principal debt with interest at the specified time (usually six months) after the date of the mortgage.

Proviso for redemption.

In the last edition of this work was contained the following passage, which has been here retained, notwithstanding the suggestion thereby made, has not met with any very general acceptance. It may, however, prove useful under particular circumstances. The learned authors suggested "to the consideration of the profession the practicability of introducing into such deeds a clause by which the estate may be made to cease, on payment of the debt at any time within a definite number of years. Such a contrivance would be found useful in the case of mortgages intended as a security for small temporary loans. Where a man borrows a hundred pounds or two for a short time, the expense of a double conveyance (*i. e.*, on the loan and on its repayment) is felt to be a serious augmentation of the burthen, and, hence, recourse is frequently had to equitable mortgages by a mere deposit of deeds. The dispensing with the necessity of a reconveyance was undoubtedly the original aim of the proviso for redemption, but which fails to accomplish the object for two reasons:—First, because it usually runs in the form of an agreement to reconvey, and does not provide that the estate shall cease; and, secondly, because, even where the clause is framed as a proviso for cesser, the estate does not cease unless payment be made punctually on the day, and in

As to a clause for the cesser of the mortgagee's estate, on payment at a distant period, in place of a reconveyance.

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strict conformity to the terms of the proviso, which is rarely done. If the mortgage contains a power of sale, of course care must be taken that the title of purchasers is not liable to be prejudiced by the mortgagee's prior or subsequent acceptance of the money. For this purpose it seems requisite that the fact should be apparent on the production of the mortgage deed. It is proposed, therefore, that the deed should, in addition to the ordinary proviso for redemption, contain a clause, declaring that, on the payment of the debt by the mortgagor or other person, if any, absolutely entitled to the equity of redemption, to the mortgagee or his personal representatives, at any time within a given period, and on the latter's signing of a receipt for the money, to be indorsed on the mortgage deed, the estate shall cease. The production to a purchaser of the mortgage deed, having on its back no such receipt, would conclusively show that the proviso had not taken effect; and if the deed were delivered up to him, he would be protected against the possibility of the cesser subsequently occurring."

"It should be observed, that, as the design of the expedient which has been suggested is merely to revest the estate on the liquidation of the debt, without the necessity of a reconveyance, and not to prolong the equity of redemption, the latter consequence should be guarded against by an explicit declaration."

Power of sale.

The statutory power of sale given to mortgages by the Conveyancing and Law of Property Act, 1881, appears to be sufficient to meet ordinary cases, and has in practice caused express power of sale to be very generally omitted from mortgages. If desired, however, the statutory power may be modified by provisions in the mortgage deed: see sect. 19 (3) of the Act.

The statutory powers of mortgagors and mortgagees to grant leases have been already considered: *ante*, pp. 80, *et seq.*

The special covenants and provisions proper to be inserted in mortgages of particular kinds of property, and under particular circumstances, will be

considered in a later part of this Chapter, and in the notes to the various Precedents following this Dissertation.

Mortgages of Freehold Lands in Fee-simple.

2. Mortgages of Copyholds.

Mortgages of copyholds are usually effected in one of the two following ways, viz.: (1) By a deed, whereby the mortgagor enters into a covenant with the mortgagee to surrender the copyholds subject to a condition for making the surrender void on payment of the principal and interest on a specified day. This deed will also contain covenants for payment of the principal and interest and other clauses similar to a mortgage of freeholds, *vide supra;* and will be followed by an actual conditional surrender pursuant to the covenant. Or (2) the mortgagor surrenders the copyholds to the use of the mortgagee, subject to a condition for avoidance, and simultaneously executes a deed containing covenants for the payment of the money, &c. In the former case the surrender is treated as a future, in the latter as a past, transaction. Even when the covenant precedes the surrender the deed and surrender are considered to be parts of the same transaction: *Riddell* v. *Riddell*, 7 Sim. 529.

Modes of effecting mortgages of copyholds.

Inasmuch as the statutory power of sale is confined to *mortgages made by deed*, it may be doubted whether such powers are to be implied in the case of mortgages effected by either of the above methods. The deed of covenant to surrender, or the deed of covenant accompanying the actual surrender, as the case may be, ought, therefore, to contain either a full power of sale with its ancillary clauses, according to the former practice, or else a clause expressly constituting the monies to be secured, a *charge* upon the mortgaged premises, whereby the statutory powers of sale are incorporated in the deed: see the definition of "mortgage" in sect. 2 (vi.) of the Conveyancing and Law of Property Act, 1881.

Power of sale.

Mortgagees are seldom admitted under conditional surrenders of copyholds; so that when the mortgage is paid off, an acknowledgment of satisfac-

As to admission, &c., of mortgagees of copyholds.

Mortgages of Copyholds.

tion entered on the Court rolls is generally sufficient. When the mortgagee has taken from the mortgagor simply a covenant to surrender, no instrument is necessary for the purpose of discharging the lands from the equitable lien, and the mortgagor may be satisfied with having the deed re-delivered to him, accompanied with evidence of payment of the money. If the mortgagee has been admitted, there must be a re-surrender to and admission of the mortgagor at the expense of the latter. The mortgagee of a copyhold, after forfeiture, may foreclose without having been admitted: *Sutton* v. *Stone*, 2 Atk. 101; and, after admittance, may take a release from the mortgagor of the equity of redemption (or of the condition for redemption, if unbroken), and thus acquire the absolute ownership, without re-admission or fine: *Kite* v. *Queinton*, 4 Co. 25.

3. Mortgage of Leaseholds.

Mortgages by assignment and by demise.

Mortgages of leaseholds may be made either by way of assignment of all the mortgagor's term and interest in the premises, or by way of underlease, a reversion of a single day or a few days being left in the mortgagor. Wherever the rent is considerable, or the covenants are of such a nature that the breach of them might possibly entitle the mortgagor to recover damages, as in the case of covenants to repair, &c., the mortgagee should take a demise, as the mortgagor's neglect to perform the covenants might involve the mortgagee in serious liabilities. If, however, the rent is small, and the covenants are not of an onerous nature, an assignment is to be preferred, having regard to the contingency of the exercise by the mortgagee of his power of sale, inasmuch as an underlease is generally regarded as a less eligible interest for purposes of sale than an assignment, especially where there are beneficial covenants by the lessor, as no privity exists between the original lessor and a mortgagee as underlessee.

Declaration of trust of reversion.

On a mortgage of leaseholds by demise there will remain, as has been seen, a nominal reversion in the

mortgagor; and it is the usual practice to insert in such mortgages a declaration by the mortgagor that he will stand possessed of this reversion in trust for a purchaser on any sale, or else in trust for the mortgagee himself. The former course has been usually preferred; but it may now be regarded as settled that a declaration of trust for the mortgagee himself will not render him liable to the lessor upon the covenants in the lease: *Walters* v. *The Northern Mining Co.*, 5 De G. M. & G. 629; nor entitle the lessor to require him to take an assignment of the lease: *Moore* v. *Greg*, 2 De G. & Sm. 304. And there seems to be no sufficient reason why this form of declaration should not be generally adopted.

Mortgages of Leaseholds.

4. Miscellaneous Suggestions as to Mortgages.

Insurance.]—In mortgages of houses and other buildings, or of machinery and other perishable property, it is necessary to provide for fire-insurance: and where the property is leasehold, this is often requisite to be done in compliance with the terms of the lease. It is obvious that, where the lease which is the subject of a mortgage contains a clause imposing forfeiture in case of the breach of this or any other covenant, it behoves the mortgagee to satisfy himself that no breach has been committed antecedently to the mortgage, and to secure the power of preventing any future breach. Such clauses of forfeiture of course diminish the value of the security. There are two methods of effecting insurances for the protection of mortgagees: one is for the mortgagor to take out the policy in his own name, and to assign it to the mortgagee; the other, for the mortgagor to effect it in the name of the mortgagee. Precedents illustrating both these modes will be found in the sequel. Either of them may be adopted, as is found convenient. In the cases of fire-insurances, the principal advantage of effecting the insurance in the name of the creditor is, that no assignment is requisite; but in regard to

As to insurances made for the security of mortgagees.

Miscellaneous Suggestions as to Mortgages.

life-insurances this course has the further advantage of the policy not being liable to be affected by the death of the assured by suicide or the hands of justice, which vacates a policy effected by a person on his own life. See some observations on life-insurance, *ante*, p. 826 *et seq.*

Fire insurance.

The statutory powers of insuring mortgaged property against fire have been already adverted to, see *ante*, p. 892. For the reasons then stated it appears advisable that mortgagors should not simply rely on the statutory powers, but that they should require their securities to contain either express covenants for insurance by the mortgagor in the usual form, or, at all events, clauses modifying the terms of the statutory powers as regards the limitations as to value, and giving the mortgagee power to require production of policies and receipts for premiums, and also giving him a personal remedy against the mortgagor for money paid by the mortgagee for premiums and expenses of insurance in case of the mortgagor's default to insure. Forms of such clauses will be found in the following precedents.

Life assurance.

Where a policy of life assurance forms part of the security, the mortgage deed should contain affirmative covenants by the mortgagor to keep up and, if necessary, to restore the policy; and also negative covenants, that he will not do any act by which the policy may become void or voidable. Where a policy was assigned with merely affirmative covenants, it was held that the avoidance of the policy by the suicide of the assured was no breach of the covenants: *Dormay* v. *Borrodaile*, 10 Beav. 335.

Power of distress for arrears of interest.

Power of Distress and Attornment.]—Where the mortgagor was himself in the occupation of the mortgaged property, it was till recently the common practice to insert in the mortgage deed a power of distress for arrears of interest, or an attornment clause, so as to afford the mortgagee an easy and expeditious mode of enforcing the payment of his interest, instead of his being obliged to take possession of the premises, to obtain which recourse must

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be had to an ejectment, unless the mortgagee has provided against this by taking a warrant of attorney to confess judgment: see *post*, p. 986. Without a power of distress for the recovery of the interest, a mortgagee is in a worse situation where the property is in the personal occupation of the mortgagor, than when it has been let to a tenant. In the latter case he has only to give notice to the tenant to pay his rent to him (the mortgagee) as the owner of the reversion, and by this means can always render the security available for payment of his interest. The power of distress, indeed, had this greater advantage, that it authorized the mortgagee to levy the amount of the interest due without involving himself in the receipt and application of the surplus rents. Such a power, however, would be inoperative against a tenant holding under a subsisting demise, who, of course, is not liable to be affected by any act of the owner of the inheritance subsequent to the creation of his interest, whether that interest be a term of years, or a tenancy from year to year. He can only be required to pay the rent accruing according to the terms of his tenancy, to the landlord himself, or to any incumbrancer or other person in whom the landlord may have vested the reversion, or to whom he may have given an authority to receive it. But as, against a tenant claiming under a *posterior* demise, the power of distress would operate as a prior charge, such tenant might be distrained upon for the interest without regard to the nature and terms of his tenancy, and the amount of the rent he has stipulated to pay. As a power of distress, therefore, would be available against future tenants, it was sometimes thought advisable to insert such a power, even where the premises were let.

Attornment.

An attornment differed from a mere power of distress in the following respects: Under a power of distress, only the goods of the mortgagor could be distrained: *Freeman* v. *Edwards*, 2 Exch. 732; but an attornment, except so far as void under the Bills of Sale Acts, empowers the mortgagee to distrain upon the goods of strangers found upon the mort-

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gaged premises: *Kearsley* v. *Phillips*, 11 Q. B. D. 621. A mere power of distress is avoided by the mortgagor's bankruptcy, inasmuch as his goods thereupon vest in his trustee: *Freeman* v. *Edwards*, *supra;* but a mortgagee under an attornment clause is in the position of a landlord so as to entitle him before or after the commencement of the bankruptcy to distrain for a year's rent under sect. 42 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52): see *Ex parte Hill*, 6 Ch. D. 63; *Ex parte Williams*, 7 Ch. D. 138.

Risk attending attornment.

Attornment clauses have in great measure fallen into disuse in consequence of the *dicta* of *James* and *Bramwell*, LL.J., in *Re Stockton Iron Furnace Co.*, 10 Ch. D. at p. 356, that the effect of such clauses is to render mortgagees liable as mortgagees in possession to account as against any second mortgagees or incumbrancers for rent received or which but for their wilful default they might have received. These *dicta* were adopted by *Jessel*, M.R., in *Ex parte Punnett*, 16 Ch. D. 235; but *Bacon*, V.-C., in *Stanley* v. *Grundy*, 22 Ch. D. 478, refused to follow them. Having regard to this risk, it has very generally been considered by conveyancers that it is not advisable to insert these clauses in mortgage deeds.

Avoidance of attornments by Bills of Sale Acts.

But now every attornment in a mortgage deed, inasmuch as it gives a power of distress and reserves a rent, falls within the mischief of the Bills of Sale Acts: see sect. 6 of the Act of 1878, *ante*, p. 801. It must therefore not only be registered under that Act: see sect. 8, *ante* p. 805; but by sect. 9 of the Act of 1882, it must be in accordance with the form of bill of sale prescribed in the schedule to the Act, which is quite inapplicable to the purposes of an attornment: see *Davis* v. *Burton*, 11 Q. B. D. 637.

Attornment clauses not advisable.

Having regard, therefore, to the risk attending attornments in the case of mortgages, and to the difficulty of framing such clauses so as not to be utterly void, their insertion in mortgage deeds is not advisable, and may be regarded as obsolete in practice.

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It will be observed that an instrument will not be a bill of sale by virtue of sect. 6 of the Act of 1878 (see *ante*, p. 801), unless thereby a power of distress is given *and a rent is reserved.* A mere power of distress may be given in a mortgage without creating a tenancy: *Chapman* v. *Benham*, 3 Q. B. 723; and possibly a mortgage containing a power for the mortgagee to distrain for interest overdue "as for rent in arrear" (*f*) might not be held to be an instrument giving a power of distress and reserving a rent within the meaning of the section. But even so, it would seem that such a power must fall within the definition of bills of sale contained in sect. 4 of the Act of 1878 (see *ante*, p. 792), as being a licence "to take possession of chattels as security" for a debt. Although, therefore, attornments and powers of distress stand on a somewhat different footing, the practical result appears to be the same, viz., that their insertion in mortgage deeds is of too doubtful validity to be recommended.

As to powers of distress.

Statutory Covenants for Title.]—Mortgage deeds formerly, according to the usual practice, contained express covenants for title by the mortgagor. The insertion of such covenants is now rendered generally unnecessary by virtue of the provisions of sect. 7 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), which enacts that there shall be implied:—

Statutory covenants for title.

(C.) "In a conveyance (*g*) by way of mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

On mortgage, by beneficial owner.

(*f*) A power in such terms will not create a tenancy, the word "rent" being merely directory as to the mode of dealing with the distress: *Doe* v. *Goodier*, 10 Q. B. 957. The power will bind the grantee himself and his assigns with notice. So a lessee may covenant with his lessor to give the latter a power of distress over premises not included in the demise (see *ante*, pp. 597, 607), and an assignee of such premises having notice of the covenant will be bound thereby: *Daniel* v. *Stepney*, L. R. 7 Ex. 185.

(*g*) Conveyance includes assignment, appointment, and other assurances and covenants to surrender made by deed: see sect. 2 (v.) of the Act.

Miscellaneous Suggestions as to Mortgages.

Right to convey.

Quiet enjoyment.

"That the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed by him, subject as, if so expressed, and in the manner in which it is expressed to be conveyed; and also that, if default is made in payment of the money intended to be secured by the conveyance, or any interest thereon, or any part of that money or interest, contrary to any provision in the conveyance, it shall be lawful for the person to whom the conveyance is expressed to be made, and the persons deriving title under him, to enter into or upon, or to receive, and henceforth quietly hold, occupy, and enjoy or take and have, the subject-matter expressed to be conveyed, or any part thereof, without any lawful interruption or disturbance by the person who so conveys, or any person conveying by his direction, or any other person not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all estates, incumbrances, claims, and demands whatever, other than those subject whereto the conveyance is expressly made; and further, that the person who so conveys and every person conveying by his direction, and every person deriving title under any of them, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, or any part thereof, other than an estate or interest subject whereto the conveyance is expressly made, will from time to time and at all times, on the request of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, but, as long as any right of redemption exists under the conveyance, at the cost of the person so conveying, or of those deriving title under him, and afterwards at the cost of the person making the request, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of conveyance and every part thereof to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required:"

Freedom from incumbrance.

Further assurance.

And—

On mortgage

(D.) "In a conveyance by way of mortgage of leasehold pro-

perty, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely) :—

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of leaseholds, by beneficial owner.

Validity of lease.

Payment of rent and performance of covenants.

"That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good, valid, and effectual lease or grant of the land conveyed, and is in full force, unforfeited, and unsurrendered and in nowise become void or voidable, and that all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance; and also that the person so conveying, or the persons deriving title under him, will at all times, as long as any money remains on the security of the conveyance, pay, observe, and perform, or cause to be paid, observed, and performed all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all actions, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him or them by reason of the non-payment of such rent or the non-observance or non-performance of such covenants, conditions and agreements, or any of them."

Mortgage of Distinct Estates.]—The practice of including in the same mortgage several estates, which are likely to be afterwards disunited in ownership, is often productive of great inconvenience. If part of the property happens to be sold while the mortgage subsists, the mortgagee is of course a necessary party to the conveyance, and is required to covenant or undertake for the production of the mortgage deed, which he declines to do, unless with a restriction confining the covenant or undertaking to the period of his continuing to be mortgagee, which the purchaser is not bound to accept (*vide Barclay* v. *Raine*, 1 Sim. & S. 451): or, if the mortgagee enters into an absolute covenant, he alleges his covenant as a ground (which it fairly is) for claiming to retain the mort-

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gage deed when his debt is paid off; and the mortgagor is obliged either to submit to such retention, or to procure the covenantees to accept his (the mortgagor's) covenant, in exchange for that of the mortgagee.

Bonds.

Bond and Warrant of Attorney.]—Bonds used sometimes to be given for the payment of monies contemporaneously secured by mortgage, in addition to the covenant to pay which is invariably inserted in the deed; but they add nothing to the security derived from the covenant, inasmuch as it has long been settled that actions of debt may be brought on such covenants (being covenants to pay sums certain: see *Browne* v. *Pendlebury,* Cro. El. 268, pl. 4: *Ingledew* v. *Cripps,* 2 Lord Raym. 814: see also *Wade* v. *Branch,* 2 And. 53, pl. 39; Co. Lit. 47 b; 7 Vin. Ab. 334, tit. "*Debt,*" (G. 1); which are, therefore, binding on the devisees of the covenantor (*vide ante,* Vol. 2, p. 360, 2nd ed.); besides which, actions of covenant may now be sustained against devisees (*vide* stat. 11 Geo. 4 and 1 Will. 4, c. 47). The bond is, for this reason, always an unnecessary expense.

Warrants of attorney to confess judgments.

Warrants of attorney to confess judgment sometimes, though not very frequently, accompanied mortgages as a collateral security, so as to enable the mortgagee to enter up judgment, and thus obtain priority in the administration of assets; but now judgments no longer affect the land of a debtor until such land shall have actually been delivered in execution (see 27 & 28 Vict. c. 112). Such warrants have now become almost obsolete.

A warrant of attorney to confess judgment (similarly to the power of distress for securing the interest), is more effectual when the mortgagor himself is in the occupation, than when it is held by a tenant; in which case, the only effect of the mortgagee's proceeding under the warrant would be to enable him to get into possession of the rents, which he might do by a mere notice to the tenant. And it has been suggested

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that the restrictions on powers of distress and attornments in mortgages imposed by the Bills of Sale Acts (see *ante*, p. 983) may have the effect of bringing warrants of attorney again into use: see Key and Elphinstone, Comp. Conv. Vol. II. p. 199, n. As to the necessary formalities with regard to the execution and attestation of warrants of attorney, see *post*, p. 1216, note.

CHAPTER X.

STAMPS ON MORTGAGE DEEDS.

By the schedule to the Stamp Act, 1870 (33 & 34 Vict. c. 97), the following duties are imposed :—

MORTGAGE, BOND, DEBENTURE, COVENANT, WARRANT OF ATTORNEY TO CONFESS AND ENTER UP JUDGMENT, AND FOREIGN SECURITY OF ANY KIND.

(1.) Being the only or principal or primary security for—

	£	s.	d.
The payment or repayment of money not exceeding 25*l.*	0	0	8
Exceeding 25*l.* and not exceeding 50*l.*	0	1	3
„ 50*l.* „ 100*l.*	0	2	6
„ 100*l.* „ 150*l.*	0	3	9
„ 150*l.* „ 200*l.*	0	5	0
„ 200*l.* „ 250*l.*	0	6	3
„ 250*l.* „ 300*l.*	0	7	6
„ 300*l.*			
For every 100*l.*, and also for every fractional part of 100*l.*, of such amount	0	2	6

(2.) Being a collateral, or auxiliary, or additional, or substituted security, or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped :

For every 100*l.*, and also for any fractional part of 100*l.*, of the amount secured	0	0	6

EXEMPTION.—Instruments for the sale, transfer, or other disposition, either absolutely or by way of mortgage, or otherwise, of any ship or vessel, or any part interest share on property of or in any ship or vessel.

The following sections of the Act are also material with regard to the stamping of mortgage deeds :—

Interpretation of term "mortgage" (*a*).

Sect. 105. "The term 'mortgage' means a security by way of mortgage for the payment of any definite and certain sum of

(*a*) Clauses in this section relating to instruments operating under the Law of Scotland are here omitted.

money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable, or for the repayment of money thereafter to be lent, advanced, or paid, or which may become due on an account current, together with any sum already advanced or due, or without, as the case may be; and includes: conditional surrender by way of mortgage, further charge, wadset, and heritable bond, disposition, assignation, or tack in security, and eik to a reversion of or affecting any lands, estate, or property, real or personal, heritable or moveable, whatsoever; also any conveyance of any lands, estate, or property whatsoever in trust to be sold or otherwise converted into money, intended only as a security, and redeemable before the sale or other disposal thereof, either by express stipulation or otherwise, except where such conveyance is made for the benefit of creditors generally, or for the benefit of creditors specified, who accept the provision made for payment of their debts in full satisfaction thereof, or who exceed five in number; also any defeasance, letter of reversion, back bond, declaration, or other deed or writing, for defeating or making redeemable, or explaining, or qualifying any conveyance, disposition, assignation, or tack of any lands, estate, or property whatsoever, apparently absolute, but intended only as a security; also any agreement, contract, or bond accompanied with a deposit of title-deeds for making a mortgage, wadset, or any such other security or conveyance as aforesaid of any lands, estate, or property comprised in such title-deeds, or for pledging or charging the same as a security.

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Sect. 106. "A security for the transfer or re-transfer of any stock is to be charged with the same duty as a similar security for a sum of money equal in amount to the value of such stock; and a transfer assignment, disposition, or assignation of any such security, and a reconveyance, release, discharge, surrender, re-surrender, warrant to vacate, or renunciation of any such security, shall be charged with the same duty as an instrument of the same description relating to a sum of money equal in amount to the value of such stock."

Security for stock, how to be charged.

Sect. 107.—"(1.) A security for the payment or repayment of money to be lent, advanced or paid, or which may become due upon an account current, either with or without money previously due, is to be charged, where the total amount secured or to be ultimately recoverable is in any way limited, with the same duty as a security for the amount so limited.

Security for future advances, how to be charged.

"(2.) Where such total amount is unlimited, the security is to be available for such an amount only as the *ad valorem* duty impressed thereon extends to cover.

Stamps on Mortgages.

Proviso.

"(3.) Provided that no money to be advanced for the insurance of any property comprised in any such security against damage by fire, or for keeping up any policy of life insurance comprised in such security, or for effecting in lieu thereof any new policy, or for the renewal of any grant or lease of any property comprised in such security upon the dropping of any life whereon such property is held, shall be reckoned as forming part of the amount in respect whereof the security is chargeable with *ad valorem* duty."

Security for repayment by periodical payments, how to be charged.

Sect. 108. "A security for the payment of any rent-charge, annuity, or periodical payments, by way of repayment, or in satisfaction or discharge of any loan, advance, or payment, intended to be so repaid, satisfied, or discharged, is to be charged with the same duty as a similar security for the payment of the sum of money so lent, advanced, or paid."

As to copyholds.

Sect. 110.—"(1.) Where any copyhold or customary lands or hereditaments are mortgaged alone by means of a conditional surrender or grant, the *ad valorem* duty is to be charged on the surrender or grant, if made out of Court, or the memorandum thereof, and on the copy of Court Roll of the surrender or grant, if made in Court.

"(2.) Where any copyhold or customary lands or hereditaments are mortgaged, together with other property, for securing the same money or the same stock, the *ad valorem* duty is to be charged on the instrument relating to the other property, and the surrender or grant, or the memorandum thereof, or the copy of Court Roll of the surrender or grant, as the case may be, is to be charged with duty as if the surrender or grant were not made upon a mortgage, but such last-mentioned duty shall not exceed the said *ad valorem* duty."

As to mortgage with conveyance of equity of redemption.

Sect. 111. "An instrument chargeable with *ad valorem* duty as a mortgage is not to be charged with any other duty by reason of the equity of redemption in the mortgaged property being thereby conveyed or limited in any other manner than to, or in trust for, or according to the direction of, a purchaser."

Stamp on mortgage of stock.

By the stat. 34 & 35 Vict. c. 4, sect. 5, mortgages of stock or other marketable securities (*b*) are subjected to a duty of 10*s.* for every 5,000*l.*, and also for any fractional part of 5,000*l.* of the amount secured. And by sect. 12 of the Stamp Act, 1870,

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(*b*) "Marketable securities" are defined in sect. 2 of the Stamp Act, 1870, as securities capable of being sold in any stock market in the United Kingdom.

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where an instrument is chargeable with *ad valorem* duty in respect of any stock or marketable security, such duty is to be calculated on the value of such stock or security according to the average price thereof on the day of the date of the instrument.

Bills of sale.

A bill of sale by way of security requires to be stamped as a mortgage.

By sect. 57 of the Stamp Act, 1870, it is enacted that,—

"A copy of a bill of sale is not to be filed in any Court unless the original, duly stamped, is produced to the proper officer."

Reconveyances.

As to stamps on reconveyances, see *post*, p. 1192, note.

Transfers.

As to stamps on transfers of mortgage, see *post*, p. 1199, note.

PRECEDENTS.

I. *STATUTORY MORTGAGE of* FREEHOLDS *in* FEE (*a*) *to one Mortgagee.*

THIS INDENTURE (*b*) made by way of statutory mort-

(*a*) The above form is that given in the 3rd Schedule to the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 4), and with reference thereto, sect. 26 of that Act enacts as follows :—

Form of statutory mortgage.

(1.) A mortgage of freehold or leasehold land may be made by a deed expressed to be made by way of statutory mortgage, being in the form given in Part I. of the Third Schedule to this Act, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

(2.) There shall be deemed to be included, and there shall by virtue of this Act be implied, in the mortgage deed—

First, a covenant with the mortgagee by the person expressed therein to convey as mortgagor to the effect following (namely) :

That the mortgagor will, on the stated day, pay to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, and will thereafter, if and as long as the mortgage money or any part thereof remains unpaid, pay to the mortgagee interest thereon, or on the unpaid part thereof, at the stated rate, by equal half-yearly payments, the first thereof to be made at the end of six calendar months from the day stated for payment of the mortgage money :

Secondly, a proviso to the effect following (namely) :

That if the mortgagor, on the stated day, pays to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, the mortgagee at any time thereafter, at the request and cost of the mortgagor, shall re-convey the mortgaged property to the mortgagor, or as he shall direct.

Variations in the above form may be made, if required, for leasehold land or other matter ; forms of statutory mortgages in which such variations occur will be found in some of the following Precedents. All mortgages by deed, except so far as a contrary intention is expressed in the mortgage deed, confer on the mortgagee statutory powers of sale, &c. : see sects. 19—24 of the

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Stamp.

(*b*) Stamp *ad valorem* on amount secured, see *ante*, p. 988.

I. Statutory Mortgage in Fee.

gage the —— day of —— 18—, Between [*mortgagor*], of &c. (*c*), of the one part, and [*mortgagee*], of &c., of the other part, WITNESSETH that in consideration of the sum of £—— now paid to [*mortgagor*] by [*mortgagee*], of which sum [*mortgagor*] hereby acknowledges the receipt, [*mortgagor*] as mortgagor and as beneficial owner hereby conveys to [*mortgagee*] ALL THAT &c. [*parcels*], TO HOLD TO AND TO THE USE of [*mortgagee*] in fee simple for securing payment on the —— day of —— 18— (*d*), of the principal sum of £——, as the mortgage money, with interest thereon at the rate of —— per centum per annum. IN WITNESS, &c.

Parties.

Testatum.

Act, *ante*, p. 918 *et seq.;* and statutory covenants for title will be implied by the conveyance by the mortgagor "as beneficial owner:" see *ante*, p. 983.

The principal advantage of the use of the statutory form of mortgage seems to be, that it enables the mortgage to be reconveyed or transferred by means of the short forms of reconveyance and transfer provided by the Act: see *post*, pp. 1189, 1198.

The form of statutory mortgage, although it may be used with additions or variations, if required, does not seem well adapted for the insertion of special covenants and provisions. The brevity of this form will no doubt cause it to be used to some extent in simple cases, but when the nature of the transaction requires provisions of any complexity to be inserted in the mortgage, it will be found that they can be more conveniently arranged in a deed according to the ordinary form: see Precedents II., III.

Mortgage of property of a married woman.

(*c*) If the mortgage is of property (whether freehold, copyhold, or leasehold), belonging to a woman married on or since the 1st of January, 1883, so as to be within the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), the mortgage will be expressed to be made as follows:—

"Between [*mortgagor*] the wife of [*husband*], of &c., to whom she was married on the —— day of —— 18—, of the one part, and [*mortgagee*], of &c., of the other part."

If, however, the marriage took place before the 1st of January, 1883, but the property was acquired by her after that date, so as to be within the Act, the date of the marriage will not be stated, but recitals must be introduced showing at what date the property was acquired: see for recitals as to acquisition of property, *post*, pp. 1001, 1016, &c.

These remarks, of course, apply to mortgages in the ordinary form as well as to statutory mortgages. For a mortgage of property of a married woman where the Act does not apply, see *post*, Precedent XXVII., p. 1053.

(*d*) Generally six months after the date of the mortgage.

II. *MORTGAGE* (*e*) *in* FEE *of* FREEHOLDS *to* ONE MORTGAGEE. COVENANT *by Mortgagor to* INSURE. PROVISO *restricting Mortgagor's Statutory* POWERS OF LEASING.

Parties.

Testatum.

Covenant for payment of principal and interest.

THIS INDENTURE (*f*) made the —— day of —— 18—, BETWEEN [*mortgagor*], of &c., of the one part, and [*mortgagee*], of &c., of the other part (*g*), WITNESSETH that in consideration of the sum of £—— now paid to the said [*mortgagor*] by the said [*mortgagee*], of which sum the said [*mortgagor*] hereby acknowledges the receipt, the said [*mortgagor*] hereby covenants with the said [*mortgagee*] to pay to him, his executors, administrators, or assigns, on the ——

Statutory form of mortgage.

(*e*) This and the next following Precedent are adapted from the form given in the 4th Schedule to the Conveyancing and Law of Property Act, 1881, with the addition of special covenants and provisions.

Stamp.

(*f*) Stamp, *ad valorem*, on amount secured, *ante*, p. 988.

Interpretation clause in mortgages.

(*g*) Instead of repeating the names of the *mortgagor* and *mortgagee* throughout, the words "hereinafter called the mortgagor" and "hereinafter called the mortgagee" may be inserted after the names and addresses of the respective parties, and an interpretation clause may be added at the end of the instrument, whereby those terms are made to include the representatives of the respective parties: see Precedent IV., *post*, p. 1001. Or, if preferred, an interpretation clause may be inserted after the names and addresses of each of the parties, as in Precedent V., *post*, p. 1006; or by means of a separate article or paragraph where the deed is of such length and complexity as to render it advisable to frame it in a paragraph form.

The advantage of interpretation clauses in mortgages as regards brevity is not very considerable, and it is necessarily purchased, in mortgages of real estate at all events, by sacrificing, to some extent, clearness of expression, as where the conveyance is made to the mortgagee, his heirs and assigns (or in fee simple); and compare the proviso for reconveyance to the mortgagor where the real representatives alone will be included, according to the sense of the context, with the covenants where his real and personal representatives will be alike included in the obligation.

Instances of the use of interpretation clauses are given in this collection (*vide supra*) for the sake of illustration, and because some practitioners prefer to use them; but generally the more usual practice is adopted of repeating the names of the parties throughout each Precedent.

Recitals.

If desired, recitals of the mortgagor's title and of the agreement for the loan may be here inserted as in Precedent IV., *post*, p. 1001. See as to the advisability of inserting recitals in mortgages, *ante*, p. 971.

II. Mortgage Fee to One Mortgagee.

day of —— 18—, the sum of £——, with interest thereon in the meantime at the rate of —— per centum per annum, AND ALSO (*h*), so long after that day as any principal money shall remain due under this mortgage, to pay to the said [*mortgagee*], his executors, administrators, or assigns, interest thereon at the same rate by equal half-yearly payments, on the —— day of —— and the —— day of —— in every year (*i*): AND THIS INDENTURE ALSO WITNESSETH, that for the consideration aforesaid the said [*mortgagor*], hereby [grants, and] as beneficial owner, conveys (*j*) unto the said [*mortgagee*] ALL THAT [*describe parcels, e.g.*, messuage or dwelling-house, with the stables, coach-house, outbuildings, yard and garden thereto belonging, and also all those —— several closes or pieces of meadow or pasture land adjoining thereto, containing by admeasurement —— acres, —— roods, and —— perches, or thereabouts, and situate in the parish of —— in the county of ——, and bounded on the north by the high road from —— to ——, on the east by land now or late of [A. B.], on the south, &c.], To HOLD all the premises UNTO AND TO THE USE of the said [*mortgagee*], his heirs and assigns (*k*), subject to

Second *testatum.*

Conveyance of freehold messuage and lands to mortgagee.

Habendum.

(*h*) A separate covenant for payment of interest enables the mortgagee to recover the interest without calling in the principal. Where a mortgage deed contained a covenant for payment of the principal sum on a specified day, with interest in the meantime at the rate of 10 per cent., but there was no covenant for payment of interest after that day if the principal should be then unpaid, it was held that interest after the day fixed for payment was recoverable only as damages at the rate of 5 per cent.: *Re Roberts*, 14 Ch. D. 49.

Covenant for payment of interest.

(*i*) A mortgagor is entitled to deduct income tax from the interest: *Moss* v. *Galte*, 23 Beav. 269.

(*j*) The word "convey" by sect. 2 of the Conveyancing and Law of Property Act, 1881, includes, for the purposes of the Act, all ordinary modes of conveyance by deed by grant, appointment, assignment, covenant to surrender, &c. Although there may not be any absolute necessity for using the word "convey" in order to pass the estate or imply the statutory covenants, it is nevertheless advisable, so as to avoid any question on the point from arising, to use the word to which the statute attaches this effect. Where the property conveyed is all of the same nature and tenure, the word "convey" alone may be used, if it is so desired; where, however, different kinds of property are to be conveyed it seems more convenient, as indicating the nature of the particular conveyances, to retain the use of the several words of conveyance hitherto appropriated thereto respectively.

(*k*) The expressions "heirs and assigns" and "executors, ad-

II. Mortgage in Fee to One Mortgagee.

Proviso for redemption.

the proviso for redemption following, namely, that if the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall on the —— day of —— 18—, pay to the said [*mortgagee*], his executors, administrators, or assigns, the sum of £—— and interest thereon at the rate aforesaid, then the said [*mortgagee*], his executors, administrators, or assigns (*l*) will, at the request and cost of the said [*mortgagor*], his heirs, executors, administrators, or assigns, reconvey the premises to the use of the said [*mortgagor*], his heirs and assigns, or as he or they shall direct: And the said [*mortgagor*] hereby covenants with the said [*mortgagee*] to keep the said messuage or dwelling-house and all the buildings upon the premises insured against loss or damage by fire in the sum of £—— at the least [*or*, to the full value thereof], in the —— Insurance Office or some other fire insurance office to be approved by the said [*mortgagee*], his executors, administrators, or assigns, and to pay all premiums or sums from time to time payable for keeping up such insurance on [*or*, within —— days after] the first day on which every such premium or sum shall become payable, and on demand to produce to him or them the policy or policies of such insurance, and the receipt for every premium or sum payable in respect thereof, and that on the refusal or failure of the said [*mortgagor*], his heirs, executors, or administrators, to produce any such policy or receipt in pursuance of this covenant, then it shall be presumed that no insurance is being kept up by or on behalf of the mortgagor in accordance with this mortgage, and it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns,

Covenant by mortgagors to insure (*m*).

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ministrators or assigns," are generally retained in these Precedents, as there seems no sufficient reason for substituting for them the equally long and less familiar expressions "in fee simple," or "persons claiming under" or "deriving title under" the grantor or grantee, as the case may be. The use of the statutory forms is not obligatory.

(*l*) The proviso should be as in the text by the mortgagee, "his executors, administrators or assigns," and not, as formerly, by his "heirs or assigns": see sect. 30 of the Conveyancing and Law of Property Act, 1881, *ante*, p. 965.

(*m*) The insertion of a covenant by the mortgagor to insure will be advisable where buildings form a material part of the intended security. All premiums paid by the mortgagee in effecting an insurance under the statutory power are a charge on the mortgaged property, with interest: see, as to the powers of mortgagees to insure on default of the mortgagor to perform his obligations in this respect, *ante*, p. 892.

II. Mortgage in Fee to One Mortgagee.

at any time thereafter to effect under the statutory powers in that behalf an insurance of the said messuage or dwelling-house and buildings to an amount not exceeding the sum of £—— [*or* to the full value thereof]: PROVIDED ALWAYS, and it is hereby agreed, that none of the powers of leasing or of agreeing to lease conferred by the Conveyancing and Law of Property Act, 1881, on mortgagors in possession, shall be exerciseable during the continuance of this security, by the said [*mortgagor*], his heirs or assigns, in respect of the premises or any part thereof, without the written consent of the said [*mortgagee*], his executors, administrators, or assigns, previously obtained. IN WITNESS, &c.

Proviso restricting mortgagor's powers of leasing.

III. *MORTGAGE in* FEE *of* FREEHOLDS *to* SEVERAL MORTGAGEES *advancing money on a* JOINT ACCOUNT (*n*). — PROVISOES *for* REDUCTION *of* INTEREST, *and that* PRINCIPAL *shall* NOT *be* CALLED IN *for a certain time.*—COVENANT *by* MORTGAGOR *to* INSURE. [*Proviso as to costs of mortgagee solicitor in note.*]

THIS INDENTURE (*o*), made the —— day of ——, 18—, BETWEEN [*mortgagor*] of, &c., of the one part, [*mortgagee*], of &c., and [*mortgagee*], of &c., of the other part, WITNESSETH that in consideration of the sum of £—— now paid to the said [*mortgagor*] by the said [*mortgagees*] out of money belonging to them on a joint account (of which sum the said [*mortgagor*] hereby acknowledges the receipt), the said [*mortgagor*] hereby covenants with the said [*mortgagees*] to pay to them, their executors, administrators, or assigns, on the —— day of ——, 18—, the sum of £——, with interest thereon in the meantime at the rate of —— per cent. per annum; AND ALSO as long after that day as any principal money shall remain due under this mortgage, to pay to the said [*mortgagees*], their executors, administrators, or assigns,

Parties.

Testatum.

Covenant for payment of principal and interest.

(*n*) This form of mortgage should be used by trustees in ordinary mortgages of moneys belonging to the trust estate where (as is usually the case) it is desired that the trust should not be disclosed: see as to the importance of avoiding such disclosure, *ante*, p. 849.

(*o*) Stamp, *ad valorem*, on amount secured, *ante*, p. 988. But see note (*u*) at the end of this Precedent. Stamp.

III. Mortgage in Fee to Several Mortgagees.

interest thereon at the same rate by equal half-yearly payments on the —— day of —— and the —— day of —— in every year; AND THIS INDENTURE ALSO WITNESSETH that for the same consideration the said [*mortgagor*] hereby grants, and, as beneficial owner, conveys unto the said [*mortgagees*] ALL THAT messuage and farm-house, and farm, with the several cottages, buildings, closes, or pieces of land, and hereditaments thereto belonging, and held therewith, known as the —— Farm situate in the parish of —— in the county of —— and containing by admeasurement —— acres, —— roods, —— perches, or thereabouts, particularly described in the schedule hereunder written, and delineated on the map annexed to [*or* drawn on] these presents, and therein coloured —— [such schedule and map being respectively taken from the apportionment of tithe commutation rent-charge for the parish of —— aforesaid, and from the map therein referred to]: TO HOLD all the premises UNTO AND TO THE USE of the said [*mortgagees*], their heirs and assigns, subject to the proviso for redemption following, namely, that if the said [*mortgagor*], his heirs, executors, administrators, or assigns shall on the —— day of ——, 18—, pay to the said [*mortgagees*], their executors, administrators, or assigns, the sum of £—— and interest thereon at the rate aforesaid, then the said [*mortgagees*], their executors, administrators, or assigns will, at the request and cost of the said [*mortgagor*], his heirs, executors, administrators, or assigns, re-convey the premises to the use of the said [*mortgagor*], his heirs and assigns, or as he or they shall direct; PROVIDED ALWAYS, that if the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall on every —— day of —— and —— day of —— (*p*) so long as the said principal sum of £——, or any part thereof, shall remain unpaid, or within —— days after each of the said days respectively, pay to the said [*mortgagees*], their executors, administrators, or assigns, interest on the said principal sum or on such part thereof as shall for the time being remain unpaid, at the rate of —— [*the reduced rate*] per cent. per annum, then and in such case (*q*) the said [*mortgagees*], their executors, adminis-

Second *testatum*.

Conveyance to mortgagees of freehold farm by reference to schedule and map.

Proviso for redemption.

Proviso for reduction of interest.

(*p*) The half-yearly days on which interest is made payable.

(*q*) In order to entitle a mortgagor to the benefit of a proviso for reduction of interest on punctual payment, he must strictly observe the conditions, otherwise he will not be relieved from his liability to pay interest at the higher rate: *Bonafous* v. *Rybot*,

III. Mortgage in Fee to Several Mortgagees.

trators, and assigns, shall accept interest for the said principal sum, or for such part thereof as shall for the time being remain unpaid, at the rate of —— [*the reduced rate*] per cent. per annum for every half year for which such interest shall shall be paid to them within such —— days as aforesaid; PROVIDED ALSO that if the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall on every —— day of —— and —— day of —— (*qq*), or within —— days next after each of such days respectively, pay to the said [*mortgagees*] interest on the said principal sum, or for such part thereof as shall for the time being remain unpaid, at the rate hereby provided, then and in such case (*r*) the said [*mortgagees*], their executors, administrators, or assigns, shall not before the —— day of ——, 18—, call in the said principal sum, or any part thereof; PROVIDED ALSO that the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall not be entitled to require or compel the said [*mortgagees*], their executors, administrators, or assigns, to receive the said principal sum of £——, or any part thereof, before the said —— day of ——, 18—; PROVIDED NEVERTHELESS that, notwithstanding anything herein contained, in case of the default or failure of the said [*mortgagor*], his heirs, executors, administrators, or assigns, to observe or perform any of the covenants herein contained, or implied, or any obligation imposed by statute or otherwise, and on his and their part to be observed or performed, other than the covenant for payment on the —— day of ——, 18—, of the said sum of £——, and interest thereon, or in case the said [*mortgagees*], their executors, administrators, or assigns, shall enter into possession or

Proviso that principal shall not be called in before specified date.

Proviso that mortgagor shall not compel receipt of principal before that date.

Proviso for cesser of foregoing provisoes on breach of mortgagor's covenants, &c. (*rr*).

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3 Bur. 1375; *Stanhope* v. *Manner*, 2 Ed. 199; *Jory* v. *Cox*, Pre. Ch. 160.

(*qq*) The half-yearly days on which interest is made payable.

(*r*) There is no equitable relief under a proviso not to call in a mortgage debt on punctual payment of interest, if such payment falls into arrear even for a few days only: *Hicks* v. *Gardner*, 1 Jur. 541. If the mortgagor becomes bankrupt the mortgagee may obtain an order for sale, although the period for calling in the money under a stipulation of this nature has not arrived: *Ex parte Bignold*, 3 M. & A. 327.

(*rr*) This proviso will be omitted altogether if there are no covenants, *and* if the statutory power of leasing is excluded; and will require obvious modification if there are no covenants, *or* if the power is excluded.

III. Mortgage in Fee to Several Mortgagees.

receipt of the rents and profits of the premises, or any part thereof, then and in any such case the provisions herein contained for reduction of interest (*s*), and for the not calling in of the said principal sum, or any part thereof, before the said —— day of ——, 18—, shall cease and be of no effect; And the said [*mortgagor*] hereby covenants with the said [*mortgagees*] that he the said [*mortgagor*] his heirs, executors, or administrators, will, at his or their own cost, from time to time, so long as any money shall remain due under this mortgage, keep all buildings comprised therein [in good and substantial repair and also] insured against loss or damage by fire, in the —— Fire Office, or in some other insurance office to be approved in writing by the said [*mortgagees*], their executors, administrators, or assigns, in the aggregate sum of £—— at the least; and will, from time to time duly and punctually pay the premiums and moneys necessary for effecting and keeping up such insurance; and will, on demand, deliver to the said [*mortgagees*], their executors, administrators, or assigns, the policy or policies of such insurance, and the receipts for all such payments; And that, in case default shall at any time be made in keeping [in repair as aforesaid or] insured the said buildings, or any of them, or in delivering the said policy or policies or the receipt for any such payment as aforesaid, then and in every such case it shall be lawful for the said [*mortgagees*], their executors, administrators, or assigns [to enter upon the premises and effect any repair which they may think necessary or proper, or] to insure and keep insured all or any of the said messuage, cottage, and buildings, in any sum not exceeding £—— [as the case may require]; and that the said [*mortgagor*], his heirs, executors, administrators, or assigns, will, on demand, pay unto the said [*mortgagees*], their executors, administrators, or assigns, all such sums of money as they or any of them shall expend in or about such [repair or] insurance [as the case may be], with interest for the same at the rate aforesaid, as from the time of the same having been expended respectively; and that, until repayment, the same shall be a charge upon the

Covenant by mortgagor to repair and insure (*t*).

(*s*) A mortgagee in possession is entitled to charge the higher rate of interest, notwithstanding a proviso for reduction on punctual payment: *Union Bank of London* v. *Ingram*, 16 Ch. D. 53.

(*t*) For a more concise form of covenant to insure, relying on the statutory provisions as to insurance, see *ante*, p. 996.

premises: PROVIDED ALWAYS that, in case any loss or damage by fire shall happen to the said messuage or dwelling-house, buildings, and premises, all monies which shall be received by virtue of any such policy of insurance as aforesaid, shall forthwith be applied in making good the damage or injury which shall have been sustained, or, in the discretion of the said [*mortgagees*], their executors, administrators, or assigns, and if they shall so require by notice in writing given to the said [*mortgagor*], his heirs, executors, administrators, or assigns, or left on the premises hereby conveyed, within —— days after such loss or damage by fire shall have happened, shall be applied in or towards the discharge of the monies for the time being due under this mortgage (*u*). IN WITNESS, &c.

III. Mortgage in Fee to Several Mortgagees.

Application of insurance moneys.

THE SCHEDULE ABOVE REFERRED TO.

IV. *MORTGAGE of FREEHOLDS in* FEE *to several Mortgagees, advancing Money on a* JOINT ACCOUNT, *with express* POWER *of* SALE. [ATTORNMENT CLAUSE *and* POWER *of* DISTRESS *in note.*]

THIS INDENTURE (*v*), made the —— day of ——, 18—,

(*u*) Where one of the mortgagees is a solicitor, as is often the case where trust money is lent on mortgage, the following clause may here be added:—

Proviso that costs of mortgagee solicitor shall be included in the security.

"PROVIDED ALWAYS, and it is hereby agreed, that the fact of the said [*mortgagee*] or of any other person for the time being entitled to the benefit of this security being a solicitor shall not prevent him from advising and transacting business in relation hereto or the premises hereby conveyed, and being entitled to charge the said [*mortgagor*], his heirs, executors, administrators, and assigns, for such services the usual and accustomed costs and charges as between solicitor and client, and that until payment all monies which shall become due in respect of such services as aforesaid, with interest thereon as from the time when the same shall respectively have become due shall be a charge upon the premises in like manner as the said principal sum of £——and interest hereby secured."

Where this clause is inserted an additional stamp should be impressed for an amount estimated to cover the probable amount of costs: see *ante*, p. 989.

Extra stamp.

(*v*) Stamp, *ad valorem* on amount secured, *ante*, p. 988.

Stamp.

IV. Mortgage in Fee with Express Power of Sale.

Parties.

Recitals: of seisin of mortgagor;

of agreement for loan.

Testatum.

Covenant to pay principal and interest.

Second *testatum.*

Conveyance of freehold messuages, lands, &c.

Habendum.

Proviso for redemption, &c.

Power of sale (*y*).

BETWEEN [*mortgagor*] of &c. (hereinafter called the mortgagor) of the one part; and [*mortgagee*] of &c., and [*mortgagee*] (hereinafter called the mortgagees), of the other part: WHEREAS, under an indenture dated the —— day of ——, 18—, and made between [*parties*], [*or* under the will of [*testator*], late of &c., deceased, dated &c.] the mortgagor is seised of or entitled to the hereditaments described in the schedule hereto, and intended to be hereby conveyed for an estate in fee simple in possession, free from incumbrances; AND WHEREAS the mortgagees have agreed to lend to the mortgagor the sum of £——, upon having the repayment of the same with interest thereon, at the rate hereinafter mentioned, secured in manner hereinafter appearing. NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement, and in consideration of the sum of £——, this day paid to the mortgagor by the mortgagees, out of monies belonging to them on a joint account, of which sum the mortgagor hereby acknowledges the receipt, the mortgagor hereby covenants with the mortgagees to pay to them, &c. [*Covenant to pay principal and interest, ante*, p. 997]; AND THIS INDENTURE ALSO WITNESSETH that for the consideration aforesaid, the mortgagor hereby grants and, as beneficial owner, conveys unto the mortgagees; ALL THOSE messuages or dwelling-houses, lands, and hereditaments, situate in the parish of ——, in the county of ——, particularly described in the schedule hereto, and delineated in the map drawn on these presents, and therein coloured ——; TO HOLD all the premises UNTO AND TO THE USE of the mortgagees, their heirs and assigns [*or* in fee simple] (*x*), subject to the proviso for redemption following, that is to say [*proviso for redemption, ante*, p. 998, *and, if desired, provisoes for reduction of interest, &c., ibid*]; AND IT IS HEREBY AGREED that if default shall be made in payment of the said principal sum of £——

(*x*) See as to this, *ante*, p. 995, note (*k*). The expression in brackets is perhaps the most suitable in this case.

(*y*) The statutory power of sale given to mortgagees by sect. 19 of the Conveyancing and Law of Property Act, 1881 (see *ante*, p. 918), seems to be fully sufficient in ordinary cases, and is very generally relied on in practice. A form of an express power of sale of freeholds, such was formerly in common use, is here given, in case a mortgagee should prefer to have an express power, and also as it may be of assistance in framing special powers of sale under particular circumstances, and also in framing mortgages of lands in British colonies or dependencies, where powers of sale are not

IV. Mortgage in Fee with Express Power of Sale.

and interest thereon, as aforesaid, on the said —— day of ——, 18—, then it shall be lawful for the mortgagees, without any further consent of the mortgagor, to sell the premises, or any part or parts thereof, either together or separately, and either by public auction or private contract, and subject to any stipulations as to title or evidence or commencement of title or otherwise, which the mortgagees shall deem proper, with full power to buy in or rescind or vary any contract for sale, and to resell without being responsible for any loss occasioned thereby; And to execute and do all such assurances and things for effectuating any such sale, as they shall deem proper; And that upon any such sale, as aforesaid, by any person or persons who may not be seised of the legal estate in the premises sold, the person or persons in whom the legal estate in the same premises shall be vested shall execute and do all such assurances and things for carrying the sale into effect, as the person or persons by whom the sale shall be made shall direct; Provided always, that the mortgagees shall not execute the power of sale hereinbefore contained, unless and until default shall have been made in payment, at the time hereinbefore appointed for payment thereof, of some principal money or interest, the payment whereof is intended to be hereby secured, and he or they shall have given a notice in writing to the mortgagor to pay off the monies for the time being owing on the security of these presents, or shall have left a notice in writing to that effect, at or upon some part of the premises hereby conveyed, and default shall have been made in payment of the whole or part of such monies for *six* calendar months from the time of giving or leaving such notice, or unless and until the whole or part of some half-yearly payment of interest, which shall become due on the security of these presents, shall have become in arrear for *three* calendar months; And every such notice as aforesaid shall be sufficient, though not addressed to any person or persons by name or designation, and notwithstanding the person or any of the persons affected thereby may be unborn, unascertained, or under disability: Provided also, that upon

Proviso that the power shall be exercised only in certain events.

Purchasers not to be

imported into mortgages by statute, or otherwise. The power in the text is also applicable in the case of copyholds. An express power of sale of leaseholds is given in Precedent XI., *post*, p. 1017. Special clauses varying or extending the statutory power of sale will also be found in the following Precedents.

IV. Mortgage in Fee with Express Power of Sale.

bound to inquire whether such events have happened, &c.

any sale purporting to be made in pursuance of the aforesaid power, no purchaser shall be bound to inquire whether either of the cases mentioned in the clause or provision lastly hereinbefore contained has happened, or whether any default has been made in payment of any such principal money or interest as aforesaid, or whether any money remains owing on the security of these presents, or as to the necessity or expediency of the stipulations, subject to which such sale shall have been made, or otherwise as to the propriety or regularity of such sale; And, notwithstanding any impropriety or irregularity whatsoever in any such sale, the same shall, as regards a purchaser or purchasers, be deemed to be within the aforesaid power, and be valid accordingly; And the remedy (if any) of the mortgagor in respect of any breach of the clause or provision lastly hereinbefore contained, or of any impropriety or irregularity whatsoever in any such sale, shall be in damages only; And it is hereby also agreed that upon any such sale as aforesaid the receipt of the mortgagees for the purchase-monies of the premises sold, shall effectually discharge the purchaser or purchasers therefrom, and from being concerned to see to the application, or being accountable for any loss or misapplication thereof; And it is hereby further agreed that the mortgagees shall by and out of the monies which shall arise from any such sale as aforesaid, in the first place, reimburse themselves, or pay all the expenses incurred in or about such sale, or otherwise in relation to the premises; And, in the next place, apply such monies in or towards satisfaction of the monies for the time being owing on the security of these presents; And then pay the surplus (if any) unto the mortgagor, or as he shall direct; And it is hereby also agreed that the aforesaid power of sale may be exercised by any person or persons, who, for the time being, shall be entitled to receive and give a discharge for the monies owing on the security of these presents; Provided also, that the mortgagees shall not be accountable for any involuntary losses which may happen in or about the exercise or execution of the aforesaid power and trusts, or any of them (*z*): Provided lastly, and it is hereby agreed that

Receipts of mortgagees to be effectual discharges.

Trusts of proceeds of sale.

Interpretation clause.

Attornment clause.

(*z*) Where the mortgaged property is in the occupation of the mortgagor an attornment clause is sometimes here inserted, as follows:—

"And, for the consideration aforesaid, the mortgagor hereby

IV. Mortgage in Fee with Express Power of Sale.

in the construction of these presents, unless the contrary appears, the expression "the mortgagor" shall include the attorns and becomes tenant from year to year to the mortgagees of the premises hereby conveyed, or of so much and such part or parts thereof as are in the occupation of the mortgagor, at the yearly rent of £——, clear of all deductions, to be paid by equal half-yearly payments on the —— day of —— and —— day of —— in every year (i.e., *the days appointed for payment of interest*) during the continuance of this security: PROVIDED ALWAYS, that it shall be lawful for the mortgagees at any time, without any previous notice, to enter into and upon and take possession of the premises whereof the mortgagor has hereby attorned tenant, and to determine the tenancy created by the attornment aforesaid: [PROVIDED ALWAYS, that the rents received under or by virtue of such tenancy shall be applied in keeping down the interest which shall from time to time become due under this security, and the surplus thereof shall from time to time be applied, if the mortgagees shall so think fit, in or towards satisfaction of the principal monies for the time being due under this security:] PROVIDED ALSO, that neither the receipt of such rents nor the creation of such tenancy, as aforesaid, shall render the mortgagees liable to account as mortgagees in possession."

Several mortgagors.

Joint tenants should attorn jointly; tenants in common should attorn jointly and separately. Where tenants in common, who were partners, mortgaged premises on which the business of the partnership was carried on, and each of the mortgagors *separately* attorned tenant to the mortgagees, it was held that the mortgagees could not distrain on any partnership property which was on the mortgaged premises: *Ex parte Parke*, L. R. 8 Eq. 381.

Attornment to receivers.

If a receiver is appointed at the time of the mortgage, the more convenient course is for the mortgagor to attorn to the receiver and not to the mortgagee, and that the attornment clause should be contained in the deed appointing the receiver. The rent should be a fair rent: *Ex parte Williams*, 7 Ch. D. 138; *Re Stockton Iron Furnace Co.*, 10 Ch. D. 335; *Ex parte Jackson*, 14 Ch. D. 725. Provided the rent be not in excess of the fair value of the premises, it may be in excess of the amount of the interest payable under the mortgage, and there is no objection to the rent being made to fluctuate according to the happening of certain events: *Ex parte Voisey*, 21 Ch. D. 442.

Having regard to the dicta in *Re Stockton, &c., Co.* and *Ex parte Jackson, supra*, to the effect that an attornment clause in a mortgage operates so as to render the mortgagee liable to account to subsequent incumbrancers as a mortgagee in possession, it seems

IV. Mortgage in Fee with Express Power of Sale.

said [*mortgagor*] and his heirs and assigns, and the expression "the mortgagees" shall include the said [*mortgagees*] and the [survivors and (*a*)] survivor of them, and the executors and administrators of such survivor, and their or his assigns. In witness, &c.

The Schedule above referred to.

V. *MORTGAGE of* Freeholds in Fee, subject *to* Prior Charge. Proviso *for* repayment *of principal by* Instalments.

Parties and interpretation clause.

THIS INDENTURE (*aa*), made the —— day of ——, 18—, Between [*mortgagor*], of &c. (who and his heirs and assigns, unless the contrary appears, are hereinafter called the mortgagor), of the one part, and [*mortgagee*], of &c. (who and his executors, administrators, and assigns, unless the contrary appears, are hereinafter called the mortgagee), of the other part, WITNESSETH that in consideration of the sum

Testatum.

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advisable, notwithstanding the decision of *Bacon*, V.-C., to the contrary in *Stanley* v. *Grundy*, 22 Ch. D. 478, to add to the clause an express proviso negativing the liability; such a proviso will bind the mortgagor and persons claiming under him with notice of the mortgage. Sometimes, instead of an attornment clause, a power of distress is inserted in the mortgage as follows:—

Power of distress.

"Provided always, and it is hereby agreed that in case any interest payable under this security shall fall into arrear by the space of —— days after the days hereinbefore appointed for payment thereof, then and so often as the same shall happen, it shall be lawful for the mortgagees to enter and distrain upon the premises hereby granted, or such part or parts thereof, as shall for the time being be in the occupation of the mortgagor, and the distress or distresses then and there made to take, and dispose of according to law, to the intent that thereby all interest so in arrear, and all costs and expenses of and incident to such distress may be fully paid and satisfied."

As to the question how far attornment clauses and powers of distress are valid or useful, see *ante*, p. 980 *et seq.*

(*a*) The words in brackets will be used where there are more than two mortgagees.

(*aa*) Stamp, *ad valorem*, on amount secured, *ante*, p. 988.

V. Mortgage in Fee Subject to Prior Charge.

of £—— now paid to the mortgagor by the mortgagee, of which sum the mortgagor hereby acknowledges the receipt, the mortgagor hereby covenants, &c. [*Covenant for payment of principal and interest, ante*, p. 997]: AND THIS INDENTURE ALSO WITNESSETH that for the consideration aforesaid the mortgagor hereby grants, and, as beneficial owner, conveys unto the mortgagee ALL THAT [*describe parcels*] TO HOLD the premises UNTO AND TO THE USE OF the mortgagee, his heirs and assigns [*or* in fee simple (*b*)]; SUBJECT, NEVERTHELESS (*c*), to an indenture of mortgage dated the —— day of ——, 18—, and made between [*parties*], whereby the premises hereby conveyed were assured by the mortgagor to the use of [*prior mortgagee*], of &c., his heirs and assigns, for securing the sum of £——, and interest thereon at the rate of —— per cent. per annum as therein mentioned; AND ALSO SUBJECT to the proviso for redemption following, namely, that if the mortgagor shall, on the —— day of ——, 18—, pay to the mortgagee the sum of £——, and interest thereon at the rate of —— per cent. per annum, then the mortgagee will, at the request and cost of the mortgagor, reconvey the premises to the use of the mortgagor, or as he shall direct; Subject (*d*) to the said indenture of mortgage, and to all monies thereby secured, if the same mortgage shall be then subsisting: PROVIDED ALWAYS, that if the mortgagor shall pay to the mortgagee the said sum of £—— by the instalments and at the times following, that is to say, the sum of £—— on the —— day of ——, 18—, and the further sum of £—— on the —— day of ——, 18—, and a like sum on the —— day of —— of every succeeding year, or within —— days after each of

Covenant for payment of principal and interest.

Second *testatum*.

Conveyance.

Subject to prior charge.

Proviso for redemption.

Proviso for repayment by instalments.

(*b*) See *ante*, p. 1002, note (*x*).

(*c*) If there are several prior charges say,

"SUBJECT, NEVERTHELESS, to the several mortgages, charges, and incumbrances specified in the schedule hereunder written, and to the several sums and interest thereby secured respectively as appears by the same schedule; AND ALSO SUBJECT," &c.

Subject to several prior charges.

(*d*) If there are several prior charges say,

"Subject to the said several mortgages, charges, and incumbrances, subject to which the same premises are hereinbefore expressed to be hereby granted, or such of them as shall be then subsisting."

Several prior charges.

V. Mortgage in Fee Subject to Prior Charge.

the said days, until the said sum of £—— shall be fully paid, and shall also pay interest at the rate aforesaid on the said sum of £——, or on such instalments thereof as shall for the time being remain unpaid upon the half-yearly days hereinbefore appointed for payment of interest, or within —— days after such days respectively, then and in such case the mortgagee shall not call in or require payment of the said principal sum of £—— or any part thereof, except by such instalments as aforesaid (*e*). In witness, &c.

VI. *COVENANT to surrender* Copyholds *by* way *of* Mortgage (*f*). [Variations *where there is a* prior Mortgage *in notes.*]

Parties.

THIS INDENTURE (*ff*), made &c., Between [*mortgagor*], of &c., of the one part; and [*mortgagee*], of &c., of the other part; Whereas the said [*mortgagor*] is seised of or entitled unto the fee-simple in possession, according to the custom of the manor of ——, of and in the messuages or tenements, lands and hereditaments hereinafter described and covenanted to be surrendered (*g*), free from incumbrances; And whereas

Recital that mortgagor is seised in fee according to the custom of the manor.

Recital of

(*e*) Any special provisions or covenants with regard to mode of payment of principal or interest, or as to insurance or otherwise, may be inserted in this and other following Precedents as required.

(*f*) As to mortgages of copyholds, *vide ante*, pp. 761, 977.

Stamp.

(*ff*) Stamp, *ad valorem*, on amount secured at the rate of 2*s.* 6*d.* per 100*l.*, if this deed is to be the sole security; or at the rate of 6*d.* per 100*l.* if it is to be immediately followed by a surrender pursuant to the mortgage: see *ante*, pp. 998, 990.

Variation where there is a prior mortgage.

(*g*) If there is a prior mortgage, insert here the following words—"Subject to a conditional surrender made the —— day of ——, whereby the said hereditaments were surrendered and assured by the said [*mortgagor*] To the use of [*prior mortgagee*], his heirs and assigns, for securing to him the said [*prior mortgagee*], his executors, administrators, or assigns, the sum of £——, and interest, but otherwise, &c."

The recitals may (except where there is a prior mortgage) be omitted, if desired; they can be of little use, as the title appears on the Court Rolls. Where there is a prior mortgage its existence must be stated somewhere in the deed, and this may be conveniently done by recital.

VI. Covenant to Surrender Copyholds by way of Mortgage.

the said [*mortgagee*] has, at the request of the said [*mortgagor*], agreed to lend to him the sum of £——, upon having the re-payment thereof with interest secured in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of £—— now paid to the said [*mortgagor*] by the said [*mortgagee*], the receipt whereof the said [*mortgagor*] hereby acknowledges; the said [*mortgagor*] hereby covenants with the said [*mortgagee*] [*Covenant for payment of principal and interest, ante*, p. 994]: AND THIS INDENTURE ALSO WITNESSETH, that, for the consideration aforesaid, the said [*mortgagor*] covenants with the said [*mortgagee*] that he the said [*mortgagor*], or his heirs, will forthwith, at his or their own cost, surrender into the hands of the lord, or lady, of the said manor, according to the custom of the manor, and he also hereby, as beneficial owner, conveys ALL THAT [*describe parcels*], TO THE USE of the said [*mortgagee*], his heirs and assigns, according to the custom of the said manor, by and under the accustomed rents, fines, suits, and services; Subject to (*h*) a condition for avoiding such surrender if the said [*mortgagor*], his heirs or assigns, shall, on the —— day of —— next, pay to the said [*mortgagee*], his executors, administrators, or assigns, the sum of £——, with interest thereon after the rate aforesaid: AND the said [*mortgagor*] hereby covenants with the said [*mortgagee*] that the hereditaments and premises hereby covenanted to be surrendered and conveyed shall henceforth be charged with the payment of all principal monies and interest intended to be hereby secured; and that until surrender the said [*mortgagor*], his heirs and assigns, will stand possessed thereof in trust for the said [*mortgagee*], his heirs and assigns, but subject to such equity of redemption as the same premises would have been subject to if surrendered: AND the said

Testatum.

Covenant for payment of principal and interest.

Second *Testatum.*

Conveyance.

Charge and declaration of trust (*i*).

Power of attorney (*k*).

(*h*) If there is a prior mortgage, say—
"Subject to the conditional surrender hereinbefore referred to and to all monies thereby secured, and also subject to," &c., as in the text.

Subject to prior mortgage.

(*i*) As to the insertion of a clause expressly charging the copyholds so as to confer on the mortgagee the statutory power of sale, see *ante*, p. 922.

(*k*) This power of attorney being an authority coupled with an interest, even if not expressly made irrevocable (as to which see

VI. Covenant to Surrender Copyholds by way of Mortgage.

[*mortgagor*] hereby irrevocably appoints the said [*mortgagee*], his executors, administrators, and assigns, and every of them, and his or their nominees or nominee, the attorney and attorneys of him the said [*mortgagor*], in his name and on his behalf, at any time when he or they shall think fit, to surrender the same premises, pursuant to the covenant in that behalf hereinbefore contained, and to execute and do all instruments, acts, and things which may be necessary for that purpose: And the said [*mortgagor*] covenants with the said [*mortgagee*] that he the said [*mortgagor*], his heirs, executors, administrators, or assigns, will at all times during the continuance of this security, duly pay and perform all rents, fines, suits, and services respectively which shall become due and ought to be paid and performed respectively, in respect of the said hereditaments and premises hereinbefore covenanted to be surrendered. In witness, &c.

Covenant to pay fines, &c. (*l*).

VII. *CONDITIONAL SURRENDER of* Copyholds.

Manor of ——
in the
County of ——.

BE IT REMEMBERED (*m*), that, on the —— day of, &c. [*mortgagor*], of, &c., one of the customary tenants of the said manor, came before [*steward*], gentleman, steward of the said manor, and in consideration of the sum of £—— to the said [*mortgagor*] then paid by [*mortgagee*], of, &c., did out of court surrender into the hands of the lord of the said manor

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ante, p. 819) could not be revoked during the continuance of the security: *Gaussen* v. *Morton*, 10 B. & C. 731; *Bromley* v. *Holland*, 7 Ves. 28.

In the absence of a declaration of trust and power of attorney, in case of the mortgagor's refusal to surrender, a vesting order may be obtained under the Trustee Acts: *Re Crowe's Mortgage*, L. R. 13 Eq. 26. See also sect. 14 of the Judicature Act, 1884, 47 & 48 Vict. c. 61.

(*l*) This covenant will enable the mortgagee, in case of a breach thereof, to exercise his statutory power of sale, see *ante*, p. 919. It seems clear that even in the absence of an express covenant the mortgagor could not redeem without repaying to the mortgagee all sums expended by him in paying fines, &c., with interest: see *ante*, pp. 890, 897: see also Fish. Mortg. 256.

Stamp.

(*m*) As to stamp, see sect. 110 of the Stamp Act, 1870, *ante*, p. 990.

by the hands and acceptance of the said steward by the rod, according to the custom of the said manor; ALL, &c. [*describe the lands*] with the appurtenances; [TO SUCH USES, upon such trusts, and for such intents and purposes as the said [*mortgagee*] shall at any time or times hereafter, by deed or will, appoint, and in default of such appointment (*n*)], TO THE USE of the said [*mortgagee*], his heirs and assigns for ever, TO HOLD by copy of court roll, at the will of the lord, according to the custom of the said manor, at the rents and services therefor due, and of right accustomed; SUBJECT NEVERTHELESS to this condition, that, if the said [*mortgagor*], his heirs, executors, or administrators, shall pay unto the said [*mortgagee*], his executors, administrators, or assigns, the sum of £——, on the —— day of —— next, together with interest for the same in the meantime after the rate of —— per centum per annum, then this surrender is to be void and of no effect.

VII. Conditional Surrender of Copyholds.

VIII. *DEED (to accompany a* CONDITIONAL SURRENDER *of* COPYHOLDS), *containing* COVENANTS *for Payment of* PRINCIPAL *and* INTEREST, *and for* TITLE.

THIS INDENTURE (*o*), made the —— day of ——, 18—, BETWEEN [*mortgagor*], of, &c., of the one part; and [*mortgagee*], of, &c., of the other part; WHEREAS the said [*mortgagee*] has this day lent unto the said [*mortgagor*] the sum of £——, at interest after the rate herein mentioned, as the said

Parties.
Recitals: of loan;

(*n*) The insertion of a power of this nature would be convenient, if the lord of the manor will permit it, because it seldom happens that a mortgagee of copyholds is admitted, and such a power enables an unadmitted mortgagee on the occasion of a transfer of the mortgage, or an exercise of the power of sale (if there is one) to confer on the transferree or purchaser by means of an appointment the right to be admitted. Supposing, too, the mortgagee should have found it necessary to be admitted, for the purpose of possession, &c., the power of appointment would enable him to reconvey the estate to the mortgagor, on payment of the debt, without a re-surrender. If the mortgagee should not have been admitted, an acknowledgment of satisfaction would be sufficient: *vide ante*, p. 977.

Surrender to such uses as mortgagee shall appoint.

(*o*) Stamp, 6*d*. per 100*l*. as a collateral security, see *ante*, p. 988.

Stamp.

VIII. Copyholds. Deed of Covenant to Accompany Conditional Surrender.

of conditional surrender.

[*mortgagor*] hereby acknowledges; And whereas, for securing the repayment thereof, the said [*mortgagor*] has this day surrendered into the hands of the lord of the manor of ——, in the county of ——, by the acceptance of [*steward*], steward of the said manor, according to the custom thereof, All that [*describe parcels*], [To such uses as the said [*mortgagee*] shall by deed appoint, and subject thereto], To the use of the said [*mortgagee*], his heirs and assigns for ever, to be holden at the will of the lord, and according to the custom of the said manor, at and under the rents and services therefor due and of right accustomed; Subject nevertheless to a condition for avoidance of the said surrender, on payment by the said [*mortgagor*], his heirs, executors, or administrators, unto the said [*mortgagee*], his executors, administrators, or assigns, of the sum of £——, on the —— day of —— next, with interest for the same in the meantime at the rate of —— per cent. per annum; And whereas, upon the treaty for the said loan, it was agreed, that, for the more effectually securing the payment of the said principal sum and interest, the said [*mortgagor*] should enter into the covenants and make the declarations herein contained: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and for the considerations aforesaid, the said [*mortgagor*] hereby covenants, &c.; [*Covenant for payment of principal and interest, ante*, p. 994; *Charge and declaration of trust, ante*, p. 1009; *Covenant to pay fines, &c., ante*, p. 1010.] And the said [*mortgagor*] hereby covenants with the said [*mortgagee*], that he the said [*mortgagor*], at the time of making the surrender hereinbefore recited, had good right to surrender the premises so surrendered as aforesaid, in manner hereinbefore recited; And also, that it shall be lawful for the said [*mortgagee*], his heirs, appointees, and assigns, peaceably and quietly to enter upon, and hold and enjoy the same premises, and to receive the rents and profits of the same, without any interruption whatsoever, by the said [*mortgagor*], his heirs or assigns, or any person or persons whomsoever; And that, free and discharged, or by the said [*mortgagor*], his heirs, executors, or administrators, effectually indemnified from and against all estates, rights, charges, and incumbrances whatso-

Agreement for present deed of covenant.

Testatum.

Covenant by mortgagor that he had good right to surrender (*k*);

for quiet enjoyment after default;

free from incumbrances;

(*k*) This deed, not containing any *conveyance*, requires express covenants for title, no statutory covenants for title being capable of being therein implied.

ever; AND ALSO, that the said [*mortgagor*] and his heirs, and every person whosoever having or rightfully claiming, or to claim any estate, or interest in, or to, the premises, or any part thereof, will from time to time, and at the cost of the said [*mortgagor*], his heirs, executors, or administrators, until sale or foreclosure, and thenceforth at the cost of the person or persons requiring the same, execute and do all such assurances and acts, for more effectually assuring the said premises, and every part of the same, to the use of the said [*mortgagee*], his heirs [appointees], and assigns, according to the custom of the said manor, as shall be reasonably required. IN WITNESS, &c.

and for further assurance.

IX. *STATUTORY MORTGAGE of* LEASEHOLDS *by* DEMISE *to several Mortgagees advancing Money on a* JOINT ACCOUNT. COVENANTS *by Mortgagor for* REPAIR *and* INSURANCE (*l*).

THIS INDENTURE (*m*), made by way of statutory mortgage, the —— day of ——, 18—, BETWEEN [*mortgagor*], of, &c., of the one part; and [*mortgagee*], of, &c., and [*mortgagee*], of, &c., of the other part, WITNESSETH, that in consideration of the sum of £——, now paid to the said [*mortgagor*] by the said [*mortgagees*], out of monies belonging to them on a joint account, of which sum the said [*mortgagor*] hereby acknowledges the receipt, he the said [*mortgagor*] hereby [demises and] as mortgagor and as beneficial owner conveys to the said [*mortgagees*], ALL the messuage and premises situate, &c. [*parcels according to the description in the lease* (*n*)], TO HOLD the same premises TO the said

Parties.

Testatum.

Demise.

Habendum for residue of term

(*l*) This Precedent illustrates the mode in which variations may be introduced in the form of statutory mortgage given in the third Schedule to the Conveyancing and Law of Property Act, 1881: see *ante*, p. 992. In general, however, where additional covenants and provisions are desired, it will be found more convenient to insert them in a mortgage according to the ordinary form.

(*m*) Stamp, *ad valorem* on amount secured, see *ante*, p. 988.

Stamp.

(*n*) It is more usual in mortgages of leaseholds, whether by demise or assignment, to recite the lease as in Precedent X., *post*, p. 1015.

IX. Statutory Mortgage of Leaseholds.

[*mortgagees*] for all the residue now unexpired of a term of —— years, from the —— day of ——, 18—, therein created by an indenture of lease, dated &c., and made between [*parties*], except the last —— days of the said term, for securing payment on the —— day of ——, 18— (*o*), with interest thereon at the rate of —— per centum per annum.

less last —— days.

Declaration of trust of nominal reversion.

And the said [*mortgagor*] declares that he and his executors, administrators, and assigns, will henceforth stand possessed of the reversion hereby excepted out of the said term in trust for the said [*mortgagees*], their executors, administrators, and assigns, and to assign and dispose of the same as they shall from time to time direct, subject to such right of redemption as may for the time being be subsisting by virtue of this mortgage (*p*): And the said [*mortgagor*] hereby irrevocably appoints the said [*mortgagees*], their executors, administrators, and assigns, and every of them and their or his nominees or nominee, the attorneys and attorney of him the said [*mortgagor*], in his name and on his behalf, at any time when they or he shall think fit, to assign the said excepted reversion to the said [*mortgagees*], their executors, administrators, or assigns, or as they shall direct, subject to such equity of redemption (if any) subsisting as aforesaid, and to execute and do all deeds, instruments, and things which may be necessary or proper for that purpose: And the said [*mortgagor*] hereby covenants with the said [*mortgagees*] to keep the said messuage and premises at all times during the continuance of this security in good and substantial repair, and insured against loss or damage by fire in accordance with the covenants of the said lease, and on demand to produce to the said [*mortgagees*], their executors, administrators, or assigns, the policy of such insurance, and the receipt for every premium payable in respect thereof (*q*). In witness, &c.

Power of attorney.

Covenant for repair and insurance.

(*o*) Generally six months after the date of the mortgage.

(*p*) Insert here, if desired, proviso for reduction of interest on punctual payment (*post*, p. 998), or any other stipulations with reference to the mode of payment of the moneys secured by the mortgage, for which see Index to Precedents.

(*q*) Add here any clauses, excluding the application of statutory provisions, or other special stipulations with regard to the mortgaged property: see *ante*, p. 996, *post*, p. 1021, &c.

X. *MORTGAGE of Leaseholds by* DEMISE (*r*) *to one Mortgagee.*

X. Mortgage of Leaseholds by Demise.

THIS INDENTURE (*s*), made the —— day of ——, 18—, BETWEEN [*mortgagor*], of, &c., of the one part; and [*mortgagee*], of, &c., of the other part; WHEREAS, by an indenture of lease, dated the —— day of ——, 18—, and made between [*parties*], ALL THAT [*describe parcels fully from the lease*] was demised to the said [*lessee*], his executors, administrators, and assigns, for the term of —— years, at the yearly rent of £——, and subject to the covenants on the lessee's part and conditions therein contained, which said leasehold premises have, by virtue of certain mesne assignments and acts in the law, and ultimately by an indenture of assignment, dated, &c., and made between [*parties*], become and are now vested in the said [*mortgagor*] for all the residue of the said term; AND WHEREAS the said [*mortgagee*] has agreed to lend to the said [*mortgagor*] the sum of £——, upon having the repayment thereof, with interest after the rate hereinafter mentioned, secured in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of £—— now paid to the said [*mortgagor*] by the said [*mortgagee*], the receipt whereof the said [*mortgagor*] hereby acknowledges, he the said [*mortgagor*] hereby covenants [*Covenant by mortgagor for payment of principal and interest, ante*, p. 994]: AND THIS INDENTURE ALSO WITNESSETH, that for the consideration aforesaid, he the said [*mortgagor*] hereby demises, and, as beneficial owner, conveys unto the said [*mortgagee*] ALL THAT the said messuage or tenement hereinbefore described, and all other the premises (if any) comprised in the hereinbefore recited indenture of lease: TO HOLD all the premises unto the said [*mortgagee*], his executors, administrators, and assigns, henceforth for all the residue now unexpired of the said term of —— years, except the last day thereof [*Declaration of trust of nominal reversion and power of attorney, ante*, p. 1014]. PROVIDED ALWAYS that if the said [*mortgagor*], his executors,

Parties.

Recital of lease.

Of agreement for loan.

Testatum.

Second *Testatum.*

Parcels.

Habendum.

Proviso for redemption.

(*r*) A mortgage of leaseholds should be by demise if they are held at a high rent or subject to onerous covenants, otherwise the mortgage may be by assignment: see next Precedent.

(*s*) Stamp, *ad valorem* on amount secured, *ante*, p. 988.

X. Mortgage of Leaseholds by Demise.

administrators, or assigns shall, on the —— day of —— next, pay to the said [*mortgagee*], his executors, administrators, or assigns, the sum of £——, with interest thereon at the rate of —— per cent. per annum, computed from the date hereof, the said [*mortgagee*], his executors, administrators, or assigns will, at the request and at the cost of the said [*mortgagor*], his executors, administrators, or assigns, surrender or otherwise reconvey the premises unto him or them, or as he or they shall direct. In witness, &c.

XI. *MORTGAGE of* Leaseholds *by* Assignment, *with express* Power of Sale.

Parties.

THIS INDENTURE (*ss*), made, &c., Between [*mortgagor*], of, &c., of the one part; and [*mortgagee*], of, &c., of the other part;

Recitals: of leases;

Whereas, by indenture of lease dated the —— day of ——, 18—, and made between [*parties*], the said [*lessor*] demised unto the said [*mortgagor*] [*describe parcels*]: To hold the same unto the said [*mortgagor*] from the —— day of —— then next, for the term of —— years, at the rent, and subject to the covenants on the part of the lessee to be performed, and conditions therein contained; And whereas, by another indenture of lease, dated, &c. [*recite, as before, lease of other property intended to be comprised in the mortgage* (*t*)];

of agreement for loan.

And whereas the said [*mortgagee*] has, at the request of the said [*mortgagor*], agreed to lend to him the sum of £——, on having the repayment thereof with interest secured in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH, that

First *testatum.*

[*Covenant by mortgagor for payment of principal and interest, ante*, p. 994]:

Covenant for payment of principal and interest.

AND THIS INDEN-

Stamp.

(*ss*) Stamp, *ad valorem* on amount secured, *ante*, p. 988.

(*t*) If the leases were not granted to the mortgagor, but passed through the hands of intermediate owners, recite leases accordingly, and add—

Reference to mesne assignments.

"And whereas the premises comprised in the said several indentures of lease have, by virtue of certain mesne assignments or acts in the law, become absolutely vested in the said [*mortgagor*] for all the residue of the terms of —— years and —— years respectively, at the rents, and subject to the lessee's covenants and conditions reserved by and contained in the said indentures of lease respectively."

XI. Mortgage by Assignment of Leaseholds.

TURE ALSO WITNESSETH, that for the consideration aforesaid, he the said [*mortgagor*] hereby assigns, and, as beneficial owner, conveys unto the said [*mortgagee*] ALL THOSE the said several pieces or parcels of ground and premises in the said indentures of lease described, and thereby demised respectively; TO HOLD the same premises unto the said [*mortgagee*] henceforth for all the several residues now unexpired of the said several terms of —— years granted by the said several indentures of lease, subject to the proviso for redemption hereinafter contained; PROVIDED ALWAYS, that if the said [*mortgagor*], his executors, administrators, or assigns shall, on the —— day of —— 18—, pay to the said [*mortgagee*], his executors, administrators, or assigns, the sum of £—— with interest thereon at the rate aforesaid, then the said [*mortgagee*], his executors, administrators, or assigns will, at the request and cost of the said [*mortgagor*], his executors, administrators, or assigns, reconvey the premises unto the said [*mortgagor*], his executors, administrators, or assigns, or as he or they shall direct: AND IT IS HEREBY AGREED, that if default shall be made in payment of the principal sum of £—— and interest thereon as aforesaid, on the said —— day of ——, 18—, then it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, without any further consent on the part of the [*mortgagor*], his executors, administrators, or assigns, to sell the premises hereby conveyed, or any part or parts thereof, either together or in parcels (*x*), and either by public auction or private contract, and subject to any stipulations as to title, or evidence or commencement of title, or otherwise, which the said [*mortgagee*], his executors, administrators, or assigns, shall deem proper; WITH full power to buy in or rescind, or vary any contract for sale, and to resell without being responsible for any loss occasioned thereby, and to execute and do all such assurances and things for effectuating any such sale as he or they shall deem proper (*y*).

Second *testatum*.

Conveyance of leaseholds.

Proviso for redemption.

Power of sale of leaseholds (*u*).

(*u*) See as to the insertion of express powers of sale, *ante*, p. 1002, note (*y*).

(*x*) This power is applicable also in the case of personal chattels. If such chattels comprise policies of insurance, add here—

"And as to the said policy or policies of insurances, either by way of surrender to the office or offices by which the same may have been granted, or otherwise."

(*y*) In an express power of sale in a mortgage of leaseholds by *demise*, the following clause should be here added:—

XI. Mortgage by Assignment of Leaseholds.

[*Power to be exercised only in certain events; protection of purchaser; mortgagees' receipts to be effectual discharges, &c., ante,* p. 1003, *mutatis mutandis* (*z*)]. In witness, &c.

XII. *MORTGAGE by* Assignment *of* Renewable Leaseholds, *with* Covenant *to* Renew.

Parties.

Recitals: of lease;

THIS INDENTURE (*a*), made the —— day of ——, 18—, Between [*mortgagor*], of, &c., of the one part; and [*mortgagee*], of, &c., of the other part; Whereas by an indenture of lease, dated the —— day of December, 18—, and made between the governors and guardians of the —— Hospital of the first part, [*A. B.*] of the second part, and the said [*mortgagor*] of the third part, It was witnessed that, for the considerations therein expressed, the said governors and guardians (by the direction of the said [*A. B.*]), demised unto the said [*mortgagor*], his executors, administrators, and assigns [*describe piece of ground*], together with two messuages thereon; which premises, with the dimensions and abuttals thereof, are more particularly described in the plan drawn in the margin of the indenture now in recital (except and always reserved unto the said governors and guardians, and their successors and assigns, the free passage or running of water and soil coming from any other buildings and lands contiguous to the premises thereby demised, in and through the watercourses made under the demised premises), To hold the premises from the —— day of —— for the term of ninety-nine years, at the rent of a peppercorn for the first three years, and for the remainder of the term (save the last half year), at the yearly rent of £——, payable quarterly without

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"And that after any such sale as aforesaid, the said [*mortgagor*], his executors, administrators, and assigns, shall stand possessed of the last —— days of the said term upon trust for the purchaser or purchasers of the premises hereby demised, and to assign and dispose of the same as such purchaser or purchasers shall direct."

(*z*) There being no interpretation clause in this Form, and only one mortgagee, the clauses referred to must be altered accordingly.

Stamp.

(*a*) Stamp, *ad valorem* on amount secured, *ante*, p. 988.

XII. Assignment of Renewable Leaseholds.

any deduction, and for the last half year at the rent of £——, and subject to the several covenants and agreements in the indenture now in recital contained, and on the lessee's part to be observed and performed; AND WHEREAS the said [*mortgagee*] has agreed to lend to the said [*mortgagor*] the sum of £—— upon having the repayment thereof with interest secured in manner hereinafter expressed: NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £—— this day paid by the said [*mortgagee*] to the said [*mortgagor*], the receipt whereof the said [*mortgagor*] hereby acknowledges, the said [*mortgagor*] hereby covenants, &c. [*Covenant for payment of principal and interest, ante*, p. 994]: AND THIS INDENTURE ALSO WITNESSETH, that, in further pursuance of the said agreement, and for the consideration aforesaid, the said [*mortgagor*] hereby assigns, and, as beneficial owner, conveys unto the said [*mortgagee*], ALL and singular the said piece or parcel of ground with the two messuages thereon and premises comprised in and demised by the hereinbefore recited indenture of lease, Together with all such right of renewal of the said [*mortgagor*] under or by virtue of the covenant or proviso in that behalf contained in the said indenture of lease; TO HOLD ALL the premises UNTO the said [*mortgagee*], his executors, administrators, and assigns, henceforth for all the unexpired residue of the said term of ninety-nine years, subject to the proviso for redemption or cesser of the said assignment hereinafter contained; PROVIDED ALWAYS, that if the said [*mortgagor*], his heirs, executors, or administrators, shall, on the —— day of ——, 18—, pay the sum of £——, with interest for the same in the meantime, after the rate of —— per cent. per annum, without any deduction, then, and from thenceforth, the assignment hereby made shall cease and be void: [*Covenant by mortgagor to insure the premises against fire, ante*, p. 1014.] AND THE SAID [*mortgagor*] also covenants with the said [*mortgagee*] that he the said [*mortgagor*], his executors or administrators, will, from time to time during the continuance of this security, at his or their own cost, at the usual and accustomed time or times of renewal, apply for and endeavour to obtain a new lease of the premises comprised in the hereinbefore recited indenture of lease, pursuant to the covenant in that behalf therein contained, the said [*mortgagee*], his executors,

of agreement for loan.

Testatum.

Covenant for payment of principal and interest.

Second *Testatum.*

Conveyance.

Proviso for redemption.

Covenant by mortgagor to procure renewal.

XII. Assignment of Renewable Leaseholds.

administrators, or assigns, doing and concurring in all acts which may be necessary or expedient for the purpose of obtaining such renewal; and that immediately after obtaining every such new lease, the said [*mortgagor*] will assign the same, and the premises therein comprised, to the said [*mortgagee*], his executors, administrators, and assigns, subject to such equity of redemption as shall be then subsisting by virtue of these presents; AND THAT, in the meantime the said [*mortgagor*], his executors and administrators, will stand possessed of such renewed lease, in trust for the said [*mortgagee*], his executors, administrators, and assigns, for securing the said principal and interest monies hereby secured; AND FURTHER, that in case the said [*mortgagor*], his executors, administrators, or assigns shall refuse or neglect to obtain such renewed lease, and to pay all fines, fees, and costs of and incident to such renewal, it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, to obtain such new lease as aforesaid, and that he the said [*mortgagor*], his executors, administrators, or assigns, will thereupon pay to the said [*mortgagee*], his executors, administrators, or assigns, all sums of money which he or they shall expend in and about every such renewal, with interest thereon at the rate of —— per cent. per annum, from the time or respective times of the expenditure thereof; AND THAT all sums of money so to be expended by the said [*mortgagee*], his executors, administrators, or assigns, and interest for the same as aforesaid, shall be a charge upon the said renewed lease and the premises therein comprised; [*Restriction as to leasing powers, ante*, p. 997]. IN WITNESS, &c.

Declaration of trust of renewed lease.

And in default that mortgagee may renew.

XIII. *MORTGAGE of* FREEHOLDS *and* COPYHOLDS. PROVISO *giving* MORTGAGEE *right of* CONSOLIDATION.

THIS INDENTURE (*a*), made the —— day of ——, 18—, BETWEEN [*mortgagor*], of, &c., of the one part; and [*mortgagee*], of, &c., of the other part, WITNESSETH that, in consideration of the sum of £—— now paid to the said [*mortgagor*] by the said [*mortgagee*], the receipt whereof the

Parties.

Testatum.

Covenant to pay principal and interest.

Stamp.

(*a*) Stamp, *ad valorem* on amount secured, *ante*, p. 988.

said [*mortgagor*] hereby acknowledges, the said [*mortgagor*] hereby covenants, &c. [*Covenant for payment of principal and interest, ante*, p. 994]: AND THIS INDENTURE ALSO WITNESSETH that for the consideration aforesaid the said [*mortgagor*] hereby grants, and, as beneficial owner, conveys [*Conveyance of freeholds to mortgagee in fee, and proviso for redemption, ante*, p. 994]: AND THIS INDENTURE ALSO WITNESSETH that, for the consideration aforesaid, the said [*mortgagor*], hereby covenants with the said [*mortgagee*] that he the said [*mortgagor*] will forthwith at his own cost surrender into the hands of the lord or lady of the said manor, according to the custom thereof, and he also, as beneficial owner, conveys ALL THAT [*describe parcels*] TO THE USE of the said [*mortgagee*], his heirs and assigns, according to the custom of the said manor, by and under the accustomed rents, fines, suits, and services, but subject to a condition for avoiding such surrender corresponding to the proviso for redemption hereinbefore contained as to the freehold hereditaments hereby granted: [*Charge and declaration of trust of copyholds; power of attorney to effect surrender; and covenant by mortgagor to pay fines, &c., ante*, p. 1009]: PROVIDED ALWAYS, and it is hereby agreed that it shall be lawful for the said [*mortgagee*], his executors, administrators, and assigns, to consolidate this security with any other security on property other than that comprised herein for any money for the time being due to him or them from the said [*mortgagor*], his heirs, executors, administrators, or assigns, it being the express intention of the parties hereto that the 17th section of the Conveyancing and Law of Property Act, 1881, shall not apply to these presents or to the security intended to be hereby made. IN WITNESS, &c.

XIII. Mortgage of Freeholds and Copyholds.

Second *Testatum.*

Grant of freeholds and proviso for redemption.

Third *Testatum.*

Covenant to surrender copyholds subject to condition for avoidance corresponding to proviso for redemption of freeholds.

Proviso giving mortgagee right of consolidation.

XIV. *MORTGAGE of* FREEHOLDS *and* LEASEHOLDS *(by demise)*. COVENANTS *by* MORTGAGOR *for* REPAIRS *and* INSURANCE. PROVISO *extending statutory* POWER OF SALE.

THIS INDENTURE (*b*), made the —— day of ——, 18—, BETWEEN [*mortgagor*], of, &c., of the one part; and

Parties.

(*b*) Stamp, *ad valorem* on amount secured, *ante*, p. 988.

Stamp.

XIV. **Mortgage of Freeholds and Leaseholds.**

[*mortgagee*], of, &c., of the other part, WITNESSETH that, in consideration of the sum of £—— now paid to the said [*mortgagor*] by the said [*mortgagee*], the receipt whereof the said [*mortgagor*] hereby acknowledges, the said [*mortgagor*] hereby covenants, &c. [*Covenant for payment of principal and interest, ante*, p. 994]: AND THIS INDENTURE ALSO WITNESSETH that, for the consideration aforesaid, the said [*mortgagor*] hereby grants, and, as beneficial owner, conveys unto the said [*mortgagee*] ALL THAT, &c. [*describe parcels*]: TO HOLD all the premises hereby granted UNTO AND TO THE USE of the said [*mortgagee*], his heirs and assigns: SUBJECT to the proviso for redemption hereinafter contained: AND THIS INDENTURE ALSO WITNESSETH that, for the consideration aforesaid, the said [*mortgagor*] hereby demises, and, as beneficial owner, conveys unto the said [*mortgagee*] ALL THAT [*describe parcels according to description in the lease*]: TO HOLD all the premises hereby demised unto the said [*mortgagee*], his executors, administrators, and assigns, for all the residue now unexpired of a term of —— years from the —— day of ——, 18—, therein created by an indenture of lease dated the —— day of ——, 18—, and made between [*parties*], except the last —— days of the said term, SUBJECT to the proviso for redemption hereinafter contained: [*Declaration of trust of nominal reversion and power of attorney, ante*, p. 1014]: PROVIDED ALWAYS that if the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall, on the —— day of ——, 18—, pay to the said [*mortgagee*], his executors, administrators, or assigns, the sum of £—— and interest thereon at the rate aforesaid, then the said [*mortgagee*], his executors, administrators, or assigns, will, at the request and cost of the said [*mortgagor*], his heirs, executors, administrators, or assigns, reconvey the premises hereby granted unto the said [*mortgagor*], his heirs or assigns, and surrender or otherwise assure the premises hereby demised unto the said [*mortgagor*], his executors, administrators, or assigns, or as he or they shall direct: AND the said [*mortgagor*] hereby covenants with the said [*mortgagee*], at all times during the continuance of this security, to keep the several messuages and buildings respectively erected and being on the premises hereby granted insured against loss or damage by fire, in the aggregate sum of £—— at the least, in the —— Insurance Office, or in some other fire insurance office, to be approved by the said [*mortgagee*], his executors, administrators, or assigns,

Testatum.

Covenant for payment of principal and interest.

Second *Testatum.*

Grant of freeholds.

Third *Testatum.*

Demise of leaseholds.

Proviso for redemption.

Covenant by mortgagor to keep mortgaged premises insured against fire.

XIV. Mortgage of Freeholds and Leaseholds.

and to keep the messuage and buildings erected and being upon the premises hereby demised insured against loss or damage by fire in accordance with the covenants of the said indenture of lease, and from time to time duly and punctually to pay all premiums and monies necessary for effecting and keeping up such insurances respectively, and on demand to produce to the said [*mortgagee*], his executors, administrators, or assigns, all the policies of such insurances as aforesaid, or any of them, and the receipts for all premiums and payments in respect thereof respectively, or any of them [or other proper and sufficient evidence of the subsistence of such policies (*c*)]; And that in case of the refusal or failure of the said [*mortgagor*], his heirs, executors, administrators, or assigns, to produce any such policies or policy or receipts or receipt [or such other evidence] as aforesaid, in pursuance of the covenant in that behalf hereinbefore contained, it shall be presumed that the insurances or insurance to which such policies or policy or receipts or receipt, if effected or given, would relate, are or is not being kept up by or on behalf of the mortgagor in accordance with this mortgage; and it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, at any time thereafter, to effect, under the statutory power in that behalf, insurances or an insurance of the premises in respect of which no such policies or policy or receipts or receipt (as the case may be) shall be produced, to the amounts following, that is to say, as to the said messuages and buildings erected and being on the premises hereby granted to an aggregate amount not exceeding £——, and as to the said messuage and buildings erected and being on the premises hereby demised to an amount not exceeding £——: Provided always that, if default shall be made in payment of the said principal sum of £—— and interest thereon as aforesaid, on the —— day of ——, 18—, then it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, at any time thereafter, to exercise the power of sale conferred on mortgagees by the Conveyancing and Law of Property Act,

Proviso making the statutory power of sale exercisable without notice, &c. (*d*).

(*c*) The policies, &c., as to the leaseholds may be required to be delivered to the lessor.

(*d*) A stringent proviso of this nature should not be inserted in a mortgage without preserving evidence that the mortgagor's attention was specially called thereto, and that he assented to its insertion: *Cradock* v. *Rogers*, W. N. 1884, p. 166. Affirmed W. N. 1885, p. 134.

XIV. Mortgage of Freeholds and Leaseholds.

1881, without any restrictions as to notice or otherwise, it being the express intention of the parties hereto that the 20th section of the said Act shall not apply to these presents or the security intended to be hereby made. IN WITNESS, &c.

XV. *STATUTORY MORTGAGE of* FREEHOLDS, COPYHOLDS, *and* LEASEHOLDS.

Parties.

THIS INDENTURE (*d*), made by way of statutory mortgage, the —— day of ——, 18—, BETWEEN [*mortgagor*], of, &c., of the one part; and [*mortgagee*], of, &c., of the other part, WITNESSETH that, in consideration of the sum of £—— now paid to the said [*mortgagor*] by the said [*mortgagee*] (of which sum the said [*mortgagor*] hereby acknowledges the receipt), the said [*mortgagor*], as mortgagor and as beneficial owner, hereby conveys (*e*) unto the said [*mortgagee*]: FIRST, ALL THAT [*describe freehold parcels*]; AND, SECONDLY, ALL THAT [*describe copyhold parcels*]; AND, THIRDLY, ALL THAT [*describe leasehold parcels*]: TO HOLD the premises as to the premises first hereinbefore conveyed UNTO AND TO THE USE of the said [*mortgagee*], his heirs and assigns: AND as to the premises secondly hereinbefore conveyed UNTO AND TO THE USE of the said [*mortgagee*], his heirs and assigns, according to the custom of the manor of ——, in the county of ——, whereof the same are holden, by and under the accustomed rents, fines, suits, and services, AND as to the premises thirdly hereinbefore conveyed, UNTO the said [*mortgagee*], his executors, administrators, and assigns, for the residue now unexpired of a term of —— years from the —— day of ——, 18—, therein granted by an indenture of lease dated the —— day of ——, and expressed to be made between [*parties*] [less the last —— days of the said term (*f*)], but as to all the premises hereinbefore conveyed

Testatum.

Habendum.

Stamp.

(*d*) Stamp, *ad valorem* on amount secured, *ante*, p. 988.

(*e*) The term "convey" includes "covenant to surrender," for the purposes of the Conveyancing and Law of Property Act, 1881: see sect. 2 (v.). The term does not seem to be strictly apposite, as a *conveyance* of copyholds can hardly be said to be effected by a mere covenant to surrender.

(*f*) The words in brackets will be used where the mortgage of the leaseholds is by demise.

for securing payment on the —— day of —— next of the principal sum of £—— as mortgage money, with interest thereon at the rate of —— per cent. per annum: [AND the said [*mortgagor*] hereby declares that he and his executors, administrators, and assigns will henceforth, during the continuance of this security, stand possessed of the reversion hereby excepted of the said term, IN TRUST for the said [*mortgagee*], his executors, administrators, or assigns, subject to such right of redemption as may for the time being be subsisting as to the premises thirdly hereby conveyed by virtue of this mortgage.] IN WITNESS, &c.

XV. Statutory Mortgage of Freeholds, Copyholds, and Leaseholds.

Declaration of trust of nominal leasehold reversion

XVI. *MORTGAGE of an* ESTATE, *comprising* FREEHOLDS, COPYHOLDS, *and* LEASEHOLDS, *held under several leases.* PROVISOES *declaring that* NO INSURANCE *is required, and* LIMITING *the* STATUTORY POWER OF SALE.

THIS INDENTURE (*g*), made the —— day of ——, 18—, BETWEEN [*mortgagor*], of &c., of the one part; and [*mortgagee*], of &c., of the other part; WHEREAS the said [*mortgagor*] is seised of or entitled to the several manors, lands, and hereditaments, particularly described in the first schedule hereunder written, in fee simple in possession, and is also seised of or entitled to the lands and hereditaments particularly described in the second schedule hereunder written, to him and his heirs, according to the customs of the several manors mentioned in the same schedule, whereof such last-mentioned lands and hereditaments are respectively holden, and subject to the rents and services therefor due and accustomed respectively, and is also possessed of or entitled to the several messuages and lands particularly described in the third schedule hereunder written, for the residue of the several terms therein respectively granted by the several leases, which, and the mesne assignments whereof respectively are also men-

Parties.

Recitals: of mortgagor's title;

(*g*) Stamp, *ad valorem*, on amount secured, *ante*, p. 988.

Stamp.

XVI. **Mortgage of Estate comprising Freeholds, Copyholds, and Leaseholds.**

tioned in such last-mentioned schedule, and are therein set opposite to the premises to which such leases and assignments relate respectively, and at the yearly rents therein mentioned respectively; AND WHEREAS the said [*mortgagee*] has agreed to lend to the said [*mortgagor*] the sum of £—— upon having the repayment of the same, with interest thereon at the rate hereinafter mentioned, secured in manner hereinafter appearing. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of £—— this day paid to the said [*mortgagor*] by the said [*mortgagee*], the receipt whereof the said [*mortgagor*] hereby acknowledges, the said [*mortgagor*] hereby covenants [*Covenant for payment of principal and interest, ante*, p. 994]: AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreement, and for the consideration aforesaid, the said [*mortgagor*] grants, and, as beneficial owner, conveys unto the said [*mortgagee*] ALL THAT AND THOSE the mansion-house called —— Hall, with gardens, pleasure grounds, and park thereto belonging, and the several manors, messuages, or dwelling-houses, lands, and hereditaments situate in the parishes of —— and —— in the county of ——, and particularly described in the first schedule hereunder written and delineated with the abuttals in the map or plan drawn on these presents and therein coloured [*red*]; TO HOLD the premises hereby granted UNTO AND TO THE USE OF the said [*mortgagee*], his heirs and assigns, SUBJECT to the proviso for redemption hereinafter contained. AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreement, and for the consideration aforesaid, the said [*mortgagor*] hereby covenants with the said [*mortgagee*] that he the said [*mortgagor*], or his heirs, will forthwith, at his or their cost, surrender into the hands of the several lords or ladies of the manors of which the same are respectively holden, and according to the several customs of such manors respectively, and he also hereby, as beneficial owner, conveys ALL THOSE messuages, lands, and hereditaments, situate in the parishes of —— and —— aforesaid, and particularly described in the second schedule hereunder written, and delineated with the abuttals in the map or plan drawn on these presents, and therein coloured [*yellow*]; TO THE USE of the said [*mortgagee*], his heirs and assigns, according to the several customs of the said manors, and at and under the

of agreement for loan.

Testatum.

Covenant for payment of principal and interest.

Second *Testatum.*

Grant of freeholds.

Third *Testatum.*

Covenant to surrender copyholds.

several rents, fines, suits, and services therefor due or accustomed respectively, but SUBJECT to conditions for avoiding all such surrenders as aforesaid, respectively corresponding to the proviso for redemption hereinafter contained as to the freehold and leasehold premises hereby granted and assigned respectively [*Charge, and declaration of trust and power of attorney, ut ante*, p. 1009]. AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreement, and for the consideration aforesaid, the said [*mortgagor*] hereby assigns, and, as beneficial owner, conveys unto the said [*mortgagee*] ALL THOSE the several messuages and pieces or parcels of land and premises situate in the parishes of —— and —— aforesaid particularly described in the third schedule hereunder written, and delineated with the abuttals in the said map or plan and therein coloured [*blue*]; To HOLD the premises hereby assigned UNTO the said [*mortagagee*], his executors, administrators, and assigns, for the respective residues of the several terms therein respectively granted as aforesaid; SUBJECT to the proviso for redemption hereinafter contained; PROVIDED ALWAYS, that if the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall on the —— day of ——, 18—, pay to the said [*mortgagee*], his executors, administrators, or assigns, the sum of £——, and interest thereon at the rate aforesaid, then the said [*mortgagee*], his executors, administrators, or assigns, will, at the request and cost of the said [*mortgagor*], his heirs, executors, administrators, or assigns, re-convey the premises hereby granted unto the said [*mortgagor*], his heirs and assigns, and reassign the premises hereby assigned unto the said [*mortgagor*], his executors, administrators, and assigns, or as he or they shall direct. [*Here insert any special covenants and provisoes as to payment of principal or interest from preceding Precedents.*] PROVIDED ALWAYS, and it is hereby declared, that no obligation shall be deemed to be imposed under or by virtue of these presents upon the said [*mortgagor*], his heirs, executors, administrators, or assigns, to effect any insurance of any part of the premises herein comprised; PROVIDED ALSO, and it is hereby agreed, that the said [*mortgagee*], his executors, administrators, or assigns, shall not exercise the power of sale conferred on mortgagees by the Conveyancing and Law of Property Act, 1881, unless and until a notice shall have been served in accordance with the 20th section of

XVI. **Mortgage of Estate comprising Freeholds, Copyholds, and Leaseholds.**

Fourth *Testatum.*

Assignment of leaseholds.

Proviso for redemption.

No insurance required.

Limitation of statutory power of sale.

XVI. Mortgage of Estate comprising Freeholds, Copyholds, and Leaseholds.

the said Act, and default shall have been made in payment of the mortgage money, or of part thereof, for [*six*] calendar months after such service, or unless and until some interest under this security shall have become in arrear and unpaid for [*three*] calendar months after the same shall have become due [*insert any other restriction on the exercise of the power of sale which may be agreed upon*]: PROVIDED ALWAYS, that except as is otherwise hereinbefore provided, the power of sale conferred by the said Act, and all the provisions therein contained, shall, as regards the protection of purchasers, or otherwise howsoever, remain in full force and be exerciseable or available by the said [*mortgagee*], his executors, administrators, and assigns: PROVIDED ALWAYS, that the powers of leasing conferred on mortgagors and mortgagees while in possession respectively by the Conveyancing and Law of Property Act, 1881, shall be varied and extended as follows, that is to say, [*Specify the variations agreed upon*]. IN WITNESS, &c.

Variation of statutory leasing powers.

THE FIRST SCHEDULE ABOVE REFERRED TO.

THE SECOND SCHEDULE ABOVE REFERRED TO.

THE THIRD SCHEDULE ABOVE REFERRED TO.

XVII. *MORTGAGE in* FEE *to secure a* PRESENT LOAN *and* FUTURE ADVANCES (*h*).

Parties.

Testatum.

Covenant for repayment of present loan and

THIS INDENTURE (*i*), dated the —— day of ——, 18—, BETWEEN [*mortgagor*], of &c., of the one part; and [*mortgagee*], of &c., of the other part, WITNESSETH, that in consideration of the sum of £—— now paid to the said [*mortgagor*] by the said [*mortgagee*], the receipt of which sum

(*h*) Where a mortgage is made to secure future advances or a balance of account current, the mortgagee cannot claim priority thereunder as against a subsequent incumbrancer in respect of any advances made after notice of the subsequent incumbrance, unless with the express consent of such incumbrancer: *Hopkinson* v. *Rolt*, 9 H. L. C. 514; *Daun* v. *City of London Brewery Co.*, L. R. 8 Eq. 155; *Menzies* v. *Lightfoot*, L. R. 11 Eq. 459; and see as to equitable mortgages, *London and County Banking Co.* v. *Ratcliffe*, 6 App. Ca. 722.

Stamp.

(*i*) A stamp will be required of sufficient value to cover the *ad valorem* duty (see *ante*, p. 988) of the present loan, and the probable amount of the future advances.

XVII. Mortgage in Fee to Secure Future Advances.

the said [*mortgagor*] hereby acknowledges, the said [*mortgagor*] hereby covenants with the said [*mortgagee*] to pay to him, his executors, administrators, or assigns, on the —— day of ——, the sum of £——, with interest thereon in the meantime at the rate of —— per centum per annum; And also to pay to him or them on such —— day of —— or —— day of —— as shall first happen after any further sum of money shall hereafter be paid or advanced on the security of these presents such sum or sums as shall be so paid and advanced, with interest thereon at the rate aforesaid as from the time or respective times of such sum or sums being so paid and advanced; And also so long as the said sum of £——, or any sum or sums so paid and advanced as aforesaid, or any part thereof respectively, shall remain due under this security after the days hereinbefore appointed for payment thereof respectively, to pay to the said [*mortgagee*], his executors, administrators, or assigns, interest thereon, at the rate aforesaid, by equal half-yearly payments, on the —— day of —— and the —— day of —— in every year; AND THIS INDENTURE ALSO WITNESSETH, that for the consideration aforesaid, the said [*mortgagor*] hereby grants, and, as beneficial owner, conveys unto the said [*mortgagee*] All that [*describe parcels*]; To hold all the premises, Unto and to the use of the said [*mortgagee*], his heirs and assigns; Subject to the proviso for redemption hereinafter contained; Provided always, that if the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall, on the —— day of ——, 18—, pay to the said [*mortgagee*], his executors, administrators, or assigns, the said sum of £——, with interest thereon in the meantime at the rate aforesaid, and shall also, on such —— day of —— or —— day of —— as shall first happen after any further sum shall be so paid or advanced as aforesaid, pay to him or them such sum or sums as shall be so paid or advanced, with interest thereon at the rate aforesaid as from the time or respective times of such sum or sums being so paid or advanced, then the said [*mortgagee*], his executors, administrators, or assigns, shall, at the request and cost of the said [*mortgagor*], his heirs, executors, administrators, or assigns, re-convey the premises hereby granted to the use of the said [*mortgagor*], his heirs and assigns, or as he or they shall direct. [*Insert any special covenants or provisoes as to payment of principal and interest, &c., from preceding Precedents.*] In witness, &c.

future advances, and interest.

Second *Testatum.*

Grant in fee.

Habendum

Proviso for redemption.

XVIII. *MORTGAGE in* Fee, *of FREEHOLDS,* Part *of* Property *comprised in a* Prior Mortgage; *the* Prior Mortgagee *concurs to* Postpone *his Mortgage.*

Parties.

Recitals: of prior mortgage;

of agreement for present loan;

of consent of prior mortgagee to postpone security.

Testatum.

Covenant to pay principal and interest.

Second *Testatum.*

THIS INDENTURE (*k*), made the —— day of ——, 18—, Between [*prior mortgagee*], of &c., of the first part; [*mortgagor*], of &c., of the second part; and [*mortgagee*], of &c., of the other part; Whereas, by an indenture, dated the —— day of ——, 18—, and made between the said [*prior mortgagee*], of the one part, and the said [*mortgagor*], of the other part, in consideration of the sum of £—— paid to the said [*mortgagor*] by the said [*prior mortgagee*], the hereditaments hereby granted were, with other hereditaments, conveyed unto the said [*prior mortgagee*], his heirs and assigns, subject to a proviso for redemption on payment by the said [*mortgagor*], his heirs, executors, administrators, or assigns, on the —— day of ——, 18—, to the said [*prior mortgagee*], his executors, administrators, or assigns, of the sum of £—— with interest for the same in the meantime, at the rate of —— per cent. per annum; And whereas the said [*mortgagee*] has agreed to lend to the said [*mortgagor*] the sum of £——, upon having the repayment of the same with interest thereon, at the rate aforesaid, secured in manner hereinafter appearing; And whereas the said [*prior mortgagee*] has, at the request of the said [*mortgagor*], agreed to join in these presents for the purpose of postponing his security under the hereinbefore recited indenture of mortgage to the security intended to be hereby effected, so far as relates to the said hereditaments hereinafter expressed to be hereby granted, in manner hereinafter appearing. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of £——, now paid to the said [*mortgagor*] by the said [*mortgagee*], the receipt whereof the said [*mortgagor*] hereby acknowledges, the said [*mortgagor*] hereby covenants [*Covenant to pay principal and interest, ante*, p. 994]. AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreement, and for the consideration aforesaid, the said [*prior*

Stamp.

(*k*) Stamp, *ad valorem*, on amount secured, *ante*, p. 988, and further stamp of 10*s.* in respect of the acknowledgment.

mortgagee] hereby, at the request and by the direction of the said [*mortgagor*], who directs as beneficial owner, grants and releases, and as mortgagee conveys (*l*), And the said [*mortgagor*] hereby grants and confirms unto the said [*mortgagee*] ALL THAT [*describe parcels*], TO HOLD all the premises UNTO AND TO THE USE of the said [*mortgagee*], his heirs and assigns, FREE AND DISCHARGED from the said sum of £—— [*the prior mortgage-debt*], and all interest now or hereafter to accrue due for the same, and every part thereof respectively, and from all claims and demands under or by virtue of the hereinbefore recited indenture of mortgage; SUBJECT, nevertheless, to the proviso for redemption hereinafter contained; PROVIDED ALWAYS, that if the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall, on the —— day of ——, 18—, pay to the said [*mortgagee*], his executors, administrators, or assigns, the sum of £——, with interest thereon at the rate aforesaid, then the said [*mortgagee*], his executors, administrators, or assigns, will, at the request and cost of the said [*mortgagor*], his heirs, executors, administrators, or assigns, reconvey the premises hereby granted to the use of the said [*mortgagor*], his heirs and assigns, subject to such right or equity of redemption as shall be subsisting therein, and to all such powers, authorities and provisions as shall be subsisting or exercisable in relation thereto, under or by virtue of the hereinbefore recited indenture of mortgage: AND IT IS HEREBY AGREED AND DECLARED that, subject to this security, the hereinbefore recited indenture of mortgage, and all powers therein or thereby contained or implied, shall remain in full force (*m*); AND the said [*prior mortgagee*] hereby acknowledges the right of the said [*mortgagee*] to production of the hereinbefore recited indenture of mortgage, and of the several deeds and documents of title mentioned in the schedule hereunder written, and to delivery of copies thereof respectively; AND the said [*mortgagee*]

XVIII. Mortgage in Fee with Concurrence of Prior Mortgagee.

Proviso for redemption.

Acknowledgment of right to production of title deeds.

(*l*) In any conveyance a covenant against incumbrances is implied by every person who conveys and is expressed to convey "as mortgagee": see sect. 7, sub-sect. 1 (F) of the Conveyancing and Law of Property Act, 1881. As to direction "as beneficial owner," see sub-sect. 2 of the same section.

(*m*) Here insert any special covenants and provisions, *e.g.*, restriction on mortgagor's leasing powers, *ante*, p. 916; covenant to insure, *ante*, p. 996, &c., &c.

XVIII. Mortgage in Fee with Concurrence of Prior Mortgagee.

hereby acknowledges the right of the said [*prior mortgagee*] to the production of these presents (*n*), and to the delivery of copies thereof. IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

XIX. *MORTGAGE of FREEHOLDS in* FEE *by* APPOINTMENT *under a* POWER.

Parties.

Recitals: of power of appointment;

of agreement for loan.

First *testatum.*

Covenant for payment of principal and interest.

Second *Testatum.*

THIS INDENTURE (*o*), made the —— day of ——, 18—, BETWEEN [*mortgagor*], of &c., of the one part; and [*mortgagee*], of &c., of the other part; WHEREAS by an indenture, dated the —— day of ——, 18—, and made between [*parties*], the hereditaments hereinafter expressed to be hereby appointed were, for the considerations therein mentioned, conveyed and assured to such uses upon such trusts, and for such intents and purposes as the said [*mortgagor*] should by deed appoint, and in default of such appointment to the use of the said [*mortgagor*] for his life, with divers remainders over; AND WHEREAS the said [*mortgagee*] has agreed to lend to the said [*mortgagor*] the sum of £——, upon having the repayment thereof with interest at the rate hereinafter mentioned secured in manner hereinafter appearing. NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of £—— now paid to the said [*mortgagor*] by the said [*mortgagee*] the receipt of which sum the said [*mortgagor*] hereby acknowledges, the said [*mortgagor*] hereby covenants, &c. [*Covenant for payment of principal and interest, ante*, p. 994]. AND THIS INDENTURE ALSO WITNESSETH, that in further

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(*n*) If any of the documents of title relate exclusively to the property comprised in this mortgage, they will probably be handed over to the mortgagee. In that case add here—

Acknowledgment of right to production when part of deeds handed over.

"And of the deeds and documents relating to the premises hereby granted, mentioned in the second schedule hereunder written, the receipt of which from the said [*prior mortgagee*] the said [*mortgagee*] hereby acknowledges, and to delivery of copies thereof respectively.

"IN WITNESS, &c."

(*o*) Stamp, *ad valorem*, on amount secured, *ante*, p. 988.

pursuance of the said agreement and for the consideration aforesaid, the said [*mortgagor*] hereby in exercise of the power in that behalf given to him by the hereinbefore recited indenture, and of every other power (if any) him hereunto enabling, appoints, and by virtue of his estate and interest grants, and confirms, and, as beneficial owner, conveys unto the said [*mortgagee*] ALL, &c. [*describe parcels*], TO HOLD all the premises UNTO AND TO THE USE of the said [*mortgagee*], his heirs and assigns; SUBJECT to the proviso for redemption following, namely, that if the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall, on the —— day of ——, 18—, pay to the said [*mortgagee*], his executors, administrators, or assigns, the sum of £——, and interest thereon at the rate aforesaid, then the appointment hereby made shall be void [*or*, then the said [*mortgagee*], his executors, administrators, or assigns, shall, at the request and cost of the said [*mortgagor*], his heirs, executors, administrators, or assigns, reconvey the premises hereby appointed to the use of the said [*mortgagor*], his heirs or assigns, or as he or they shall direct]. IN WITNESS, &c.

XIX. **Mortgage in Fee by Appointment.**

Appointment in fee.

Proviso for redemption.

XX. *MORTGAGE by* TENANT *for* LIFE *of* SETTLED FREEHOLDS *under the Settled Land Act*, 1882, *sect.* 18, *to raise Money for Enfranchisement.* ACKNOWLEDGMENT *of Mortgagee's right to* PRODUCTION *of* TITLE-DEEDS, *and* UNDERTAKING *for safe* CUSTODY (*p*).

THIS INDENTURE (*q*), made the —— day of ——, 18—, BETWEEN [*tenant for life*], of &c., of the first part; [*trustee*], of &c., and [*trustee*], of &c., of the second part; and

Parties.

(*p*) The tenant for life must give notice to the trustees of the settlement and to their solicitor of his intention to make this charge pursuant to sect. 45 of the Settled Land Act, 1882: see *Re Ray's Settled Estates*, 25 Ch. D. 464. Notice of a general intention to make a mortgage or charge is not sufficient: see sect. 5 (1) of the Settled Land Act, 1884, and see *ante*, p. 40, note (*a*).

Stamp.

(*q*) Stamp, *ad valorem*, on amount secured, *ante*, p. 988, and also a stamp of 10*s.* in respect of the acknowledgment of right of mortgagee to production of documents.

XX. Mortgage by Tenant for Life for Enfranchisement.

[*mortgagee*], of, &c., of the third part; WHEREAS, by an indenture of settlement, dated &c., and made between [*parties*], the several manors, lands, and hereditaments therein mentioned, and comprising, with other hereditaments, the lands and hereditaments hereby appointed, were limited and settled to the use of the said [*tenant for life*] for his life in possession with remainders over; and the indenture now in recital contained a power for the said [*trustees*], or other the trustees or trustee for the time being thereof, to sell the said hereditaments and premises thereby settled as therein mentioned (*r*); AND WHEREAS, the said [*trustees*] are the present trustees of the said indenture of settlement; AND WHEREAS, the said [*tenant for life*] has, under the power in that behalf given to him by the Settled Land Act, 1882, agreed with [*lord*] the lord of the manor of ——, in the county of ——, for the enfranchisement of certain copyhold lands and hereditaments holden of the said manor, being part of the hereditaments and premises comprised in the hereinbefore recited indenture of settlement; AND WHEREAS the sum of £—— is required for the purpose of effecting such enfranchisement, and the said [*mortgagee*] has agreed to advance the sum of £—— so required upon having the repayment of the same with interest at the rate hereinafter mentioned secured in manner hereinafter appearing. NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of £—— now paid to the said [*trustees*] by the said [*mortgagee*] at the request of the said [*tenant for life*], the payment and receipt whereof the said [*tenant for life*] and the said [*trustees*] respectively hereby acknowledge, the said [*tenant for life*], in exercise of the power for this purpose given to him by the Settled

Recitals:

of settlement created by deed;

as to trustees of settlement;

of agreement for enfranchisement;

of agreement for loan to raise money required for enfranchisement.

Testatum.

Conveyance by tenant for life under statutory powers.

(*r*) Trustees having a power of sale of the settled lands are, by virtue of such powers, constituted "trustees of the settlement" for the time being for the purposes of the Settled Land Acts: see sect. 2 (8) of the Act of 1882. If the settlement was made since 1882, and contains a declaration that the trustees are to be trustees of the settlement for the purposes of the Acts, say—

"Contained a declaration that the said [*trustees*], or other the trustees or trustee for the time being thereof, should be trustees thereof for the purposes of the Settled Land Act, 1882, [and the Settled Land Act, 1884.]"

XX. Mortgage by Tenant for Life for Enfranchisement.

Land Act, 1882, and of every other power enabling him in this behalf, hereby appoints and, as beneficial owner, conveys unto the said [*mortgagee*] ALL THOSE [*describe parcels* (*s*)], TO HOLD all the premises UNTO AND TO THE USE of the said [*mortgagee*], his heirs and assigns, FREE and discharged from all the limitations, trusts, powers, and provisions of the hereinbefore recited indenture of settlement, and from all estates, interests, and charges now subsisting, or hereafter to arise thereunder, but SUBJECT to the proviso for redemption following, namely, that if the said [*tenant for life*], or any person or persons for the time being interested in the premises under the hereinbefore recited indenture of settlement, shall, on the —— day of ——, 18—, pay to the said [*mortgagee*], his executors, administrators, or assigns, the sum of £——, with interest thereon in the meantime at the rate of —— per centum per annum, then the said [*mortgagee*], his executors, administrators, or assigns, will at the request and cost of the said [*tenant for life*], or such person or persons as aforesaid, reconvey the premises to the uses, upon the trusts, and subject to the powers and provisions for the time being subsisting in relation to the same under or by virtue of the hereinbefore recited indenture of settlement: PROVIDED ALWAYS and it is hereby agreed that if the said sum of £——, or any part thereof, shall not be paid on the —— day of ——, 18—, then the said [*mortgagee*], his executors, administrators, and assigns, shall thenceforth be entitled to interest at the rate aforesaid, on the said sum of £——, or so much thereof as shall for the time being remain unpaid, by equal half-yearly payments on the —— day of ——, and the —— day of —— in every year; AND the said [*tenant for life*] hereby covenants with the said [*mortgagee*] that he the said [*tenant for life*] will, during his life, keep down and pay to the said [*mortgagee*], his executors, administrators, or assigns, the interest on the said sum of £——, or on so much thereof as shall for the time being remain unpaid at the rate aforesaid, as and when the same shall become due and payable; AND the said [*tenant for life*] hereby acknowledges the right of the said [*mortgagee*] to the production of the several deeds and documents of title

Proviso for redemption.

Mortgagee to be entitled to interest.

Covenant by tenant for life to pay interest during his life.

Acknowledgment of mortgagee's right to production

(*s*) In this Precedent the lands mortgaged are not the same as those which are the subject of the enfranchisement.

XX. **Mortgage by Tenant for Life for Enfranchisement.**

mentioned in the schedule hereunder written, and to delivery of copies thereof, and he hereby undertakes for the safe custody thereof. IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

of title-deeds and undertaking for safe custody (*t*).

XXI. *MORTGAGE by* TRUSTEES *of a Settlement created by Will, on behalf of an* INFANT TENANT FOR LIFE *of Settled* FREEHOLDS AND COPYHOLDS, *under the* SETTLED LAND ACT, 1882, *Sects.* 18 *and* 60, *to raise Money for Equality of Exchange.* ACKNOWLEDGMENT *of Mortgagee's right to* PRODUCTION *of* TITLE-DEEDS.

THIS INDENTURE (*u*), made the —— day of —— 18—, BETWEEN [*trustee*], of &c., and [*trustee*], of &c., of the one part; and [*mortgagee*], of &c., and [*mortgagee*], of &c., of the other part; WHEREAS [*testator*], late of &c., deceased, duly made and executed his will, dated &c., and thereby gave and devised all his real estate of every description to the use of [*first tenant for life*] for his life, and from and after his decease to the use of [*infant tenant for life*] for his life, with divers remainders over; AND WHEREAS the said [*testator*] died on the —— day of —— 18—, and his said will was, on the —— day of ——, duly proved by the executors therein named, in the principal registry of the Probate Division of her Majesty's High Court of Justice: AND WHEREAS, by an order dated the —— day of —— 18—, and made by his lordship Sir A. B., one of the justices of the Chancery Division of her Majesty's High Court of Justice, the

Parties.

Recitals: of settlement created by will;

of death of testator;

of appointment of trustees of settlement by court;

(*t*) The deeds relating exclusively to the land mortgaged will be delivered to the mortgagee; the acknowledgment and undertaking is with respect to the deeds relating also to settled lands not comprised in the mortgage.

Stamp.

(*u*) Stamp, *ad valorem*, on amount secured, and additional stamp of 10*s.* in respect of the acknowledgment of right to production of documents.

XXI. **Mortgage by Trustees of Settlement on Behalf of Infant for Equality of Exchange.**

said [*trustee*] and [*trustee*] were, on the application of the said [*first tenant for life*], appointed trustees of the settlement created by the said will for the purposes of the Settled Land Acts, 1882 and 1884; And whereas the said [*first tenant for life*] died on the —— day of ——, 18—; And whereas the said [*infant tenant for life*] has not yet attained his majority, having been born on the —— day of —— 18—; And whereas the said [*trustees*], on behalf of the said [*infant tenant for life*], recently agreed with [A. B.] for the exchange of certain closes of land and hereditaments hitherto forming part of the real estate of the said [*testator*], so devised by his said will, as is hereinbefore recited, for the several closes of land and hereditaments hereby appointed, hitherto the property of the said [A. B.]; And whereas, by an indenture bearing even date with, but intended to be executed immediately before, these presents, and made between the said [A. B.] of the one part, and the said [*trustees*] of the other part, in consideration of the conveyance as therein mentioned to the said [A. B.] of the several closes of land and hereditaments therein mentioned or referred to, being part of the real estate of the said [*testator*] so devised as aforesaid, And also in consideration of the sum of £—— paid to the said [A. B.] by the said [*trustees*] for equality of exchange, the said [A. B.] has conveyed unto the said [*trustees*] the several closes of land and hereditaments hereby appointed: To hold the same to such of the uses, upon such of the trusts, and with and subject to such of the powers and provisions in and by the said will declared and contained, of and concerning the lands and hereditaments thereby devised, as are now subsisting; And whereas the said sum of £—— so paid for equality of exchange as aforesaid, was advanced to the said [*trustees*] by the said [*mortgagees*], and upon the treaty for the said advance it was agreed that the repayment thereof with interest at the rate hereinafter mentioned should be secured in manner hereinafter appearing. NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of £—— so paid as aforesaid to the said [*trustees*] by the said [*mortgagees*], the receipt whereof the said [*trustees*] respectively hereby acknowledge, the said [*trustees*], on behalf of the said [*infant tenant for life*], and in exercise of the powers for this purpose given to

of infancy of tenant for life;

of conveyance of lands taken in exchange to trustees of settlement and of payment of moneys for equality of exchange;

of advance by mortgagee of moneys paid for equality of exchange.

Testatum.

Conveyance by trustees under statutory power.

XXI. Mortgage by Trustees of Settlement on Behalf of Infant for Equality of Exchange.

or vested in them, as such trustees as aforesaid of the settlement created by the hereinbefore-recited will of the said [*testator*], by the Settled Land Act, 1882, and of every other power enabling them in this behalf, hereby appoint, and, as trustees, convey unto the said [*mortgagees*] ALL THOSE several closes of land, &c. [*describe parcels by reference to schedule, ante*, p. 1027]; TO HOLD the same premises UNTO AND TO THE USE of the said [*mortgagees*], their heirs and assigns: SUBJECT to the proviso for redemption following, namely, that if the said [*trustees*], or any person or persons, &c. [*proviso for conveyance* "at the request and cost of the said [*trustees*], or such person or persons," &c., *ut ante*, p. 1035]. AND the said [*trustees*], on behalf of the said [*infant tenant for life*], hereby acknowledge the right of the said [*mortgagees*] to the production of the several deeds and documents of title mentioned in the second schedule hereunder written, and to delivery of copies thereof (*x*). IN WITNESS, &c.

Proviso for redemption.

Acknowledgment of mortgagees' right to production of title-deeds (*w*).

THE FIRST SCHEDULE ABOVE REFERRED TO.

(*Parcels.*)

THE SECOND SCHEDULE ABOVE REFERRED TO.

(*Deeds and Documents of Title.*)

(*w*) As in this Precedent it is intended that the lands taken in exchange shall be the subject of the mortgage, the conveyance of the lands taken in exchange will be handed over to the mortgagees, but the other documents relating to the title of the infant tenant for life and his successors will, generally, be retained by the trustees.

(*x*) As to whether trustees should give an undertaking for safe custody of title-deeds, &c., see *ante*, tit. ACKNOWLEDGMENTS, Vol. I., p. 256.

XXII. *DEED of* Substituted Security *by a* Tenant for Life *under the* Settled Land Act, 1882, *sect.* 5, charging *an* Incumbrance *affecting* lands sold *on other part of the Settled Lands* (*y*).

THIS INDENTURE (*z*), made the —— day of ——, 18—, Between [*tenant for life*], of &c., of the one part; and [*mortgagee*], of &c., of the other part; Whereas, by an indenture of mortgage, dated the —— day of ——, 18—, and made between [*parties*], the hereditaments particularly described in the schedule thereunder written were conveyed and assured to the use of the said [*mortgagee*] in fee simple, by way of mortgage for securing payment of the sum of £—— with interest thereon at the rate of —— per cent. per annum; And whereas, by an indenture of settlement dated the —— day of —— 18—, and made between [*parties*], the said hereditaments comprised in the hereinbefore recited indenture of mortgage, were limited, with other hereditaments, (but as to the said hereditaments comprised in the said indenture of mortgage, subject thereto and to the said sum of £——,

Parties.

Recitals: of mortgage;

of settlement;

(*y*) The 5th sect. of the Settled Land Act, 1882 (45 & 46 Vict. c. 381), enacts as follows:

"Where on a sale, exchange, or partition there is an incumbrance affecting land sold or given in exchange or on partition, the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold or so given, and, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly."

Transfer of incumbrances on land sold, &c.

The "incumbrances" referred to in this section include charges having priority to the settlement, but not charges created by or in exercise of a power in the settlement on which no money has been actually raised, as a conveyance by way of sale, &c., by a tenant for life in exercise of his statutory power, is effectually to pass the land conveyed, free from such charges: see sect. 20 (2) of the Act.

Notice of the tenant for life's intention to make this charge should be given to the trustees of the settlement and to their solicitor: see *ante*, p. 1033, note (*p*). See also as to substitution of securities on lands acquired by purchase or exchange, sect. 24 (4) of the Act.

(*z*) Stamp, *ad valorem*, at the rate of 6*d.* for every £100 and also for every fractional part of £100 of the amount secured: see *ante*, p. 988.

XXII. **Deed of Substituted Charge by Tenant for Life.**

and interest for the same thereby secured) to the use of the said [*tenant for life*] for his life, with divers remainders over; AND WHEREAS the said [*tenant for life*] as such tenant for life as aforesaid in possession of the hereditaments comprised in the hereinbefore recited indenture of settlement recently contracted with [*purchaser*] for the sale to him of a certain messuage or dwelling-house, and a close or parcel of land thereto adjoining, being part of the said hereditaments comprised in the hereinbefore recited indenture of mortgage, and upon the treaty for the said sale, the said [*mortgagee*] consented that such sale should be made free and discharged from his aforesaid mortgage upon having the payment of such monies respectively charged and secured on the hereditaments and in manner hereinafter appearing; AND WHEREAS, by an indenture bearing even date with, but executed before these presents, the said messuage and premises so contracted to be sold as aforesaid have been conveyed and released unto and to the use of the said [*purchaser*], freed and discharged from the said sum of £—— and interest secured by, and all claims and demands under the hereinbefore recited indenture of mortgage; AND WHEREAS the whole of the said principal sum of £—— together with interest thereon for the current half-year is now owing to the said [*mortgagee*] on the security of the hereinbefore recited indenture of mortgage. NOW THIS INDENTURE WITNESSETH, that in consideration of the premises the said [*tenant for life*] in exercise of the power in that behalf by the Settled Land Act, 1882, given to him as such tenant for life in possession as aforesaid, and of every other power (if any) him hereunto enabling, hereby charges the hereditaments hereinafter described and hereby appointed with the payment of the said principal sum of £——, and all interest due and henceforth to become due thereon in exoneration and substitution for the said messuage and premises so sold and conveyed by the hereinbefore recited indenture of even date herewith as aforesaid. AND THIS INDENTURE ALSO WITNESSETH, that for the consideration aforesaid, the said [*tenant for life*], in exercise of the power or powers aforesaid, hereby appoints, and, as beneficial owner, conveys [*Conveyance of substituted lands: Habendum: Proviso for redemption as in Precedent XX., ante*, p. 1035; *Proviso as to interest, and covenant by tenant for life to pay interest during his life*, "as from the —— day of —— last" (*the last half-yearly day*

of contract by tenant for life for sale of messuage, &c., free from incumbrance, and mortgagee's consent thereto;

of conveyance of messuage, &c., to purchaser.

of state of mortgage debt.

First *Testatum.*

Charge.

Second *Testatum.*

Conveyance of substituted lands.

of payment), *ante*, p. 1035]. And the said [*tenant for life*] hereby acknowledges the right of the said [*mortgagee*] to the production of the hereinbefore recited indenture of settlement (of which he now retains and holds possession), and to delivery of copies thereof, and he hereby undertakes for the safe custody thereof. In witness, &c.

XXII. **Deed of Substituted Charge by Tenant for Life.**

Acknowledgment of mortgagee's right to production of settlement, and undertaking.

XXIII. *MORTGAGE of* Freehold Lands *under a* Term *created by a* Settlement *for* raising Portions *for Younger Children* (*a*).

THIS INDENTURE (*c*), made the —— day of ——, 18—, Between [*trustee*], of &c., and [*trustee*], of &c., of the first part; [*tenant in tail*], of &c., of the second part; [*portionist*], of &c., and [*portionist*], of &c., of the third part; and [*mortgagee*], of &c., of the fourth part; Whereas, by an indenture of settlement, dated the —— day of ——, 18—,

Parties (*b*).

Recitals of settlement (*d*);

(*a*) The trusts of a term for raising portions will be considered hereafter, sub tit. Settlements.

Term for raising portions.

(*b*) It is advisable and usual, if the tenant in tail or for life (as the case may be) of the settled lands is *sui juris* and will consent to concur in raising money under the trusts of a portions term, that he should be made a party to the mortgage deed, to covenant for payment of the principal and interest; or, it may be arranged that he shall join in the mortgage only to covenant to keep down the interest during his life: see *infra*, note (*l*); unless this obligation is imposed on him by the trusts of the term, as is sometimes the case. If, however, he is a minor, or will not consent to join in the mortgage, the land will be the only security available to a mortgagee advancing money for raising portions. The concurrence of the portionists is not essential, according to the usual frame of the trusts of a portions term, and may, accordingly, often be safely dispensed with; but such concurrence is desirable if the portionists are *sui juris*: see *infra*, note (*g*).

Parties.

(*c*) Stamp, *ad valorem*, on amount secured: *ante*, p. 988.

(*d*) Inasmuch as the settlement will be retained with other documents of title by the tenant for life of the settled lands (see *ante*, Vol. II. p. 718), it is better that the settlement should be recited, than that the mortgage should be expressed to be made as supplemental or as an annex to the settlement: see the remarks as to when an instrument should be by supplemental deed or annex, *ante*, Vol. I. p. 778, note (*d*). The course here recommended is particularly advisable if the mortgage does not exclude the statutory power of sale (*vide infra*), as the recital will in that case be useful as constituting the mortgage a good root of title if

XXIII. Mortgage of Term for Raising Portions.

and made between [*parties*] (being the settlement made in consideration of the then intended marriage between the said [A. B.] and [C. D.], afterwards [C. B.] his wife), the several messuages, lands and hereditaments described in the schedule thereto, and also in the schedule hereunder written, and hereby assigned, were conveyed unto the said [*trustees*], to the uses therein mentioned, until the solemnization of the said marriage, and from and after the solemnization thereof to the use of the said [A. B.] during his life, with remainder to the use that the said [C. B.], if she should survive him, should receive during the remainder of her life a yearly jointure rent-charge of £——, payable as therein mentioned, and subject to such rent-charge, to the use of the said [*trustees*] for a term of 500 years, without impeachment of waste, upon the trusts thereinafter declared of the same, and subject thereto to the use of the first and other sons of the said [A. B.] and [C. B.] successively, according to seniority in tail male, with remainders over as therein is mentioned: And it was by the indenture now in recital declared that the premises were thereinbefore limited to the said [*trustees*] for the said term of 500 years, upon trust that if there should be any child or children of the said marriage (other than any son or sons who before his or their respectively attaining the age of twenty-one years should become entitled thereunder to the premises for the first estate in tail male), who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, then the trustees or trustee for the time being should after the death of the said [A. B.], raise by any of the ways and means therein mentioned, and particularly by mortgage of the premises, or any of them, for all or any part of the said term, for the portion or portions of such child or children (other than as aforesaid), such sum as therein mentioned, that is to say, if there should be but one such child, the sum of £——, and if there should be but two such children, the sum of £——, and if there should be three or more such children, the sums therein mentioned respectively, the sum so raiseable to be paid to the child or children for whose portion or

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a necessity for a sale under the power should arise at a future time.

XXIII. Mortgage of Term for Raising Portions.

portions the same should be raised at such time, and, if more than one, in such shares, and in such manner as the said [A.B.] should by deed or will appoint, and in default of such appointment to be paid unto or among the child or children for whose portion or portions the same should be raised, and, if more than one, in equal shares, being a son or sons, on his or their attaining the age or respective ages of twenty-one years, or being a daughter or daughters on her or their attaining the age or respective ages of twenty-one years, or day or respective days of marriage, which should first happen, if the same respectively should happen after the death of the said [A. B.], but if the same should respectively happen during his life, then immediately after his death; AND WHEREAS the said marriage was duly solemnized shortly after the date of the hereinbefore-recited indenture of settlement (*e*); AND WHEREAS the said [A. B.] died on the —— day of ——, 18—, without having exercised the power of appointment so given to him by the hereinbefore-recited indenture of settlement as aforesaid; AND WHEREAS there was issue of the said [A. B.] and [C. B.] three children and no more, that is to say, the said [*tenant in tail*], who is their first son, and the said [*portionists*], all of which children attained the age of twenty-one years during the life of the said [A. B.]; AND WHEREAS the said [*portionists*] have requested the said [*trustees*] to raise and pay to them the sum of £—— so directed by the hereinbefore-recited indenture of settlement to be raised for portions as

of marriage;

of death of tenant for life;

of number and ages of younger children (*f*);

of request to trustees to raise portions (*g*);

(*e*) If there has been a resettlement of the property whereby the tenant in tail's interest has been cut down to a life interest, it must of course be recited. So, also, if the entail has been cut off, and the estate converted into a fee simple subject to the subsisting charges.

(*f*) If some of the younger children have not attained their majority, a recital must be here introduced, instead of the recital in the text, stating the number of the younger children and their respective names and dates of birth.

(*g*) In the event referred to in the last preceding note the amount to be raised may be merely that of the share of one or more portionists who have attained the age of twenty-one years, in which case this recital will run as follows:

Recitals when some only of portionists are *sui juris*.

"AND WHEREAS the said [*adult portionist or portionists*] has [have] requested the said [*trustees*] to raise and pay to him [them respectively] the sum of £——, being the share [shares] to which he is [they are respectively] entitled of the

XXIII. **Mortgage of Term for Raising Portions.**

of agreement for loan.

aforesaid; AND WHEREAS the said [*trustees*] have applied to the said [*mortgagee*] to lend to them the sum of £—— for the purpose of such portions, which he the said [*mortgagee*] has agreed to do, upon having the repayment thereof, with interest at the rate hereinafter mentioned, secured in manner hereinafter appearing. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of £—— to the said [*portionist*], and of the sum of £—— to the said [*other portionist*], making together the sum of £——, now paid by the said [*mortgagee*], at the request and by the direction of the said [*trustees*], and with the approbation of the said [*tenant in tail*], the receipt and payment of which sum of £—— the said [*portionists*] and [*trustees*] respectively hereby acknowledge, the said [*tenant in tail*] hereby covenants with the said [*mortgagee*] [*Covenant for payment of principal and interest, ante*, p. 994]. AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreement, and for the consideration aforesaid, the said [*trustees*], in execu-

First *Testatum.*

Covenant by tenant in tail for payment of principal and interest (*h*).

Second *Testatum.*

Assignment.

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sum of £—— now presumptively raisable for portions under or by virtue of the hereinbefore-recited indenture of settlement."

And the recital here given may be continued as follows if the settlement contains a power for the trustees to raise the whole sum for portions before all are actually payable :

"And the said [*trustees*], in the exercise of the discretion as aforesaid, have determined to raise the whole of the said sum of £——, so presumptively raisable as aforesaid, of which the sum of £—— is [several sums of £—— and £—— are] to be paid to the said [*adult portionist or portionists* respectively], and the sum of £——, the remainder thereof, is to be held and invested by the said [*trustees*] in manner directed by the hereinbefore-recited indenture of settlement, as the primary fund for the payment of portions or other payments which may hereafter become payable under the trusts of the said term of —— years created by the same indenture."

It will be necessary, in this case, that the material parts of the power to raise the whole amount should be recited in the recital of the settlement; the remainder of the money raised will be paid to the trustees, and they will acknowledge the receipt thereof.

(*h*) If the tenant in tail or for life is merely to covenant to keep down the interest during his life, this covenant will be omitted and the acknowledgment will be immediately followed by the words "the said [*trustees*] in execution," &c.

XXIII. Mortgage of Term for Raising Portions.

tion of the trust for this purpose reposed in them by the hereinbefore recited indenture of settlement, hereby assign, and, as trustees, convey, and the said [*tenant in tail*] hereby confirms unto the said [*mortgagee*] ALL &c. [*describe parcels*]; TO HOLD the same UNTO the said [*mortgagee*] for all the residue now unexpired of the said term of 500 years, without impeachment of waste; SUBJECT nevertheless to the said annual jointure rent-charge of £——, by the said indenture of settlement limited in favour of the said [C.B.] during her life as aforesaid, and the powers and remedies for recovering payment of the same; AND ALSO SUBJECT to the proviso for redemption following, namely, that if the said [*trustees*], or the said [*tenant in tail*], or any other person or persons for the time being entitled to the premises hereby assigned in remainder immediately expectant on the determination of the said term, shall, on the —— day of ——, 18—, pay to the said [*mortgagee*], his executors, administrators, or assigns, the sum of £——, with interest for the same at the rate aforesaid, then the said [*mortgagee*], his executors, administrators, or assigns shall, at the request and cost of the said [*trustees*], or the survivor of them, or the executors or administrators of such survivor, or their or his assigns, or of the said [*tenant in tail*], his heirs, executors, administrators, or assigns, or any such other person or persons entitled as aforesaid, re-assign the premises unto the said [*trustees*], or the survivor of them, or the executors or administrators of such survivor, their or his assigns, or as he or they shall direct: [PROVIDED ALWAYS that if the said sum of £—— shall not be duly paid on the said —— day of ——, 18—, the said [*mortgagee*], his executors, administrators, and assigns, shall be entitled to interest thereon, or on so much thereof as shall for the time being remain unpaid, at the rate aforesaid, by equal half-yearly payments, on the —— day of —— and the —— day of —— in every year:] PROVIDED ALWAYS that no power of sale of the premises hereby assigned, or any part thereof, shall be deemed to be implied by or in, or to apply to this security

Subject to jointure.

Proviso for redemption.

Interest to be payable after default (*i*).

Exclusion of power of sale (*k*).

(*i*) This proviso will be required only if there is not an absolute covenant for payment of principal and interest, in which case its insertion is advisable: see *Re Roberts*, 14 Ch. D. 49; see also *Ex parte Furber*, 17 Ch. D. 191.

(*k*) It is very usual, especially where the repayment of the loan is secured by the covenants of the tenant for life or in tail, for

XXIII. Mortgage of Term for Raising Portions.

Trustees not to be personally liable.

under or by virtue of any statute or otherwise howsoever: PROVIDED ALSO that nothing herein contained shall render the said [*trustees*] or either of them personally, or their or his heirs, executors, administrators, estates, or effects, liable as for a debt in respect of any monies intended to be hereby secured (*l*). IN WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

XXIV. *MORTGAGE of* LEASEHOLDS *by* EXECUTORS (*m*).

Parties.

Recitals: of lease to testator;

THIS INDENTURE (*n*), made the —— day of ——, 18—, BETWEEN [*executor*], of &c., and [*executor*], of &c., of the one part; and [*mortgagee*], of &c., of the other part; WHEREAS, by an indenture of lease dated the —— day of ——, 18—, and made between [*lessor*], of the one part, and [*testator*], of &c., deceased, of the other part, the messuage and piece of land, &c. [*describe parcels from lease*], being the premises hereby assigned [*or*, demised], were demised to the said [*testator*] for the term of —— years from the —— day of ——, 18—, at the yearly rent of £——, and subject to the covenants and conditions therein contained, and on the part of the lessee to be observed and performed;

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money to be lent to pay family charges without a power of sale. Generally, however, trustees with power to mortgage may give to the mortgagee a power of sale if he requires it: see *Re Chawner's Will*, L. R. 8 Eq. 569.

(*l*) If the tenant in tail or for life merely covenants to keep down the interest during his life, add here the following covenant:

Covenant by tenant in tail or for life to keep down interest during his life.

"And, in consideration of the premises, the said [*tenant in tail*] hereby covenants with the said [*mortgagee*], that he the said [*tenant in tail*] will during his life pay to the said [*mortgagee*], his executors, administrators, or assigns, interest at the rate aforesaid on the said sum of £——, or so much thereof as shall for the time being remain unpaid, by equal half-yearly payments on the —— day of —— and the —— day of —— in every year."

Power of executors to mortgage.

(*m*) As to the power of executors to raise money by mortgage of leaseholds forming part of their testator's estate, see *ante*, p. 727 *et seq.*

Stamp.

(*n*) Stamp, *ad valorem*, on amount secured: see *ante*, p. 988.

XXIV. Mortgage of Leaseholds by Executors.

AND WHEREAS the said [*testator*] duly made and executed his will, dated the —— day of ——, 18—, and thereby appointed the said [*executors*] and [A. B.] to be the executors thereof; AND WHEREAS the said [*testator*] duly made a codicil, dated the —— day of ——, 18—, and thereby revoked the hereinbefore recited appointment of the said [A. B.] to be one of the executors of his said will, but in all other respects the said [*testator*] confirmed his said will; AND WHEREAS the said [*testator*] died on the —— day of ——, 18—, and his hereinbefore recited will and codicil were, on the —— day of ——, 18—, duly proved by the said [*executors*], as such executors thereof as aforesaid, in the Principal Registry of the Probate Division of her Majesty's High Court of Justice; AND WHEREAS the said [*executors*], having occasion for the sum of £—— for the purpose of paying thereout certain debts or liabilities of the said [*testator*], have applied to the said [*mortgagee*] to lend to them such amount, which the said [*mortgagee*] has agreed to do upon having the repayment thereof, with interest at the rate hereinafter mentioned, secured in manner hereinafter appearing. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement and in consideration of the sum of £—— now paid to the said [*executors*] by the said [*mortgagee*], the receipt whereof the said [*executors*] hereby acknowledge, the said [*executors*] hereby assign (*o*) [*or* demise], and, as personal representatives of the said [*testator*], deceased as aforesaid (*p*), convey unto the said [*mortgagee*], ALL THOSE the messuage and premises comprised in and demised by the hereinbefore recited indenture of lease; TO HOLD all the same premises UNTO the said [*mortgagee*], his executors, administrators, and assigns, for all the residue now unexpired of the said term of —— years created by the hereinbefore recited indenture of lease [except the last —— days of the said term (*q*)], SUBJECT to the proviso for redemption following; PROVIDED

of will appointing executors;

of codicil;

of death of testator, and probate of will and codicil;

of agreement for loan;

Testatum.

(*o*) As to the comparative advantages of mortgages by assignment and demise, see *ante*, p. 978. Executors will generally prefer to mortgage leaseholds by assignment. Implied covenants.

(*p*) As to the statutory covenants implied by conveying "as personal representatives," see Conveyancing and Law of Property Act, 1881, sect. 7, sub-sect. 1 (F).

(*q*) This exception will be omitted if the mortgage be by assignment.

XXIV. **Mortgage of Leaseholds by Executors.**

ALWAYS, that if the said [*executors*] or one of them, or any other person or persons interested in the premises hereby assigned [*or*, demised] under the hereinbefore recited will and codicil of the said [*testator*] shall, on the —— day of ——, 18—, pay to the said [*mortgagee*], his executors, administrators, or assigns, the sum of £——, with interest thereon in the meantime at the rate of —— per cent. per annum, then the said [*mortgagee*], his executors, administrators, or assigns, shall, at the request and cost of the said [*executors*], or one of them, or such other person or persons as aforesaid, reassign [*or* surrender] or otherwise assure the premises hereby assigned [*or*, demised], unto the said [*executors*], or the survivor of them, or their or his executors, administrators, or assigns, or as they or he shall direct. [*Declaration of trust of nominal reversion, ante*, p. 1014 (*qq*).—*Proviso that on default in payment on the day appointed the mortgagee shall be entitled to interest, ante*, p. 1045 (*r*).] PROVIDED ALWAYS, that nothing herein contained shall render the said [*executors*], or either of them personally, or their or his heirs, executors, or administrators, estates or effects, liable as for a debt by virtue or in respect of these presents or of any principal monies or interest hereby secured. IN WITNESS, &c.

Interest to be payable after default.

Executors not to be personally liable.

XXV. *MORTGAGE of FREEHOLDS by* TENANT *for* LIFE *and* TENANT *in* TAIL *in Remainder.*

Parties.

THIS INDENTURE (*s*), made the —— day of ——, 18—, BETWEEN [*tenant for life*], of &c., of the first part; [*tenant in tail*], of &c., of the second part; and [*mortgagee*], of &c., of the third part; AND SUPPLEMENTAL (*t*) to an indenture of settlement (hereinafter referred to as the principal

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(*qq*) This declaration of trust will be omitted if the mortgage is by assignment.

(*r*) See as to this proviso, *ante*, p. 1045, note (*i*).

Stamp. (*s*) Stamp, *ad valorem*, on amount secured, *ante*, p. 988.

Form of deed. (*t*) As the settlement, with other documents of title to the mortgaged lands, will presumably be handed over to the mortgagee on completion, there seems to be no objection to the mortgage being effected by a supplemental deed: see as to this, *ante*, Vol. I. p. 778. Otherwise the settlement should be recited

XXV. Mortgage of Freeholds by Tenant for Life.

indenture), dated &c., and made between [*parties*] (being the settlement made in consideration of the then intended marriage, which was shortly afterwards solemnized between the said [*tenant for life*] and [*wife*] his wife); AND WHEREAS the said [*tenant in tail*] is the eldest son of the said marriage, and was born on the —— day of ——, 18—; AND WHEREAS the said [*mortgagee*] has agreed to lend to the said [*tenant for life*] and [*tenant in tail*] the sum of £——, upon having the repayment thereof with interest at the rate hereinafter mentioned secured in manner hereinafter appearing. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement and in consideration of the sum of £—— this day paid to the said [*tenant for life*] and [*tenant in tail*], the receipt whereof the said [*tenant for life*] and [*tenant in tail*] respectively hereby acknowledge, they the said [*tenant for life*] and [*tenant in tail*] do, and as a separate covenant each of them doth hereby covenant with the said [*mortgagee*] that they the said [*tenant for life*] and [*tenant in tail*], or their respective heirs, executors, administrators, or assigns, or some, or one of them, will pay to the said [*mortgagee*], his executors, administrators, or assigns, on the —— day of ——, 18—, the sum of £——, with interest thereon in the meantime at the rate of —— per cent. per annum, and also so long after that day as any principal-money shall remain due under this mortgage, will pay to the said [*mortgagee*], his executors, administrators, or assigns, interest thereon at the rate aforesaid by equal half-yearly payments on the —— day of ——, and the —— day of —— in every year. AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreement, and for the consideration aforesaid, the said [*tenant for life*] and the said [*tenant in tail*], with the consent, hereby testified, of the said [*tenant for life*], as protector of the settlement created by the principal indenture, each according to his estate and interest, hereby, grant and, as beneficial owners, convey unto the said [*mortgagee*], ALL THOSE manors, capital and other messuages, lands, tenements, and hereditaments, situate &c., and particularly

Recitals: of title of tenant in tail; of agreement for loan.

Testatum.

Joint and several covenant for payment of principal and interest.

Second *Testatum.*

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so far as is necessary to show the limitations down to and including the estate tail, "with remainders over." Obvious verbal alterations will, in this case, be necessary throughout the deed.

This deed will require to be enrolled as a disentailing assurance. Enrolment.

XXV. **Mortgage of Freeholds by Tenant for Life.**

described in the schedule hereunder written and delineated in the map hereunto annexed; To HOLD the same premises UNTO AND TO THE USE OF the said [*mortgagee*], his heirs and assigns; SUBJECT, nevertheless, as to the estate and interest of the said [*tenant in tail*] in the same premises, to the uses, trusts, and powers limited and contained by and in the principal indenture, which are prior to the estate tail thereby limited to the use of the said [*tenant in tail*], so far as the same uses, trusts, or powers are now subsisting, or capable of taking effect, but FREED and discharged from all estates in tail of the said [*tenant in tail*] at law or in equity, and all estates, interests, and powers to take effect after the determination, or in defeazance of such estate tail; AND SUBJECT as to all the estates, interests, and premises hereby granted, to the proviso for redemption hereinafter contained; PROVIDED ALWAYS, that if the said [*tenant for life*] and [*tenant in tail*], or their respective heirs, executors, administrators, or assigns, or some or one of them, shall, on the —— day of ——, 18—, pay to the said [*mortgagee*], his executors, administrators, or assigns, the sum of £——, with interest thereon at the rate aforesaid, then the said [*mortgagee*], his executors, administrators, or assigns, will, at the request and cost of the said [*tenant for life*], or his assigns, or of the said [*tenant in tail*], his heirs or assigns, convey the said hereditaments and premises (*u*), if the said [*tenant for life*] and [*tenant in tail*] shall both be then living, then to such uses as they shall jointly direct, and in default of and subject to such direction to the use of the said [*tenant for life*], for his life, without impeachment of waste, with remainder to the use of the said [*tenant in tail*], his heirs and assigns, or if the said [*tenant for life*] shall be then dead, then to the use of the said [*tenant in tail*], his

Subject to estates and interests prior to the estate tail.

Proviso for redemption.

Proviso for redemption so as to resettle the mortgaged property.

(*u*) If it is intended that the equity of redemption shall be resettled, the proviso for reconveyance from this point is sometimes made to run as follows:

"To the uses upon the trusts, and with and subject to the powers and provisions contained in the principal indenture, or such of the same uses, trusts, powers, and provisions as would then be subsisting, or capable of taking effect if these presents had never been made and executed."

But it seems more prudent to make the resettlement by a separate deed, see *ante*, p. 733.

heirs and assigns, or as he or they shall direct, but, subject in either event, to all such estates, interests, and powers, prior to the estate and interest of the said [*tenant in tail*], under or by virtue of the principal indenture, as shall be then subsisting and capable of taking effect. IN WITNESS, &c.

XXV. **Mortgage of Freeholds by Tenant for Life.**

THE SCHEDULE ABOVE REFERRED TO.

XXVI. *MORTGAGE by the* COMMITTEE *of a* LUNATIC TENANT *in* TAIL *of* FREEHOLDS *by* DEMISE *without* POWER *of* SALE (*x*).

THIS INDENTURE (*y*), made the —— day of ——, 18—, BETWEEN [*lunatic*], so found by inquisition, by [*committee*], of &c., the committee of the estate of the said lunatic of the one part; and [*mortgagee*], of &c., of the other part; WHEREAS by an indenture of settlement dated the —— day of ——, and made between [*parties*], the hereditaments hereinafter described and hereby demised, with other hereditaments, now stand limited to the uses and upon the trusts therein mentioned, under which the said [*lunatic*] is now tenant in tail in possession thereof, free from incumbrances; AND WHEREAS by an inquisition taken before [A. B.] Esquire, one of the masters in lunacy, on the —— day of ——, under a Commission of Lunacy duly issued for that purpose, the said [*lunatic*] was found to be a person of unsound mind; AND WHEREAS by an order of the Lords Justices of the Court of Appeal entrusted by the sign manual of her Majesty with the care and commitment and custody of idiots, lunatics, and persons of unsound mind and their estates, made on the —— day of ——, 18—, in the matter of "[*lunatic*], a person of unsound mind," it was ordered that the said [*committee*] should be the committee of the person and estate of the said [*lunatic*]; AND WHEREAS by an order of the said Lords Justices dated the —— day of ——, made in the matter of the said [*lunatic*], it was ordered that the sum

Parties.

Recitals: of settlement under which lunatic is tenant in tail in possession of settled lands;

of finding of lunacy;

of order appointing committee;

of order for raising money by mortgage;

(*x*) This precedent is suggested by the case of *Re Pares*, 2 Ch. D. 61, in which, under circumstances similar to those recited in the text, it was ordered that the committee should raise the money. The deed will require enrolment.

(*y*) Stamp, *ad valorem* on amount secured, *ante*, p. 988. Stamp.

XXVI. Mortgage by Committee of Lunatic Tenant in Tail.

of £—— should be raised by mortgage by demise for a term of —— years of the premises hereby demised, but without any power of sale, and that the equity of redemption should be reserved in manner hereafter appearing, and that it should be referred to the masters in lunacy to settle and approve of such mortgage, and that the said [*committee*] as such committee as aforesaid should, in the name and on behalf of the said [*lunatic*], execute and do such conveyance and things necessary for carrying the same into effect as the said masters should approve; AND WHEREAS the said [*mortgagee*] has agreed to lend to the said [*committee*] as such [*committee*] of the said [*lunatic*] as aforesaid, the sum of £—— upon the security of these presents; AND WHEREAS [C. D.], one of the masters in lunacy, has settled and approved of these presents as a proper mortgage of the premises pursuant to the said order of the —— day of ——, and in testimony of such his approval has signed his name in the respective margins of the first and second skins, and his name and allowance in the third and last skin hereof; AND WHEREAS the said [*mortgagee*], on the —— day of ——, duly paid the said sum of £—— into Court to the credit of the said lunacy, to an account entitled, &c., as appears by the certificate of the Paymaster-General. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said order, and in consideration of £—— so paid into Court as aforesaid, the payment whereof in manner aforesaid the said [*committee*] hereby acknowledges, the said [*lunatic*], acting by the said [*committee*] as such his committee as aforesaid, hereby demises, and, as beneficial owner, conveys, and the said [*committee*] as such committee as aforesaid hereby confirms unto said [*mortgagee*], ALL, &c. [*describe parcels*]; TO HOLD the same unto the said [*mortgagee*], his executors, administrators, and assigns, henceforth for the term of —— years freed and discharged, for the purpose of giving effect to this security, but not further or otherwise, from the estate tail of the said [*lunatic*] therein, and all estates in reversion, remainder, or otherwise, to take effect after determination or in defeazance of such estate tail, but SUBJECT to the proviso for redemption following, that is to say, That if the said [*committee*], or any person or persons entitled to the premises hereby demised, shall, on the —— day of ——, 18—, pay to the said [*mortgagee*], his executors, administrators, or assigns, the sum of £—— with interest thereon in the meantime at

of agreement for loan;

of master's approval of mortgage;

of payment of money advanced into court.

Testatum.

Demise of lands for —— years.

Proviso for redemption.

the rate of —— per cent. per annum, then the said [*mortgagee*], his executors, administrators, or assigns, shall surrender or otherwise assure the same premises unto the person or persons for the time being entitled to the same under or by virtue of the hereinbefore recited indenture of settlement as if these presents had never been made or executed. [*Proviso that after default in payment on the appointed day mortgagee shall be entitled to interest, ante*, p. 1045]. PROVIDED ALSO, and it is hereby declared, that no power of sale of the premises hereby demised, or any part thereof, shall be exercisable in respect of, or applied to this security under or by virtue of any statute, or otherwise howsoever. IN WITNESS, &c.

XXVI. **Mortgage by Committee of Lunatic Tenant in Tail.**

Interest to be payable after default.

Exclusion of power of sale.

XXVII. *MORTGAGE by* HUSBAND *and* WIFE *Married before the 1st of January, 1883, of* FREEHOLDS *belonging to the Wife and not being her Separate Property* (*y*).

THIS INDENTURE (*z*), made the —— day of——, 18—, BETWEEN [*husband*], of &c., and [*wife*] his wife, of the one part; and [*mortgagee*], of &c., of the other part; WHEREAS the said [*husband*] intermarried with the said wife on the —— day of ——, 1870, but no settlement was made on the occasion, or in consideration of the said marriage affecting any after-acquired property, of or to which the said [*wife*], or the said [*husband*] in her right, might thereafter become possessed, or entitled; AND WHEREAS [*wife's brother*], being

Parties.

Recitals: of marriage;

of wife's title;

(*y*) This deed will require acknowledgment by the wife. In a mortgage by a husband of his wife's leaseholds, where the property was acquired by her and the marriage took place before the 1st of January, 1883, her concurrence will not be required. The deed should contain recitals of the lease or its assignment to the wife, and of the marriage, and that no settlement affects the premises; the remainder of the mortgage may be in the form of an ordinary mortgage of leaseholds by the husband alone: see *ante*, Precedents IX. and X., pp. 1013, 1014. As to mortgages by married women of property which is their separate estate, see *ante*, p. 993, note (*a*).

Mortgage of wife's leaseholds.

(*z*) Stamp, *ad valorem* on amount secured, *ante*, p. 988.

Stamp.

XXVII. **Mortgage by Husband and Wife of Freeholds.**

of agreement for loan.

seised or possessed of the hereditaments hereby granted, died unmarried and intestate on the —— day of ——, 1880, leaving the said [*wife*], his only sister and heiress-at-law, him surviving; AND WHEREAS the said [*mortgagee*] has agreed to lend to the said [*husband*] and [*wife*] the sum of £——, upon having the repayment thereof, with interest at the rate hereinafter mentioned, secured in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of £—— now paid to the said [*husband*] and [*wife*] by the said [*mortgagee*], the receipt whereof the said [*husband*] and [*wife*] hereby acknowledge, the said [*husband*] and the said [*wife*] (so as to bind all separate estate and property to which she is or hereafter may become entitled, or over which she has now, or hereafter may have any power of disposal, under or by virtue of any statute or otherwise) do, and as a separate covenant each of them doth, hereby covenant with the said [*mortgagee*], that they the said [*husband*] and [*wife*], or their respective heirs, executors, or administrators, or some or one of them, will pay to the said [*mortgagee*], his executors, administrators, or assigns, on the —— day of ——, 18—, the sum of £——, with interest thereon in the meantime at the rate of —— per cent. per annum, and also as long after that day as any principal money shall remain due under this mortgage, will pay to the said [*mortgagee*], his executors, administrators, or assigns, interest thereon at the rate aforesaid, by equal half-yearly payments, on the —— day of —— and the —— day of —— in every year: AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreement, and for the consideration aforesaid, the said [*wife*], with the concurrence of the said [*husband*], hereby grants, and, as beneficial owner, conveys, and the said [*husband*] hereby grants, and confirms unto the said [*mortgagee*], ALL &c. [*describe parcels*], TO HOLD all the premises UNTO AND TO THE USE of the said [*mortgagee*], his heirs and assigns, SUBJECT to the proviso for redemption hereinafter contained: PROVIDED ALWAYS, that if the said [*husband*] and [*wife*], or their respective heirs, executors, administrators, or assigns, or some or one of them, shall, on the —— day of ——, 18—, pay to the said [*mortgagee*], his executors, administrators, or assigns, the sum of £——, with interest thereon at the rate aforesaid, then the said [*mortgagee*], his executors, administrators, or

Testatum.

Joint and several covenants by husband and wife for payment of principal and interest.

Second *Testatum.*

Grant of freeholds.

Proviso for redemption.

XXVII. Mortgage by Husband and Wife of Freeholds.

assigns will, at the cost of the person or persons requiring the same, reconvey the premises hereby granted unto the said [*wife*], her heirs and assigns, or as she or they shall direct: PROVIDED ALWAYS that, as between the said [*husband*], of the one part, and the said [*wife*], and the premises hereby granted, of the other part, the said [*husband*] shall be primarily liable for the principal moneys and interest intended to be hereby secured: BUT it is hereby expressly declared, that the proviso hereinbefore contained with respect to the primary liability of the said [*husband*] shall not affect the said [*mortgagee*], his executors, administrators, or assigns, or his or their right to have recourse to, and enforce all or any securities, or remedies for the recovery of the said principal monies and interest hereby secured, in such order and manner as he or they shall think fit. IN WITNESS, &c.

Proviso as to primary liability.

XXVIII. *MORTGAGE* (*z*) *of* FREEHOLDS *where the Money is advanced by Two* SEPARATE SETS *of* MORTGAGEES *in equal* SHARES — *One* SET *of*

(*z*) Where several persons contribute to advance money on the same estate, intending that none of them shall acquire any relative priority, the two most usual modes of effecting this object are either to limit to each an aliquot share of the estate, proportioned to his share of the money (as in the text), or for a mortgage of the entire estate to be made to both or all the lenders as joint tenants, or to a trustee or trustees for them (such trustees being either some of the persons advancing the money, or, which is preferable, strangers), with a declaration (as in the next precedent) that the mortgage-money is advanced by the several persons in question, in certain proportions; and this, it is obvious, is the more advisable method where the sums advanced are not easily reducible into aliquot shares, as moieties, thirds, &c., and also where the separate sums advanced are numerous, even though they may be easily reducible into aliquot shares. The two modes of mortgaging which have been suggested are attended with different consequences in several important particulars. In the first case, the deed operates as so many distinct mortgages, so as to enable each mortgagee to sell his share of the mortgaged premises or to foreclose in respect of his share. In the latter case, if the

Modes of proceeding where money is advanced by several.

XXVIII. **Contributory Mortgage of Land.**

Mortgagees *being* Trustees *advancing the Money on a* Joint Account.

Parties.

THIS INDENTURE (*a*), made the —— day of ——, 18—, Between [*mortgagor*], of &c., of the first part; [*mortgagee*], of &c., of the second part; and [*trustee-mortgagee*], of &c., and [*trustee-mortgagee*], of &c., of the third part,

Testatum.

WITNESSETH, that in consideration of the sum of £5000,

Covenant for payment of principal and interest to first set of mortgagees.

now paid to the said [*mortgagor*] by the said [*mortgagee*] (the receipt of which sum of £5000 the said [*mortgagor*] hereby acknowledges), the said [*mortgagor*] hereby covenants with the said [*mortgagees*], &c. [*Covenant for payment of principal sum of* £5000, *ante, p.* 994]: AND THIS INDENTURE ALSO WITNESSETH,

Second *Testatum.*

Covenant for payment of principal and interest to second set of mortgagees.

that in consideration of the further sum of £5000, now paid to the said [*mortgagor*] by the said [*trustee-mortgagees*] out of monies belonging to them on a joint account [*Similar receipt and covenant as to the other* £5000 *and interest*]: AND THIS INDENTURE ALSO WITNESSETH,

Third *Testatum.*

Conveyance of lands.

that in consideration of the premises, the said [*mortgagor*] grants and, as beneficial owner, conveys unto the said [*mortgagee*], [*trustee-mortgagee*], and [*other trustee-mortgagee*],

Habendum.

All those [*describe parcels*], To hold all the premises hereby granted as to one moiety unto and to the use of the said [*mortgagee*], his heirs and assigns, and as to the other moiety thereof, unto and to the use of the said [*trustee-mortgagees*], their heirs and assigns, but subject, as to both of the said moieties, to the proviso for redemption thereof respectively hereinafter contained:

Proviso for redemption.

Provided always, that if the said [*mortgagor*], his heirs, executors, or administrators shall, on the —— day of ——, 18—, pay to the said [*mortgagee*] the sum of £5000, and interest thereon at the rate aforesaid, and also pay to the said [*trustee-*

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mortgage is made to the several persons entitled to proportions of the money in their own names, all the persons entitled to the money must concur in a sale or foreclosure: see *Palmer* v. *Earl of Carlisle*, 1 Sim. & S. 423. If, however, the mortgage is made to a trustee or trustees for the lenders in the ordinary way, the trust for the lenders will not be disclosed, and accordingly the statutory powers of mortgagees as regards sale, &c., will be vested in such trustees.

In the above precedent the two sets of mortgagees advance the money and the property is conveyed to them in equal shares; it may easily be adapted to the case of two or more sets advancing money in unequal shares.

Stamp.

(*a*) Stamp, *ad valorem*, on each amount secured, *ante*, p. 988.

mortgagees], their executors, administrators, or assigns, the further sum of £5,000, with interest thereon at the rate aforesaid, then the entirety of the premises hereby granted shall, at the request and cost of the said [*mortgagor*], his heirs, executors, administrators, or assigns, be duly reconveyed to the said [*mortgagor*], his heirs or assigns, or as he or they shall direct [*Insert here any special covenants and provisions—e.g., declaration as to leasing power* (*b*), *ante*, p. 996, *&c.*]. In witness, &c.

XXVIII. Contributory Mortgage of Land.

XXIX. *DECLARATION of* Trust *of* Money Advanced *by* Several *sets of* Lenders, *on the* Security *of a* Mortgage *to* Trustees (*c*).

THIS INDENTURE (*d*) [*or* MEMORANDUM], made the —— day of ——, 18—, Between [*trustee*], of, &c., [*trustee*], of, &c., and [*trustee*], of, &c., of the first part, [A. B.], of, &c., of the second part; [C. D.], of, &c., and [E. F.], of, &c., of the third part; [G. H.], of, &c., and [J. K.], of, &c., of the fourth part; and [L. M.], the wife of [N. M.], of, &c., of the fifth part; Whereas by an indenture bearing even date with but executed before these presents and made between [*mortgagor*] of the one part, and the said [*trustees*] of the other part, In consideration of the sum of £10,000 paid to the said [*mortgagor*] by the said [*trustees*] out of money expressed to be belonging to them on a joint account, the said [*mortgagor*] conveyed certain messuages and hereditaments situate in the parish of ——, in the county of ——, therein particularly described, Unto and to the use of the said [*trustees*], their heirs and assigns, Subject to a proviso for redemption thereof on payment by the said [*mortgagor*], his heirs, executors, administrators, or assigns, to the said [*trustees*], their executors, administrators, or assigns, of the sum of £10,000, with interest thereon in the meantime at the rate of —— per cent. per

Parties.

Recitals: of mortgage;

(*b*) If the mortgagor's statutory powers of leasing are excluded, the concurrence of all the mortgagees will be necessary to the validity of the leases of the premises, which may cause inconvenience.

(*c*) See *ante*, p. 1055, note (*z*).

(*d*) Stamp 10*s.*; or if the declaration is not under seal, then 6*d*. Stamp.

XXIX. **Declaration of Trust of Separate Sums Advanced.**

annum on the —— day of ——, 18—; And whereas the said sum of £10,000 in the hereinbefore recited indenture expressed to have been advanced by the said [*trustees*] out of monies belonging to them on a joint account was in fact contributed by the several persons, and in the proportions or sums following, that is to say, the sum of £4,000, part thereof, by the said [A. B.], and the sum of £3,000 further part thereof, by the said [C. D.] and [E. F.] out of monies belonging to them as the trustees of an indenture of settlement, dated the —— day of ——, 18—, and made between [*parties*], being the settlement made in consideration of the marriage of [*husband*] and [*wife*]; And the sum of £2,000 by the said [G. H.] and [J. K.], the executors and trustees named in the will dated, &c., and proved, &c., of [*testator*], of, &c., deceased, and the sum of £1,000, the residue of the said sum of £10,000 by the said [L. M.] out of monies forming part of her separate estate;

of contribution of moneys advanced;

of agreement for declaration of trust.

And whereas the said [*trustees*] have accordingly, at the request of the several persons by whom the said sum of £10,000 was so contributed as aforesaid, agreed to make and execute such declaration of trust as is hereinafter contained: NOW THIS INDENTURE WITNESSETH [*or*, NOW THESE PRESENTS WITNESS] that in pursuance of the said agreement and in consideration of the premises, the said [*trustees*] hereby declare that they and the [survivors and] survivor of them, and the executors, administrators of such survivor, and their or his assigns, shall henceforth stand possessed of and interested in the said principal sum of £10,000 secured by the hereinbefore recited indenture of mortgage and the interest thereon upon the trusts following, that is to say: Upon trust out of the monies which shall be received from them from time to time under the said mortgage in the first place to pay thereout all their costs, charges, and expenses of and incident to the demanding, recovering, and enforcing payment of the same monies, and of the execution of the trusts of these presents; And subject thereto on trust rateably and *pari passu* for the several persons by whom the said sum of £10,000 was contributed, or their respective executors, administrators, or assigns, according and in proportion to the several sums so contributed and advanced by them respectively as aforesaid: And it is hereby further declared that the said [*trustees*], and the [survivors and] survivor of them and the executors

Testatum.

Declaration of trust of aggregate sum secured.

Declaration of trust of mortgaged premises.

and administrators of such survivor (*d*), and their or his assigns, shall stand and be seised of and interested in the hereditaments comprised in the hereinbefore recited indenture of mortgage, subject to the proviso for redemption therein subsisting, and of all other securities for the payment of the said principal sum of £10,000, and interest thereon, IN TRUST for the said several persons by whom the said principal sum of £10,000 was contributed according and in proportion to the sums contributed and advanced by them respectively: PROVIDED ALWAYS, and it is hereby further declared, that the power of sale and other powers vested by statute in mortgagees, except powers of leasing and agreeing to lease or let, shall be forthwith exerciseable and put in force upon the request in writing of any of the said several persons by whom the said principal sum of £10,000 was so contributed as aforesaid, or of any other person or persons for the time being entitled to the whole or a part or share of any of the several sums so contributed as aforesaid: PROVIDED ALWAYS, that it shall be lawful for the said [*trustees*], and the [survivors and] survivor of them, and the executors and administrators of such survivor, and their or his assigns, to exercise the powers of leasing and agreeing to lease or let vested by statute in mortgagees in possession as and when they shall in their discretion think proper. IN WITNESS, &c.

XXIX. Declaration of Trust of Separate Sums Advanced.

Proviso as to exercise of powers of sale, &c.

Powers of leasing to be exercised by trustees at discretion.

XXX. *MORTGAGE of an undivided* SHARE *of* COPYHOLDS *by one of two Tenants in Common.*

THIS INDENTURE (*e*), made the —— day of ——, 18—, BETWEEN [*mortgagor*], of, &c., of the one part, and [*mortgagee*], of, &c., of the other part; WHEREAS [*testator*], late of, &c., deceased, duly made and executed his will, dated, &c., and proved, &c., and thereby (among other things) gave and devised the copyhold hereditaments hereinafter described unto [*wife*] his wife for her life, and from and after her decease unto his two sons [A. B.] and the said [*mortgagor*],

Parties.

Recitals: of will devising copyholds to wife for life with remainder to sons as tenants in common;

(*d*) Not the "*heirs* and assigns of," &c., see sect. 30 of the Conveyancing and Law of Property Act, 1881: *ante*, p. 965.

(*e*) As to stamp, see *ante*, p. 1008, note (*ff*). Stamp.

XXX. Mortgage of Undivided Share of Copyholds.

their heirs and assigns, in equal shares as tenants in common; And whereas the said [*testator*] died on the —— day of ——, 18—, seised of or otherwise entitled to the said copyhold hereditaments in customary fee simple, according to the custom of the manor of —— in the county of ——, of which the same are holden, and leaving his said wife and two sons him surviving; And whereas the said [*wife*] died on the —— day of ——, 18—; And whereas the said [*mortgagee*] has agreed to lend to the said [*mortgagor*] the sum of £——, upon having the repayment thereof with interest at the rate hereinafter mentioned, secured in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £—— now paid to the said [*mortgagor*] by the said [*mortgagee*], the receipt whereof the said [*mortgagor*] hereby acknowledges, the said [*mortgagor*] hereby covenants [*covenant for payment of principal and interest, ante*, p. 994]: AND THIS INDENTURE ALSO WITNESSETH that, in further pursuance of the said agreement, and for the consideration aforesaid, the said [*mortgagor*] covenants with the said [*mortgagee*] that he the said [*mortgagor*], and all necessary parties will forthwith surrender into the hands of the lord or lady of the said manor, and as beneficial owner conveys unto the said [*mortgagee*], All that the one equal moiety to which he is entitled as aforesaid under the hereinbefore recited will of the said [*testator*], of and in all and singular, &c. [*describe parcels*], to the use of the said [*mortgagee*], his heirs and assigns, according to the custom of the said manor, and by and under the rents, fines, suits and services therefor due and of right accustomed, but subject to a proviso for avoiding such surrender on payment by the said [*mortgagor*], his executors, administrators or assigns to the said [*mortgagee*], his executors, administrators or assigns, on the —— day of ——, 18—, of the sum of £——, with interest thereon in the meantime at the rate of —— per cent. per annum [*Covenant to pay fines, &c.*, "in respect of the said share," *ante*, p. 1010; *and any other provisoes and covenants as to reduction of interest, mode of repayment of principal, leasing powers, &c., which may be desired*]: Provided always, and it is hereby agreed that the statutory

of death of testator;

of death of testator's wife;

of agreement for loan;

Testatum.

Covenant for payment of principal and interest.

Second *Testatum.*

Covenant for conditional surrender of share of copyholds.

Covenants to pay fines, &c.

Proviso empowering mortgagee to concur in enfranchisement (*f*) or partition.

(*f*) As to enfranchisement of copyholds by mortgagees: see the Copyholds Act, 1852 (15 & 16 Vict. c. 51), sect. 43.

XXX. Mortgage of Undivided Share of Copyholds.

powers of sale, leasing, and appointing receivers may be exercised by the said [*mortgagee*], his executors, administrators, or assigns, either in relation to the said moiety hereby covenanted to be surrendered alone, or, if he or they shall so think fit, in relation to the entirety of the premises hereinbefore described, with the concurrence of the other person or persons for the time being seised, or possessed of, or interested in other moiety of the same premises, or any undivided part or share thereof: PROVIDED ALSO that either for the purpose of enabling the said [*mortgagee*], his executors, administrators or assigns, more advantageously to effect a sale of the said hereditaments and premises, or to possess and receive the rents and profits thereof under these presents, it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, at any time after his or their statutory power of sale shall have become exercisable, if he or they shall so think fit, to concur with the other person or persons for the time being seised or possessed of or interested in the other moiety of the premises hereinbefore described, or any undivided part or share thereof, in obtaining or procuring the enfranchisement of the same premises or any part thereof, or in making partition thereof, amongst the several persons entitled thereto, or interested therein, and to take and institute any proceedings, and to make and execute all deeds, instruments, or conveyances for the purpose of effecting or carrying out such enfranchisement or partition, and to pay any sum or sums of money for enfranchisement, or for equality of partition; and all and every such sum or sums of money, as well as all costs, and charges which shall be expended or incurred in or about any such sale, lease, agreement, appointment, enfranchisement, or partition as aforesaid, shall from the time when the same shall respectively be expended and paid, be added to the principal monies hereby secured, and shall, with interest thereon at the rate, and payable at the times and in manner aforesaid, be a charge upon the said moiety hereby covenanted to be surrendered: and from and after every such partition, the hereditaments which shall be allotted and conveyed in severalty to the said [*mortgagee*], his heirs or assigns, shall be subject in all respects to the security and the powers and provisions hereinbefore contained. IN WITNESS, &c.

Costs of partition or enfranchisement to be added to debt.

XXXI. *CONVEYANCE of* FREEHOLDS *by direction of a* PURCHASER *to a* MORTGAGEE *advancing part of the* PURCHASE-MONEY.

Parties.

Recitals: of contract for purchase;

of agreement for loan.

Testatum.

Covenant by purchaser for payment of principal and interest.

Second *Testatum.*

Conveyance of lands by vendor to mortgagee.

Habendum.

THIS INDENTURE (*g*), made the —— day of ——, 18—, BETWEEN [*vendor*], of, &c., of the first part; [*purchaser*], of, &c., of the second part; and [*mortgagee*], of, &c., of the third part; WHEREAS the said [*purchaser*] lately agreed to purchase from the said [*vendor*] the hereditaments hereinafter described in fee simple free from incumbrances, at the price of £2,000; AND WHEREAS the said [*purchaser*] has applied to the said [*mortgagee*] for an advance of the sum of £1,000 to enable him to complete the said purchase, which sum he the said [*mortgagee*] has agreed to advance upon having the repayment thereof, with interest at the rate hereinafter mentioned, secured in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement in this behalf, and in consideration of the sum of £1,000 now paid to the said [*vendor*] by the said [*mortgagee*], at the request and by the direction of the said [*purchaser*], (the receipt and payment whereof the said [*vendor*] and [*purchaser*] respectively acknowledge), the said [*purchaser*] hereby covenants, &c. [*covenant to pay principal and interest, ante*, p. 994]: AND THIS INDENTURE ALSO WITNESSETH that, in further pursuance of the said agreement in this behalf and for the consideration aforesaid, and also in consideration of the further sum of £1,000 now paid to the said [*vendor*] by the said [*purchaser*], the receipt of which sum of £1,000, making together with the said sum of £1,000 so paid by the said [*mortgagee*] as aforesaid, the aggregate sum of £2,000, the said [*vendor*] hereby acknowledges, the said [*vendor*], at the request and by the direction of the said [*purchaser*] hereby grants, and, as beneficial owner, conveys unto the said [*mortgagee*] ALL, &c. [*describe parcels*], TO HOLD the

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Stamp.

(*g*) Stamp, *ad valorem*, as a conveyance by way of sale, on the total amount of the purchase-money (see *post*, tit. PURCHASES), and also as a mortgage on the amount advanced by the mortgagee: see *ante*, p. 988.

This transaction may, if preferred, be effected by means of two deeds, viz. (1) a conveyance by way of sale by the vendor to the purchaser, and (2) a mortgage in the ordinary form by the purchaser to the mortgagee. The stamp-duty will be the same in either case.

premises UNTO AND TO THE USE of the said [*mortgagee*], his heirs and assigns: SUBJECT to the proviso for redemption, following, that is to say, that if the said [*purchaser*], his heirs, executors, administrators, or assigns, shall, on the —— day of ——, 18—, pay to the said [*mortgagee*], his executors, administrators, or assigns, the sum of £1,000, with interest for the same in the meantime at the rate of —— per cent. per annum, then the premises shall, at the request and cost of the said [*purchaser*], his heirs or assigns, be conveyed to him or them, or as he or they shall direct. [*Insert here, if desired, proviso excluding mortgagor's leasing powers, ante,* p. 996; *or any other special covenants or provisions.*] IN WITNESS, &c.

XXXI. Conveyance of Freeholds to Person Advancing Purchase-money.

Proviso for redemption.

XXXII. *MORTGAGE of* LAND *to secure a* RE-TRANSFER *of* STOCK, *and* PAYMENT *in the meantime of* SUMS *equal to the* DIVIDENDS (*h*).

THIS INDENTURE (*i*), made the —— day of ——,

(*h*) This precedent is adapted to a family or friendly arrangement. It is obvious that the transaction contemplated is one intended entirely as an accommodation to the mortgagor; the mortgagees gain no advantage whatever, inasmuch as they receive no more by way of interest than they would have been entitled to receive as dividends if they had not sold the stock; and they may, not improbably, find that they have obtained a less satisfactory security. It has not unfrequently happened that trustees not having an express power to advance the trust funds to a *cestui qui trust* have so accommodated him on the security of a stock mortgage: but it must be borne in mind that trustees advancing money on such security do so at their own risk, for such a mortgage is not a proper investment of trust funds unless expressly authorised by the instrument creating the trust: *Whitney* v. *Smith*, L. R. 4 Ch. A. 513.

Whether trustees may lend on a stock mortgage.

In *Pell* v. *De Winton*, 5 De G. & J. 13, a mortgage was made for securing the re-transfer of a sum of stock to the trustees of a will; a third share in the stock afterwards became vested in the trustees of a marriage settlement, who had power to give receipts, to invest in government or real securities, and to vary investments; part of the mortgaged estate was afterwards sold for less than the value of the stock lent, and a third of the purchase-money was paid to the trustees of the settlement: it was held that the estate was not discharged.

(*i*) Stamp, *ad valorem* on value of stock to be replaced: see the Stamp Act, 1870, sect. 106, *ante*, p. 989.

Stamp.

XXXII. **Mortgage to Secure Stock and Dividends.**

18—, BETWEEN [*mortgagor*], of the one part, and [*mortgagee*], of, &c., and [*mortgagee*], of, &c., of the other part. WITNESSETH, that, in consideration of the said [*mortgagees*] having, at the request of the said [*mortgagor*], sold the sum of £—— £3 per Cent. Consolidated Bank Annuities, and having this day paid to the said [*mortgagor*] the sum of £——, being the net proceeds of such sale, which sum of stock and the proceeds of the sale thereof respectively belonged to them on a joint account, and of which sum of £—— the said [*mortgagor*] hereby acknowledges the receipt, the said [*mortgagor*] hereby covenants with the said [*mortgagees*] that he the said [*mortgagor*], his heirs, executors, or administrators, will, at his or their own cost, on or before the —— day of ——, 18—, transfer into the names of the said [*mortgagees*], their executors, administrators, or assigns, the sum of £—— £3 per Cent. Consolidated Bank Annuities; AND will in the meantime pay to the said [*mortgagees*], their executors, administrators, or assigns, such sums of money as they would have been entitled to receive by way of dividends in respect of the said sum of £—— £3 per Cent. Consolidated Bank Annuities so sold by them as aforesaid if the same annuities had not been sold, at such times and in such manner as such dividends would have been payable; AND will also, if the said sum of £—— £3 per Cent. Consolidated Bank Annuities, or any part thereof, shall not be transferred into the names of the said [*mortgagees*], their executors, administrators, or assigns, on or before the —— day of ——, 18—, pay to the said [*mortgagees*], their executors, administrators, or assigns, so long as the same sum of stock or any part thereof shall remain unreplaced and to be transferred into their names, such sums of money as they would have been entitled to receive by way of dividends whether before or after the —— day of —— aforesaid, in respect of the said sum of £—— £3 per Cent. Consolidated Bank Annuities so sold by them as aforesaid, if the same annuities had not been sold, or in respect of so much thereof as shall not for the time being have been transferred, then by half-yearly payments at the times and in manner appointed for payment of dividends in respect of the like annuities: AND THIS INDENTURE ALSO WITNESSETH [*Conveyance of freeholds, ante*, p. 997]: PROVIDED ALWAYS, that if the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall, on the ——

Parties.

First *Testatum.*

Covenant to retransfer stock on fixed day;

and meanwhile to pay sums equal to dividends;

and after default to pay sums equal to dividends.

Second *Testatum.*

Proviso for redemption.

XXXII. Mortgage to Secure Stock and Dividends.

day of ——, 18—, transfer into the names of the said [*mortgagees*], their executors, administrators, or assigns, the said sum of £—— £3 per Cent. Consolidated Bank Annuities, and shall in the meantime pay to them such sums of money as they or he would have been entitled to receive by way of dividends in respect of the same annuities, if the same had not been sold, at the times and in manner appointed for payment of dividends in respect of the like annuities, then the said [*mortgagees*], their executors, administrators, or assigns, will, at the request and cost of the said [*mortgagor*], his heirs, executors, administrators, or assigns, reconvey the lands hereby granted, unto the said [*mortgagor*], his heirs and assigns, or as he or they shall direct (*k*). [*Here insert any special provisions* (*l*).] In witness, &c.

XXXIII. *MORTGAGE to secure a* Retransfer *of* Stock, *and* Payment *of* Interest *on the value of the Stock.* Option *for* Mortgagee *to require* Payment *of* Value *of the* Stock *at the time of the Advance.* Proviso *for regulating* Rate *of* Interest *by the* Price *of* Stock (*m*).

THIS INDENTURE (*n*), made the —— day of ——, 18—, Between [*mortgagor*], of, &c., of the one part, and [*mortgagee*], of, &c., of the other part; Whereas the said [*mortgagee*] has agreed to lend to the said [*mortgagor*] the sum of £——, being the proceeds of the sale of a sum of £—— £3 per Cent. Consolidated Bank Annuities lately standing in the name of the said [*mortgagor*], upon having the transfer into

Parties.

Recital of agreement for loan.

(*k*) This precedent may be adapted to the case of a mortgage of copyholds, leaseholds, or other property; the proviso for redemption will require, in such cases, some obvious alterations.

(*l*) By sect. 2 (vi.), of the Conveyancing Act, 1881, "Mortgage" includes a charge for securing "money's worth." The statutory powers of sale, &c., given to mortgagees by that Act therefore apply to stock mortgages.

(*m*) See note (*h*) to Precedent XXXII., *ante*, p. 1063.

(*n*) Stamp, *ad valorem* on value of stock to be replaced, *ante*, p. 989. Stamp.

XXXIII. **Mortgage to Secure Stock and Interest.**

his name of a sum of £—— like annuities, and the payment of interest, at the rate hereinafter mentioned, on the sum of £——, the proceeds of the said sale secured in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of £—— this day paid to the said [*mortgagor*] by the said [*mortgagee*], (the receipt whereof the said [*mortgagor*] hereby acknowledges), the said [*mortgagor*] covenants with the said [*mortgagee*] that he the said [*mortgagor*], his heirs, executors, or administrators will, at his or their own cost, on or before the —— day of ——, 18—, transfer into the name of the said [*mortgagee*], his executors, administrators, or assigns, the sum of £—— £3 per Cent. Consolidated Bank Annuities; AND will also then pay to him or them interest in the meantime at the rate of —— per cent. per annum on the sum of £—— [*proceeds of sale of stock*]; AND will also, if the said sum of £—— £3 per Cent. Consolidated Bank Annuities, or any part thereof, shall not be transferred into the name of the said [*mortgagee*], his executors, administrators, or assigns, on or before the —— day of ——, 18—, pay to the said [*mortgagee*], his executors, administrators, or assigns, so long as the same sum of stock or any part thereof shall remain unreplaced and to be transferred into his or their names, interest at the rate aforesaid on the said sum of £—— [*proceeds of sale of stock*], or on such proportionate part thereof as shall for the time being remain unsatisfied by reason of a proportionate part of the said sum of £—— £3 per Cent. Consolidated Bank Annuities remaining then unreplaced and to be transferred as aforesaid, by equal half-yearly payments on the —— day of ——, and the —— day of ——, in every year: AND THIS INDENTURE ALSO WITNESSETH [*Conveyance of Freeholds, ante*, p. 995]. PROVIDED ALWAYS, that if the said [*mortgagor*], his heirs, executors, administrators, or assigns shall, on the —— day of ——, 18—, transfer into the name or names of the said [*mortgagee*], his executors, administrators, or assigns, the said sum of £—— £3 per Cent. Consolidated Bank Annuities, and shall then pay to him or them interest at the rate aforesaid on the said sum of £—— [*proceeds of sale of stock*] computed from the date of these presents, then, &c. [*ut ante*, p. 1065]; PROVIDED ALWAYS, and the said [*mortgagor*] hereby covenants with the said [*mortgagee*] that it shall be lawful for the said

First *Testatum.*

Covenant to transfer stock;

to pay interest on amount of advance.

Second *Testatum.*

Conveyance.

Proviso for redemption.

Proviso giving mortgagee option to

XXXIII. Mortgage to Secure Stock and Interest.

[*mortgagee*], his executors, administrators, or assigns (if he or they shall so prefer or think fit), by notice pursuant to the regulations respecting notices contained in the 67th section of the Conveyancing and Law of Property Act, 1881, to require the said [*mortgagor*], his heirs, executors, or administrators, instead of transferring into the name or names of the said [*mortgagee*], his executors, administrators, or assigns, the said sum of £—— £3 per Cent. Consolidated Bank Annuities, pursuant to the covenant in that behalf hereinbefore contained, to pay to him or them the sum of £—— [*proceeds of sale of stock*], being the present value of the annuities so sold as aforesaid, or such lesser sum as shall be proportionate to the annuities for the time being remaining unreplaced, and to be transferred as aforesaid, and thereupon and in that case the said [*mortgagor*], his heirs, executors, or administrators will, instead of transferring the said annuities as aforesaid, pay to the said [*mortgagee*], his executors, administrators, or assigns, the said sum of £—— [*proceeds of sale*] or such proportionate sum as aforesaid, and interest thereon at the rate and in manner aforesaid, and upon such payment only the premises hereby conveyed shall be redeemable and reconveyed accordingly, anything hereinbefore contained to the contrary notwithstanding: PROVIDED ALWAYS, that any such notice as aforesaid shall be given to or left for the said [*mortgagee*], his heirs, executors, or administrators, not less than —— days previously to the —— day of ——, 18—, or to the day appointed for calling in or paying off the mortgage debt intended to be hereby secured, as the case may be: [PROVIDED ALWAYS that if during such time as the said sum of £—— [*proceeds of sale of stock*], or any part thereof, shall remain due on the security of these presents the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall by half-yearly payments on the —— day of —— and the —— day of —— in every year, or within —— calendar months after each of the said days respectively pay unto the said [*mortgagee*], his executors, administrators, or assigns (without deduction, except the property or income tax), interest for the said sum of £——, or for so much thereof as shall for the time being remain due, after the rate hereinafter mentioned, that is to say, if during any half-year ending on the —— day of —— or the —— day of —— (as the case may be) the average price of £—— £3 per Cent. Consolidated Bank Annuities

require payment of value of stock at time of advance.

Proviso for regulating rate of interest by the price of stock.

XXXIII. **Mortgage to Secure Stock and Interest.**

shall exceed £——, then after the rate of —— per cent. per annum; and if during any half-year ending as aforesaid the average price of £—— £3 per Cent. Consolidated Bank Annuities shall exceed £——, but shall not exceed £——, then after the rate of —— per cent. per annum; and if during any half-year ending as aforesaid the average price of £—— £3 per Cent. Consolidated Bank Annuities shall exceed £——, but shall not exceed £——, then after the rate of —— per cent. per annum; then and in every such case the said [*mortgagee*], his executors, administrators, and assigns, shall accept such rate of interest as aforesaid in lieu of interest after the rate of —— per cent. per annum, anything hereinbefore contained to the contrary notwithstanding]. IN WITNESS, &c.

XXXIV. *MORTGAGE of* FREEHOLD *Lands to the* TRUSTEES *of a* BANKING COMPANY *to secure* BALANCE *of* ACCOUNT CURRENT (*o*).

Parties.

THIS INDENTURE, (*p*) made the —— day of ——, 18—, BETWEEN [*mortgagor*], of, &c., of the one part, and [*trustee*], of, &c., and [*trustee*], of, &c., the Trustees of the —— Banking Company, of the other part; WHEREAS the said [*mortgagor*] keeps a banking account with the said —— Banking Company, and has become indebted to the same Company in the sum of £—— on the balance of the said banking account; AND WHEREAS the said [*mortgagor*] has agreed at the request of the Board of Directors of the said Company to secure in manner hereinafter appearing the payment of all monies which now are or may from time to time hereafter become due from the said [*mortgagor*], whether solely or together with any person or persons who may be or become a partner or partners with him in the trade or business of a [baker] carried on by him at ——, aforesaid, in account

Recitals: of account and debt;

of agreement for securing balance of account current.

(*o*) As to mortgages to bankers, see *ante*, p. 852. And as to mortgages to secure floating balances, see *Melland* v. *Grey*, 2 Y. & C. C. C. 199; *Johnson* v. *Bourne*, 2 Y. & C. C. C. 268; *Re Meadows*, 5 Jur., N. S. 421.

Stamp.

(*p*) Stamp, *ad valorem* on amount named as maximum limit of advance, *ante*, pp. 988, 989.

XXXIV. Mortgage to Secure Balance of Account Current.

current with the said Company, whoever may be the persons for the time being constituting or composing or concerned or engaged in the said Company, and under whatever style or firm the banking business now carried on by the said Company may be carried on, but with such restriction as is hereinafter contained as to the amount of the money to be so secured, or ultimately recoverable upon such security, the same being intended as a guarantee to the amount hereinafter specified of a final balance or account current between the said [*mortgagor*], either solely or together with such person or persons as aforesaid and the said Company: NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration of the premises the said [*mortgagor*] hereby covenants with the said [*trustees*] that he the said [*mortgagor*], his heirs, executors, or administrators, will, within —— days after a request in writing by a Board of Directors for the time being of the said Company, or by any person or persons authorised by such Board, shall have been given personally to him, them, or any of them, or left for or posted in a prepaid letter to him, them, or any of them, at his or their usual or last known place or places of abode or business at —— aforesaid (such request to be effectual notwithstanding that any person or persons to or for whom the same may be given, left, or posted may be under any disability) pay unto the said Company, or to their cashier, or other proper officer, all and every the sums or sum of money which now are or is or may from time to time hereafter become due from the said [*mortgagor*], whether solely, or together with any such person or persons as aforesaid, in account current with the said Company, whether for money paid and advanced or upon any cheques, promissory notes, or bills of exchange, drawn, accepted, or endorsed by the said [*mortgagor*], or which shall have been paid to his credit, either solely or together with any such person or persons as aforesaid, or for interest, commission, and customary banker's charges, or otherwise howsoever, such interest to be ascertained half-yearly on the —— day of —— and the —— day of —— in every year, and if then unpaid to be added to the principal monies hereby secured: AND will pay interest after the rate of —— per cent. per annum as from the day of such request as aforesaid until actual payment of the sums or sum to be paid pursuant to such request:

Testatum.

Covenant for payment on demand of moneys due on account current.

To pay interest till payment.

XXXIV. **Mortgage to Secure Balance of Account Current.**

AND THIS INDENTURE ALSO WITNESSETH that in further pursuance of the said agreement and in consideration of the premises the said [*mortgagor*] [*Conveyance of freeholds, ante*, p. 997]: PROVIDED ALWAYS that if all and every the sums of money hereinbefore by the said [*mortgagor*] covenanted to be paid shall be paid conformably to the covenant by the said [*mortgagor*] hereinbefore contained, then they the said [*trustees*], their executors, administrators, or assigns, will at any time thereafter at the request and cost of the said [*mortgagor*], his heirs, executors, administrators, or assigns, re-convey the premises to the [*mortgagor*], his heirs and assigns, or as he or they shall direct: [*Covenant by mortgagor to insure, ante*, p. 996: *and restriction on leasing powers, ante*, p. 996, *if desired*]: PROVIDED ALWAYS, and it is hereby agreed, that the power of sale conferred on mortgagees by the Conveyancing and Law of Property Act, 1881, shall apply to this security, subject to the provisions in relation to the exercise of such power contained in the said Act in all respects, except so far as is hereby otherwise provided: PROVIDED ALWAYS that for the purposes of the exercise of such statutory power of sale the mortgage monies intended to be hereby secured shall be deemed to have become due immediately upon the execution of these presents: PROVIDED ALSO that the power of sale conferred by the said Act shall be exerciseable if default shall be made in payment of the mortgage monies, or any part thereof, for one calendar month after such request for payment shall have been given or left as aforesaid: PROVIDED ALSO that such power of sale shall be exerciseable by the persons or person who shall for the time being be the trustees or trustee of the said Company, and upon any sale or sales under or by virtue of such power, the purchaser or purchasers shall be entitled to assume that the persons or person who shall execute the conveyances as trustees or trustee for and on behalf of the said Company are or is actually such trustees or trustee for the time being, and shall not be bound, concerned or entitled to make any requisition, inquiry, or objection as to the propriety or regularity of the appointment of such persons or person to be such trustees or trustee: PROVIDED ALWAYS that these presents shall be a security for the balance of account due on account current between the said [*mortgagor*], either solely or together with any such person or persons as aforesaid, and the said Company, whoever may be the persons

Second *Testatum.*

Conveyance of freeholds.

Proviso for redemption.

Provisoes as to application of statutory power of sale.

Proviso that future members of the Company shall be entitled to benefit of security.

XXXIV. Mortgage to Secure Balance of Account Current.

for the time being constituting or composing or concerned or engaged in the said Company, and under whatever style or firm he banking business now carried on by the said Company may be carried on: PROVIDED ALSO that the receipt of the manager or principal cashier of the said Company, or of any other person duly authorised for that purpose, shall be a sufficient discharge for any monies paid under or by virtue of this security: PROVIDED LASTLY, and it is hereby agreed, that the total amount of the monies hereby secured, or to be ultimately recoverable hereunder, shall not exceed the sum of £——, this present security being intended as a guarantee of a final balance of account current between the said [*mortgagor*], whether solely or together with such person or persons as aforesaid, and the said Company, but not exceeding in the whole the sum of £——. IN WITNESS, &c.

Receipt clause.

Proviso limiting the amount to be recovered under the security.

XXXV. *MORTGAGE of FREEHOLDS or* COPYHOLDS *to a* BENEFIT BUILDING SOCIETY, *incorporated under the* BUILDING SOCIETIES ACT, 1874, *to secure* SUBSCRIPTIONS *and* REDEMPTION MONEY, &c. (*q*).

THIS INDENTURE (*s*), made the —— day of ——, 18—, BETWEEN [*mortgagor*], of, &c. (hereinafter called the mortgagor), of the one part, and the —— Benefit Building Society (hereinafter called the society), incorporated under the Building Societies Act, 1874, and having its chief offices at, &c., of the other part (*t*); WHEREAS

Parties (*r*).

Recitals: of mortgagor's title;

(*q*) As to mortgages to benefit building societies, see *ante*, p. 857. If the society advancing the money is not incorporated under the Act of 1874, the mortgage must be taken in the names of trustees.

(*r*) See the interpretation clause at the end of the precedent. This mode of defining the parties may be convenient in the case of these mortgages, as it is usual for the solicitors of building societies, after having settled their form of mortgage, to keep printed or lithographed copies in stock for use as occasion arises.

(*s*) Stamp, *ad valorem* on amount secured, *ante*, p. 988.

Stamp.

(*t*) If the mortgaged property is copyhold, the surrender is made to trustees for the society: see sect. 28 of the Act of 1874. In

Mortgage of copyholds;

XXXV. **Mortgage to Building Society.**

by an indenture, dated the —— day of ——, 18—, and made between [*parties*], the hereditaments hereby conveyed were assured to the use of the mortgagor, his heirs and assigns; AND WHEREAS the mortgagor is a member of the society, and is now the holder of —— shares therein of £—— respectively, and numbered —— and —— respectively; AND WHEREAS it has been agreed that the society shall, under the rules thereof, make an advance to the mortgagor of the sum of £——, in respect of each of his said shares therein, making the aggregate sum of £——, upon his executing such mortgage as is hereinafter contained, for securing to the society the payment under the said rules of the monthly subscriptions, fines, premiums, and other monies hereinafter mentioned: NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £——, being the full amount of £—— in respect of each of the said —— shares, of which the mortgagor is the holder as aforesaid, now paid to the mortgagor out of the funds of the society, (the receipt of which sum of £—— the mortgagor hereby acknowledges), the mortgagor hereby grants, and, as beneficial owner, conveys unto the said society ALL, &c. [*describe parcels*]; TO HOLD the same UNTO AND TO THE USE of the society: SUBJECT nevertheless to redemption, when and so soon as all payments hereinafter mentioned, and cove-

of subscription for shares;

of agreement for advance.

Testatum.

Conveyance of freeholds subject to right of redemption (*u*).

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to building society.

that case the parties will be the mortgagor of the first part, the society of the second part,

"And [*trustee*], of, &c., and [*trustee*], of, &c., the trustees of the said society of the third part."

A recital of the admission of the mortgagor will be substituted for the first recital given in the text.

Covenant to surrender copyholds.

(*u*) If the property is copyhold the conveyance will run as follows:—

"The mortgagor hereby covenants with the society, that he the mortgagor, and all other necessary parties, will forthwith, at his or their own cost, surrender into the hands of the lord or lady of the said manor, and, as beneficial owner, conveys unto the said [*trustees*], ALL, &c. [*describe parcels*]; TO THE USE OF the said [*trustees*], their heirs and assigns, according to the custom of the said manor, SUBJECT to the rents, fines, suits, and services therefor due and of right accustomed; AND ALSO SUBJECT to a condition for avoiding such surrender, when and so soon as all payments," &c.

XXXV. **Mortgage to Building Society.**

nanted to be made in respect of the said —— shares shall have been made, and the rules and regulations for the time being of the society in regard to such shares shall have been observed and performed according to the covenants herein contained; AND IT IS HEREBY AGREED AND DECLARED that, in case default shall be made in any of the said payments, or in the observance or performance of any of the said rules and regulations in regard to the said shares, or any of them, for any consecutive —— monthly meetings of the society after the date of these presents, or if the mortgagor shall become bankrupt, or enter into any statutory or other composition or arrangement with his creditors generally, then, and in any of such events as aforesaid, it shall be lawful for the society at any time thereafter, when, and as they in their discretion shall think fit, to exercise and do all the powers and acts following, that is to say: To demand from the mortgagor the immediate payment of the full amount which, at the date of such demand, would be necessary for the redemption of this mortgage, in accordance with the rules and bye-laws of the society, or to enter into possession and receive the rents and profits of the premises hereby conveyed, or to appoint, and from time to time to remove and re-appoint, a person to collect and receive the same at such per-centage for his services as the society shall think reasonable, or to demise the premises, or any part thereof, for such terms and on such conditions as the society shall deem proper or expedient, or complete any unfinished buildings upon the premises, or repair the premises when and as the society shall deem necessary or expedient, or insure any buildings upon the premises in such sums as the society shall deem expedient, or pay all [the chief or other rents and] rates and taxes and all costs, charges, expenses, and outgoings incurred or payable in respect of the premises; AND ALSO, if the society shall think proper, and either before or after the exercise or doing of any of the powers or acts aforesaid, and subject or not to any such demise as aforesaid, to take and absolutely sell and dispose of the premises, or any part thereof, with all such powers as regards mode and conduct of sale, and otherwise as are incident to the statutory power of sale vested in mortgagees, and to convey the premises when sold unto the purchaser or purchasers thereof, or as he or they may direct; AND IT IS HEREBY AGREED AND DECLARED that

Powers to society on default;

to demand immediate payment;

to enter;

to appoint receiver;

to demise;

to complete buildings, repair or insure;

to sell.

Application of proceeds of sale.

XXXV. Mortgage to Building Society.

the society shall, out of the said rents and profits, and monies arising by such sale or sales or the execution of any of the powers herein contained, in the first place, pay all [chief or other rents, and] rates and taxes payable in respect of the premises, and all costs, charges, and expenses, outgoings incurred in obtaining possession of the said mortgaged premises, or any part thereof, or in enforcing the performance of any contract or contracts for the sale thereof respectively, and in insuring, in pursuance of the said rules of the society in that behalf, the premises against fire, together with interest at the rate of —— per cent. per annum, as from the respective times of any such payments as aforesaid, and, in the next place, retain all subscriptions, fines, interest, premiums, and other sums of money, which shall be due or which may become payable in respect of the said shares, it being agreed that in the event of such sale all monies which shall at any time thereafter become due in respect of the said shares, according to the bye-laws, rules, or regulations of the society, shall be considered as then due, and the same or so much thereof as may be effectually demanded shall be deducted and lawfully paid out of the said monies, And then, and after discharge of all monies intended to be hereby secured, shall pay the surplus (if any) to the mortgagor, his executors, administrators, or assigns, or as he or they shall direct: AND IT IS HEREBY DECLARED that every receipt of the society, or of any authorised officer or agent of the society, shall be a sufficient discharge for the said rents and profits, and the monies arising by any such lease or sale as aforesaid, and that the person or persons to whom any such receipt shall be given shall not be concerned to see to the application of the monies therein expressed to be received, nor be bound to enquire into the expediency of such lease or sale, or whether such default has been made as aforesaid, or whether a lease or sale is authorised by the powers aforesaid, nor be affected with notice that no such default has been made, or that a lease or sale is not so authorised: AND the mortgagor hereby covenants with the society that he the mortgagor will from time to time hereafter make the several payments following, that is to say (*x*),

Receipt clause.

Covenants by mortgagor;

(*x*) These payments vary according to the rules of the particular building society advancing the money.

XXXV. Mortgage to Building Society.

the monthly subscription of —— in respect of each of the said shares so held by the mortgagor as aforesaid, and the further monthly subscription or sum of —— in respect of each of the same shares as redemption money, under the rules and bye-laws of the society, the said several monthly subscriptions or sums to be paid respectively to the proper officer of the society on the first —— day in every calendar month, commencing with the month of —— next; AND ALSO a premium for the first —— years after the date of these presents, at the rate of one per cent. per annum; AND ALSO interest at the rate of —— cent. per annum as from the date of these presents on the said sum of £——, or on so much thereof as shall for the time being remain owing on the security of these presents, such interest to be calculated and paid during the present year on the whole of the said sum of £——, and for each succeeding year on the amount remaining due to the society, after applying the said monthly instalments of redemption money in or towards reduction of the said mortgage-debt of £——, on the —— day of ——, in the year last preceding, and to be then debited to the account of the mortgagor in the books of the society, such premiums and interest respectively to be paid by equal half-yearly payments on the —— day of ——, and —— day of —— in every year; AND ALSO all fines which the mortgagor may incur under the said rules, bye-laws or regulations, or otherwise: AND ALSO will observe and perform the rules, bye-laws and regulations for the time being of the society in respect of the said shares; AND will on demand pay to the society all and every sums or sum of money which they shall expend under or in execution of the powers hereby conferred on them with interest for the same after the rate of —— per centum per annum from the respective times of the payment thereof; AND will keep the buildings now or hereafter standing on the premises in good repair, and also insured against loss or damage by fire to the amount of three-fourths of the value [*or*, not less than £——] at least, in such names, office and manner as shall from time to time be required by the society, and deposit every policy for such insurance with the society, and produce the receipts for the payment of such insurance [and of the chief or other rents payable in respect of the premises] within seven days after the first day on which the same respectively shall become payable, or sooner on request to the proper officer,

to pay monthly subscription;

to pay premium;

to pay interest;

to pay fines;

to comply with rules;

to repay sums expended under powers;

to repair and insure;

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and at the office for the time being of the society; And that if the premises shall be sold as aforesaid, and if the rents and profits (if any) received by the society and the monies produced by the sale shall not be sufficient to answer the trusts hereinbefore declared thereof, the mortgagor will immediately pay to the society the sum necessary to make up such deficiency: Provided always [*Restriction on leasing powers of mortgagor, ante*, p. 996]: Provided also, that the said rules and bye-laws for the time being of the society shall apply to this mortgage, and be taken by reference as incorporated herein, except so far as is hereby otherwise provided: Provided lastly, that in these presents so far as the context requires or allows the expressions "the mortgagor" and "the society" shall be taken to include the mortgagor and the society respectively, and all persons deriving title under them respectively. In witness, &c.

to pay any deficiency on sale.

Incorporation of rules.

Interpretation clause.

XXXVI. *MORTGAGE of* Leaseholds *by* Demise *to* Trustees *of a* Benefit Building Society—*not incorporated under the* Building Societies' Act, 1874 (*y*).

THIS INDENTURE (*z*) made the —— day of ——, 18—, Between [*mortgagor*], (who is hereinafter called the mortgagor), of the one part; and [*trustee*] of, &c., and [*trustee*] of, &c., the present trustees of the —— Building Association, (who are hereinafter called the mortgagees), of the other part; Whereas by an indenture of lease dated the —— day of —— 18—, [*recite lease ut ante*, p. 1016]; And whereas by divers mesne assignments and assurances in the law and particularly by an indenture of assignment dated

Parties.

Recitals: of mortgagor's title to premises;

(*y*) See as to mortgages to building societies, *ante*, p. 857. This precedent may be readily adapted to the case of a mortgage of freeholds or copyholds, or to a mortgage to an incorporated society, by reference to the last precedent.

Stamp. (*z*) Stamp, *ad valorem* on amount secured, *ante*, p. 988.

XXXVI. **Mortgage of Leaseholds to Building Society.**

the —— day of —— 18—, and made between [*parties*] the said piece of ground and premises demised by the hereinbefore recited indenture of lease, became vested in the mortgagor for the residue then unexpired of the said term of —— years; AND WHEREAS the Association was established for the purpose of raising by subscription a fund to assist the members thereof in obtaining small freehold or leasehold property pursuant to an Act of the session of the sixth and seventh years of the reign of King William the Fourth for the regulation of Benefit Building Societies; and articles and rules and regulations for the government of the Association were duly made, certified, and enrolled pursuant to the said Act, but the Association has not been registered under any later Act; AND WHEREAS the mortgagor became a subscriber for —— shares of £—— each in the said Association, numbered, &c., for which shares he received certificates signed by the president and two directors and countersigned by the manager of the Association; AND WHEREAS under the said rules of the Association the directors have agreed to advance to the mortgagor the sum of £—— in respect of each of his said shares therein upon his executing such mortgage as is hereinafter contained: NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement, and in consideration of the sum of £——, being the full amount of £—— in respect of each of the said shares to which the mortgagor is so entitled as aforesaid now paid to the mortgagor out of the funds of the Association, (the receipt of which sum of £—— the mortgagor hereby acknowledges), the mortgagor hereby covenants with the mortgagees to pay to them the monthly instalments of —— each in respect of the said —— shares for —— years from the date of these presents; the first of which instalments shall be due and payable on the first day of —— next, and the subsequent instalments on the first day of every succeeding month respectively: AND ALSO, to pay all fines, fees, and other monies which according to the said rules and regulations of the Association shall from time to time become payable in respect of the said shares, and also to observe all the said rules and regulations of the Association: AND THIS INDENTURE ALSO WITNESSETH, that for the consideration aforesaid the mortgagor hereby demises, and, as beneficial owner, conveys to the mortgagees, ALL that piece

of constitution of association;

of membership of mortgagor;

of sale of share by auction, and purchase thereof by mortgagor.

Testatum.

Covenant for payment of instalments;

and fines;

and to observe rules.

Second *Testatum.*

Demise of leasehold premises.

XXXVI. **Mortgage of Leaseholds to Building Society.**

or parcel of ground, and the messuage or dwelling-house thereon, and premises comprised in the hereinbefore recited indenture of lease, together with all fixtures and fittings in and about the premises belonging to the mortgagor: To HOLD all the premises hereby demised UNTO the mortgagees henceforth for the residue of the said term of —— years, created by the hereinbefore recited indenture of lease, except the last —— days thereof: PROVIDED ALWAYS, that if the mortgagor shall pay to the mortgagees all the said instalments and other monies which, according to the said rules for the time being of the Association, shall from time to time become payable in respect of the said shares, and shall observe and perform all the said rules and the covenants herein contained, then the mortgagees shall at any time thereafter, upon the request and at the cost of the mortgagor, endorse upon these presents a proper receipt for all monies hereby secured, and thereupon these presents shall be vacated: PROVIDED ALWAYS, AND IT IS HEREBY AGREED, that the mortgagor shall henceforth stand possessed of the said last —— days of the said term of —— years in the premises in trust for the mortgagees, and to be disposed of as they shall direct, but subject to the same equity of redemption as may for the time being be subsisting by virtue of the last preceding proviso: PROVIDED ALWAYS, that if the mortgagor shall fail to pay the said instalments or other monies for two calendar months, or to observe and perform any of the said rules of the Association or the covenants herein contained, or shall become bankrupt or enter into any composition with his creditors, then the mortgagees may, without any further consent on the part of the mortgagor, enter into the possession or the receipt of the rents of the premises hereby demised, and may appoint a receiver of the said rents, who shall be deemed the agent of the mortgagor, but shall pay the rents received (less a commission of five per cent. thereon for collection) to the mortgagees, and may lease the premises for the purpose of occupation, or otherwise, for any term they shall think proper, and may, in case they shall in their discretion think fit, sell the premises or any part thereof, and for the purposes of such sale may exercise all the powers by law or otherwise given to trustees having a power of sale over hereditaments, and on any such sale may, as attorneys for and on behalf of

Proviso for redemption.

Declaration of trust of nominal reversion.

Power of mortgagees on mortgagor's default, &c.

XXXVI. Mortgage of Leaseholds to Building Society.

the mortgagor, assign the said last —— days of the said —— term of years and the premises comprised therein unto the purchaser, or as he may direct, free from all equity of redemption and claims of the mortgagor, and may in all respects exercise and put in force all or any of the powers and provisions which it is or shall be by the said rules of the Association provided shall in mortgages or securities for advances be contained or made exerciseable under any of the circumstances mentioned in such rules: AND IT IS HEREBY AGREED that any printed copy of rules purporting to be the said rules of the Association shall be deemed conclusive evidence of the said rules for the time being: AND IT IS FURTHER AGREED that in the event of a sale being made under the power aforesaid all monies which under the said rules would subsequently become payable to the mortgagees by the mortgagor, shall be considered as then actually due and payable and shall be paid accordingly; AND that the receipts of the mortgagees for any money paid to them by virtue of these presents or of the said rules shall effectually discharge the person or persons paying the same therefrom, and from being concerned to see to the application thereof; AND that all monies received by the mortgagees for rent, or on sale of, or otherwise in respect of, the premises shall be applied first in payment of expenses incidental to the receipt thereof and to the exercise of the powers herein contained and next in satisfaction and discharge of this security, or otherwise to the purposes and in the manner to and in which such monies shall be applicable under the said rules, including the repayment to the mortgagees of any monies laid out by them in repairs and improvements to the mortgaged premises, and that the surplus, if any, shall be paid to the mortgagor, and that all buildings which are or shall be comprised in this security shall, at the expense of the mortgagor, be put and kept in repair, and shall be insured and kept insured against fire in the —— Fire Office, or such other insurance office, and in such sum as the mortgagees shall from time to time direct, and that such insurance shall be effected and maintained, and all monies received therefrom shall be applied according to the said rules, and that all monies expended by the mortgagees in repairing, improving, or insuring any of the said buildings, or in the erection of new buildings for the improvement of their security, or the benefit of the premises, shall carry interest according to the said

Copy of rules to be evidence.

Receipt clause.

Application of monies received.

XXXVI. **Mortgage of Leaseholds to Building Society.**

rules, and shall be repaid by the mortgagor on demand by the mortgagees, and shall be a charge on the mortgaged premises: AND IT IS HEREBY DECLARED that in case of a redemption by the mortgagor under the said rules the consideration money to be paid for such redemption shall be ascertained from "——'s Annuity Tables," which for that purpose shall be binding both on the mortgagor and mortgagees: PROVIDED ALWAYS that nothing herein, or in the said rules, or in any statute now or for the time being in force, contained, shall entitle the mortgagor in case the mortgagees shall hold from him a mortgage of other property not comprised in this security, to redeem either property alone without the consent of the mortgagees: AND IT IS HEREBY FURTHER DECLARED that the mortgagees shall not be compelled or compellable to render to the mortgagor, or furnish him with an account of their receipts and payments as mortgagees in possession, unless the mortgagor, on applying to the mortgagees for or demanding from them such account, shall, at the time of such application or demand, pay to the mortgagees a sum equal to five per cent. on the sum originally advanced by them to the mortgagor (but not being less than twenty pounds), on account and in part payment of the monies which shall then be owing by the mortgagor on the security of these presents: PROVIDED ALWAYS and it is hereby agreed that the said rules of the Association, so far as capable of applying to this transaction, and except so far as hereby expressly varied, or as inconsistent with any of the provisions of these presents, shall (though not expressly herein referred to) apply to this transaction: AND THIS INDENTURE ALSO WITNESSETH, that the mortgagor doth hereby attorn and become tenant to and at the will of the mortgagees, for and in respect of all the premises at a clear monthly rent of ——, payable to the mortgagees monthly in advance, at the office of the Association, on the first day of every month during the hours of business there, and the first payment thereof shall be made on the first day of the month next after any monthly instalment hereby secured shall have become in arrear, but all monies received by the mortgagees for rent under the attornment hereinbefore contained shall be accepted

Consolidation clause.

Proviso as to accounts.

Incorporation of rules of association.

Attornment clause (*a*).

(*a*) See as to attornment clauses in mortgages, *ante*, p. 980.

XXXVI. Mortgage of Leaseholds to Building Society.

in or towards satisfaction of the instalments then in arrear or payable under the said rules and these presents respectively: PROVIDED ALWAYS that the attornment hereinbefore contained shall not render it compulsory on the mortgagees to collect the rent payable thereunder, and that they shall not be accountable to a second mortgagee or any subsequent incumbrancer for any rent which they might have received under such attornment: PROVIDED ALSO that the mortgagees may at any time, without giving previous notice thereof, enter upon and take possession of the premises and determine the tenancy hereby created: PROVIDED ALWAYS and it is hereby agreed, that the relationship of mortgagor and mortgagees subsisting between the parties hereto shall not exclude the operation of the said rules of the Association providing for reference of disputes to arbitration, but in case of any dispute arising between the mortgagees on the one hand, and the mortgagor or any subsequent incumbrancer or other person claiming under the mortgagor on the other hand, touching these presents, or any matter or thing herein contained, or in respect of any account rendered or to be rendered by the mortgagees to the mortgagor, or any such other person as aforesaid, or in respect of any other matter or thing whatsoever, the same shall be deemed a dispute between the Association and one of its members, and shall be settled in accordance with the said rules, and by the arbitrators for the time being, and no objection shall be taken to such arbitration on the ground that any of the arbitrators may not have been properly appointed or otherwise: AND IT IS FURTHER AGREED that every such arbitration shall be deemed an arbitration within the Common Law Procedure Act, 1854, which shall apply thereto in all respects: And these presents may be made a rule of any court of law or equity: AND IT IS HEREBY DECLARED that [*Restriction on mortgagor's leasing power, ut ante*, p. 996]: AND LASTLY IT IS HEREBY DECLARED that the expression "the mortgagor" hereinbefore used shall, in all cases where such an interpretation is not inconsistent with the context, be construed to include his heirs, executors, administrators, and assigns, and that the expression "the mortgagees" shall be construed to include and shall signify the survivor of them or other the trustees or trustee for the time being of the Association and their assigns, and that all powers

Mortgagees not to be compelled to act upon attornment.

Arbitration clause.

Interpretation clause.

XXXVI. **Mortgage of Leaseholds to Building Society.**

hereinbefore given to the mortgagees shall be exercisable by the said trustees or trustee for the time being. IN WITNESS, &c.

XXXVII. *MORTGAGE of a* POLICY *of* ASSURANCE *effected on the* LIFE *of the* MORTGAGOR (*b*). PROVISO, *that* PRINCIPAL *shall not be called in for a specified time.*

THIS INDENTURE (*c*), made the —— day of ——, 18—,

Parties. BETWEEN [*mortgagor*], of, &c., of the one part; and [*mortgagee*], of, &c., of the other part, WITNESSETH that in

Testatum. consideration of the sum of £——, now paid to the said [*mortgagor*] by the said [*mortgagee*], the said [*mortgagor*]

Covenant for payment of principal and interest. covenants [*Covenant for payment of principal and interest, ante*, p. 994]. AND THIS INDENTURE ALSO WITNESSETH, that for the consideration aforesaid, the said

Second *Testatum.* [*mortgagor*] assigns, and, as beneficial owner, conveys unto

Assignment of policy, the said [*mortgagee*], ALL THAT policy of assurance on the life of the said [*mortgagor*], to which he, the said [*mortgagor*], is entitled in the —— Life Assurance Society, for the sum of £——, dated this —— day of ——, 18—, and numbered —— at an annual premium of £——; AND ALSO the said sum of £—— thereby assured, and all monies to be recovered or received under or by virtue of the said policy by way of bonus

Habendum. or otherwise: TO HOLD all the premises UNTO the said [*mort-*

Mortgages of life policies. (*b*) See as to mortgages of policies of life assurance, *ante*, p. 826. Such policies, for the reason there stated, seldom form the sole security for an advance, but are usually supplemented either by a mortgage of other property, or by the concurrence of sureties in the transaction for the purpose of guaranteeing the payment of the interest and premiums, and, sometimes, also of the principal. This concurrence may be effected either by an independent deed (see next following precedent), or by making the surety a party to the mortgage of the policy, as in Precedent XXXIX., *post*, p. 1086.

Stamp. (*c*) Stamp, *ad valorem* on the amount secured. The provisions as to keeping on foot the policy do not render any additional stamp-duty necessary: see sect. 107 (3) of the Stamp Act, 1870, *ante*, p. 990.

gagee], subject to redemption by the said [*mortgagor*], his executors, administrators, or assigns, on repayment of the said principal sum of £—— and interest for the same after the rate aforesaid in pursuance of the covenant in that behalf hereinbefore contained, and of all other monies (if any) owing on the security of these presents: PROVIDED ALWAYS, that if the said [*mortgagor*] shall pay the interest on the said sum of £—— half-yearly, or within thirty days after the same shall become due, and shall commit no breach of any of the covenants hereinafter contained, the said [*mortgagee*], his executors, administrators, or assigns shall not require payment of the said sum of £—— before the —— day of —— 18—, unless the said [*mortgagor*] shall previously depart this life, in which case all principal and other monies hereby secured shall immediately become payable: AND THE SAID [*mortgagor*] hereby covenants with the said [*mortgagee*] that the said policy is now valid and subsisting for the said sum of £——, and that all premiums thereon have been duly paid down to the date of these presents, and that he, the said [*mortgagor*], his heirs, executors, or administrators, will not do, or omit to do, any act whereby the said policy or any other policy to be effected as hereinafter mentioned may become void or voidable, but will regularly pay the premiums payable for keeping on foot the said policy hereby assigned, and from time to time to deliver the receipt for the premium for the current year to the said [*mortgagee*], his executors, administrators, or assigns, within —— days after the same shall have become payable; AND THAT if the said policy hereby assigned shall become voidable, the said [*mortgagor*] will immediately, at his own cost, do all things necessary for restoring and keeping on foot the same, and if the said policy shall become void, will immediately, at his own cost, effect a new policy or policies on his life in the name or names of the said [*mortgagee*], his executors, administrators, or assigns, in an office to be approved of by him or them, for the sum of £—— at the least; AND in case he shall at any time refuse, neglect, or omit to pay, produce, restore, or effect any such premium, receipt, or policy within the times or manner respectively aforesaid, it shall be lawful for but not obligatory upon the

subject to redemption.

Proviso that money shall not be called in for a specified time (*d*).

Covenants by mortgagor to keep up policy, &c.

Power for mortgagee to effect new policy on mortgagor's default.

(*d*) This proviso may, of course, be omitted, if desired.

XXXVII. **Mortgage of Life Policy.**

said [*mortgagee*], his executors, administrators, or assigns, to pay the premium, or restore, or effect the policy to which any such default, refusal, neglect, or omission shall relate; And the said [*mortgagor*], his executors, administrators, or assigns, will on demand repay to the said [*mortgagee*], his executors, administrators, or assigns, all monies which he or they shall disburse for any of the purposes aforesaid, with interest thereon at the rate aforesaid, until payment thereof; And will do and concur in all acts to enable him and them to effect any such new or other policy as aforesaid; And every new policy to be effected as hereinbefore provided, and the monies to become payable thereunder, shall be a security for all the monies intended to be hereby secured, and subject to the covenants and provisions herein contained in like manner as the said policy and premises hereby assigned. In witness, &c.

Costs of new policy to be added to debt.

XXXVIII. *DEED OF COVENANT by two* Sureties *that a* Mortgagor *shall regularly pay the* Interest *payable under a* Mortgage *of a* Policy *on his* Life, *and the* Premiums *in respect of the* Policy, *for a given time* (*see Precedent XXXVII.*).

THIS INDENTURE (*e*) made the —— day of ——, 18—,

Parties.

Between [*mortgagor*], of, &c., of the first part; [*surety*], of, &c., and [*surety*], of, &c., of the second part; and [*mortgagee*] of the third part;

Recitals: of mortgage;

Whereas by an indenture of mortgage bearing even date herewith but executed before these presents, and made between the said [*mortgagor*] of the one part, and the said [*mortgagee*] of the other part, in consideration of the sum of £—— paid to the said [*mortgagor*] by the said [*mortgagee*], the said [*mortgagor*] has covenanted with the said [*mortgagee*] for the repayment to him the said [*mortgagee*], or his executors, administrators or assigns, on the —— day of —— next, of the principal sum of £——, with interest for the same in the meantime after the rate of —— per cent. per annum, And if the said principal sum shall not be so paid on the said —— day of —— next, for payment of

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Stamp.

(*e*) Stamp, 10*s*.

XXXVIII. Deed of Covenant by Sureties for Payment of Interest and Premiums on Life Policy.

interest for the same after the rate aforesaid by equal half-yearly payments on the —— day of ——, and the —— day of —— in every year, And by the indenture now in recital, a policy of insurance for the sum of £—— effected by the said [*mortgagor*] on the —— day of ——, 18—, on his own life with the —— Life Assurance Company, has been assigned by the said [*mortgagor*] unto the said [*mortgagee*] for securing the payment of the said principal sum and interest: And it is thereby provided that if the said [*mortgagor*] should pay the interest [*recite fully proviso that money shall not be called in, see ante*, p. 1083]: And the said [*mortgagor*] has covenanted with the said [*mortgagee*] for payment of the premium and other monies, which from time to time shall become payable, for keeping on foot the said policy of insurance, —— days at least before the last day allowed for the payment thereof respectively; And whereas upon the treaty for the said mortgage, it was agreed that the payment of the interest of the said principal sum up to and including the said —— day of ——(*f*), if the said principal sum or any part thereof should so long remain unpaid, and also the payment of the premium and other monies which during the —— first years of the continuance of the said policy of insurance (if the said principal sum or any part thereof should so long remain unpaid) should become payable for keeping the said policy of insurance on foot, should be further secured by the joint and several covenants of the said [*sureties*] as sureties for the said [*mortgagor*]: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the premises, the said [*sureties*], at the request and with the privity of the said [*mortgagor*] testified by his execution of these presents, do and each of them doth hereby covenant with the said [*mortgagee*] that the said [*mortgagor*], his heirs, executors, and administrators, shall on every —— day of ——, and —— day of——, up to and including the said day of —— (if the said principal sum of £—— or any part thereof shall so long remain unpaid), pay to the said [*mortgagee*], his executors, administrators, or assigns, the interest to become due on those days respectively for the said principal sum of £——, or for so much thereof as shall for the time being remain unpaid; And also shall pay —— days at least before

of agreement that interest and premiums should be guaranteed by sureties.

Testatum.

Joint and several covenants of sureties,

that mortgagor will pay interest;

(*f*) *i.e.*, the date specified in the proviso not to call in the money.

XXXVIII. **Deed of Covenant by Sureties for Payment of Interest and Premiums on Life Policy.**

the last day allowed for payment of the same respectively, the premium and other monies which during the first —— years of the continuance of the said policy of assurance (if the said principal sum of £——, or any part thereof, shall so long remain unpaid), shall from time to time become payable for keeping the said policy respectively on foot: PROVIDED ALWAYS, and it is hereby agreed, that the giving of time to the said [*mortgagor*], his heirs, executors, or administrators, for the payment of any principal money or interest hereby secured, or any other indulgence or arrangement which may be shown or entered into with him or them, shall not in anywise release or discharge the said [*sureties*], or either of them, or their or either of their heirs, executors, or administrators, from their or his respective liability under the covenants hereinbefore contained. IN WITNESS, &c.

and premiums.

Indulgence to mortgagor not to release sureties.

XXXIX. *MORTGAGE of a* POLICY *of* ASSURANCE *effected in the* NAME *of the* MORTGAGEE; *Two* SURETIES *covenant for* PAYMENT *of* PRINCIPAL *and* INTEREST, *and of* PREMIUMS *on the* POLICY.

THIS INDENTURE (*g*), made the —— day of ——, 18—, BETWEEN [*mortgagor*], of, &c., of the first part; [*surety*], of, &c., and [*surety*], of, &c., of the second part; and [*mortgagee*], of, &c., of the third part; WHEREAS the said [*mortgagee*] has agreed to lend to the said [*mortgagor*] the sum of £—— on having the repayment thereof with interest at the rate hereinafter mentioned, secured in manner hereinafter appearing, and for the purpose of securing such repayment has effected an assurance in his own name on the life of the said [*mortgagor*], in the —— Life Assurance Office for the sum of £——, by a policy dated the —— day of ——, 18—, numbered —— and under the annual premium of £——; AND WHEREAS the said [*sureties*] have agreed to join in these presents as sureties for the said [*mortgagor*] in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreements, and in consideration of the sum of £——, this day paid to the said [*mortgagor*] by the said [*mortgagee*] with the privity of the said [*sureties*], the

Parties.

Recitals: of agreement for loan;

of policy of assurance in name of mortgagee;

of agreement by sureties to join.

Testatum.

(*g*) Stamp, *ad valorem* on amount secured, *ante*, p. 988.

XXXIX. **Mortgage of Life Policy with Sureties.**

receipt and payment whereof the said [*mortgagor*] and the said [*sureties*] hereby respectively acknowledge, the said [*mortgagor*] and [*sureties*] do, and as separate covenants each of them doth, hereby covenant with the said [*mortgagee*], that they the said [*mortgagor*] and [*sureties*], or their respective heirs, executors, or administrators, or some or one of them, will on the —— day of ——, 18—, pay to the said [*mortgagee*], his executors, administrators, or assigns, the sum of £——, with interest in the meantime at the rate of —— per cent. per annum; AND WILL ALSO, as long after that day as any principal money shall remain due under this mortgage, pay to him or them interest thereon at the rate aforesaid by equal half-yearly payments on the —— day of ——, and the —— day of —— in every year: AND IT IS HEREBY DECLARED that so long as any principal, interest, or other monies shall remain due on the security of these presents, the said policy hereinbefore recited to have been effected, and all monies recoverable or receivable under or by virtue of the same policy, shall stand charged with, and shall be redeemable only upon payment of the monies for the time being so due and owing, and shall thereupon, at the request of the said [*mortgagor*], his executors, administrators, or assigns, be assigned to him or them, or as he or they shall direct; AND the said [*mortgagor*] and [*sureties*] do, and as separate covenants each of them doth, hereby covenant with the said [*mortgagee*] as follows, that is to say, that the said policy is now valid and subsisting for the sum of £——, and not void nor voidable, and is free from incumbrances, and that the said [*mortgagor*] will not do, or omit to do, nor suffer any act or thing whereby the said policy or any other policy to be effected as hereinafter mentioned may become void or voidable, but that the said [*mortgagor*] and [*sureties*], or their respective heirs, executors, or administrators, or some or one of them, will duly and regularly pay all premiums and sums of money payable for keeping on foot the said policy, and from time to time deliver or produce the receipt for every such premium or sum to the said [*mortgagee*], his executors, administrators, or assigns, within —— days after every such premium or sum shall have become payable: AND that if the said policy hereinbefore recited to have been effected shall become voidable, the said [*mortgagor*] and [*sureties*], and the respective heirs, executors, or administrators of the said

Joint and several covenants by mortgagor and sureties for payment of principal and interest.

Declaration of charge.

Joint and several covenants by mortgagor and sureties that policy is valid;

to keep policy on foot;

to restore policy or effect a new policy in lieu thereof if voidable or void.

XXXIX. **Mortgage of Life Policy with Sureties.**

[*sureties*], or some or one of them, will immediately at their or his own cost do, or cause to be done, all things necessary for restoring and keeping on foot the same, and if the said policy shall become void, will immediately at the like cost effect a new policy or policies on the life of the said [*mortgagor*] in the name or names of the said [*mortgagee*], his executors, administrators, or assigns, in an office to be approved by him or them, for the sum of £—— at the least: And in case there shall at any time be any default, refusal, neglect, or omission to pay, produce, restore, or effect any premium, receipt, or policy within the times, and in manner respectively aforesaid, it shall be lawful, but not obligatory on the said [*mortgagee*], his executors, administrators, or assigns, to pay the premium or restore or effect the policy to which any such default, refusal, neglect or omission shall relate; And the said [*mortgagor*] and [*sureties*], their respective heirs, executors, or administrators, or some or one of them, will on demand pay to the said [*mortgagee*], his executors, administrators, or assigns, all monies which he or they shall disburse with interest thereon at the rate aforesaid until payment thereof, and will do and concur in all acts to enable him and them to revive or effect any such new policy as aforesaid, and every new policy to be effected as hereinbefore provided, and the monies to become payable thereunder shall be a security for all the monies intended to be hereby secured, and subject to the covenants and provisions herein contained in like manner as the said policy hereinbefore recited to have been effected, and the monies to become payable under the same: Provided also, that although as between the said [*mortgagor*] and the said [*sureties*], the said [*sureties*] are only sureties for the said [*mortgagor*], nevertheless as between the said [*sureties*] respectively and the said [*mortgagee*], the said [*sureties*] shall be taken to be principal debtors for all monies intended to be hereby secured, so that they shall not, nor shall either of them, nor the heirs, executors, or administrators of them, or either of them, be released from their or his liability, under these presents, by reason of time being given to the said [*mortgagor*], his heirs, executors, or administrators, or by the release of any collateral securities for the monies intended to be hereby secured, or by any other forbearance, act, or omission of the said [*mortgagee*], or such other person or persons as aforesaid, or by any other

Power for mortgagee to effect new policy on default of mortgagor.

Proviso that sureties shall be liable to mortgagee as principals.

matter or thing whereby the said [*sureties*], or either of them, or the heirs, executors, or administrators of them, or either of them, would be so released, but for this provision. IN WITNESS, &c.

XXXIX. Mortgage of Life Policy with Sureties.

XL. *MORTGAGE of a POLICY of ASSURANCE on the* LIFE *of the* MORTGAGOR, *issued under* SPECIAL CONDITIONS, *a certain number of Premiums having been paid in advance.* INTEREST *in advance for a certain number of years is* DEDUCTED *from the* PRINCIPAL; COVENANT *for* PAYMENT *of* INTEREST *in advance thereafter;* PROVISO *that the* PRINCIPAL *shall* NOT *be* CALLED *in for a certain time if the Mortgagor shall so long live; and other* SPECIAL PROVISIONS.

THIS INDENTURE (*f*), made the —— day of ——, 18—, BETWEEN [*mortgagor*], of, &c., of the one part; and [*mortgagee*], of, &c., of the other part; WHEREAS by a policy of assurance, effected by the said [*mortgagor*] with the —— Assurance Society, dated the —— day of ——, 18—, and numbered ——, in consideration of £—— paid by the said [*mortgagor*] to the said society, the sum of £—— is assured to be paid to his executors, administrators, or assigns, within one calendar month after satisfactory proof of his death shall have been received at the office of the said society, without any further payment, if such death shall happen on or before the —— day of ——, 18—, but thenceforth, at and under the annual premium of £——, and subject to certain conditions and regulations endorsed upon the said policy, as far as the same were or should be applicable, in the same manner as if the same respectively were repeated and incorporated therein; AND WHEREAS the said [*mortgagee*] has agreed to lend to the said [*mortgagor*] the sum of £——, upon having the repayment thereof with interest at the rate hereinafter mentioned, secured in manner hereinafter appearing; AND

Parties.

Recitals: of policy of assurance effected under special conditions, a certain number of premiums having been paid in advance;

of agreement for loan;

that mortgagor should,

(*f*) Stamp, *ad valorem*, on amount secured, *ante*, p. 988. Stamp.

XL. Mortgage of Life Policy under Special Conditions.

WHEREAS, upon the treaty for the said loan it was agreed that the said [*mortgagor*] should, out of the said principal sum of £——, pay to the said [*mortgagee*] the sum of £——, being the amount of —— years interest at the rate hereinafter mentioned on the same sum, and that in consideration thereof, the repayment of the said principal sum of £—— should be deferred for the term of —— years, that is to say, until the —— day of ——, unless the said [*mortgagor*] should die in the meantime, and that such provision should be made as is hereinafter contained in the event of the said [*mortgagor*] dying before the —— day of —— aforesaid for a deduction or allowance of a proportionate part of the said sum of £—— for the portion of the term which shall then remain unexpired. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £—— this day paid to the said [*mortgagor*] by the said [*mortgagee*], the receipt whereof the said [*mortgagor*] hereby acknowledges, but out of which sum of £—— the said [*mortgagor*] has paid to the said [*mortgagee*] the sum of £——, in pursuance of the hereinbefore recited agreement in that behalf, the receipt of which sum of £—— the said [*mortgagee*] hereby acknowledges, the said [*mortgagor*] hereby covenants with the said [*mortgagee*] that he the said [*mortgagor*], his heirs, executors, or administrators, will, on the —— day of —— next, pay to the said [*mortgagee*], his executors, administrators, or assigns, the sum of £——, the interest whereon, to accrue due in the meantime, and also thereafter, until the —— day of ——, 18—, aforesaid, has been already paid by the said [*mortgagor*] as aforesaid; AND will also, if and so long as after the —— day of ——, 18—, aforesaid, any principal money shall remain due under this mortgage, pay to the said [*mortgagee*], his executors, administrators, or assigns, interest thereon at the rate of —— per cent. per annum, without any deduction, by equal half-yearly payments in advance on the —— day of —— and the —— day of —— in every year. AND THIS INDENTURE ALSO WITNESSETH that, in further pursuance of the said agreement and in consideration of the premises the said [*mortgagor*] hereby assigns, and, as beneficial owner, conveys unto the said [*mortgagee*] ALL THAT the said policy of assurance hereinbefore described, Together with the said sum of £—— thereby assured, and

out of the principal, pay a certain number of years' interest in advance.

Testatum.

Covenant for payment of principal and interest.

Second *Testatum.*

Assignment of policy.

XL. Mortgage of Life Policy under Special Conditions.

all other monies assured or to become payable by virtue thereof, and the full benefit thereof; To HOLD the said policy and premises hereby assigned unto the said [*mortgagee*], SUBJECT to the proviso for redemption hereinafter contained: PROVIDED ALWAYS, that if the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall pay unto the said [*mortgagee*], his executors, administrators, or assigns, the said principal sum of £—— (subject to such deduction or allowance as is hereinafter provided) on the —— day of —— next, then the said [*mortgagee*], his executors, administrators, or assigns, will, at any time thereafter, at the request and at the cost of the said [*mortgagor*], his heirs, executors, administrators, or assigns, re-assign the said policy to the said [*mortgagor*], his executors, administrators, or assigns, or as he or they shall direct [*Covenant by mortgagor to keep up policies and power for mortgagee to effect insurances on default, &c., ante*, p. 1083, *or post*, p. 1095]: PROVIDED ALWAYS, that if and so long as all the covenants and stipulations (other than the covenant hereinbefore contained for payment of the said principal sum of £—— hereby secured) herein contained or implied by statute or otherwise, and on the part of the said [*mortgagor*] to be observed or performed, shall be observed and performed by him, and if the said [*mortgagor*] shall not, in the meantime, become bankrupt or enter into any statutory or other composition or scheme for the arrangement or liquidation of his affairs for the benefit of his creditors, the said principal sum of £—— shall not, nor shall any part thereof, be called in nor shall payment thereof, nor of any part thereof, be enforced until the —— day of ——, 18—, if the said [*mortgagor*] shall so long live: PROVIDED ALWAYS, that if the said [*mortgagor*] shall die before the —— day of ——, 18—, then and in such case the said principal sum of £—— shall become payable to the said [*mortgagee*], his executors, administrators, or assigns, immediately after the death of the said [*mortgagor*], deducting therefrom a proportionate part of the said sum of £—— [*sum retained for interest*] for the period which shall then remain unexpired of the said term of —— years from the date of these presents, and that if the said principal sum of £——, after such deduction therefrom as aforesaid, shall not be so paid, then interest shall thenceforth be payable on the said principal sum of £——, after such deduction therefrom as aforesaid, at the rate of ——

Proviso for redemption.

Proviso that the principal shall not be called in for a certain time.

Provisoes that if mortgagor shall die or repay the advance before the fixed day of repayment, the surplus interest shall be deducted from the principal;

XL. Mortgage of Life Policy under Special Conditions.

per cent. per annum, until payment thereof, anything hereinbefore contained to the contrary notwithstanding: PROVIDED ALWAYS that if the said [*mortgagor*] shall, before the —— day of ——, pay the said principal sum of £—— (which, upon giving —— calendar months' notice in writing, he shall be at liberty to do), then he the said [*mortgagor*] shall be entitled to deduct therefrom a proportionate part of the said sum of £—— for the period which shall then remain unexpired of the said term of —— years from the date of these presents: AND IT IS HEREBY FURTHER AGREED that if default shall be made in payment of the said principal sum of £——, or any part thereof, contrary to the covenant for payment thereof hereinbefore contained, then the said policy of assurance and premises hereby assigned, and also such policy or policies as shall be effected in pursuance of the covenant in that behalf hereinbefore contained, shall stand charged with the payment of all such costs, charges, and expenses (if any) as shall be incurred by the said [*mortgagee*], his executors, administrators, or assigns, in or about the exercise or attempted exercise, or in any wise relating to any statutory power of sale, or other power herein contained, or conferred or implied by statute, by virtue of or incident to these presents, or in or about any action or other proceeding or proceedings for the recovery of the principal monies and interest hereby secured, or foreclosing the equity of redemption of the mortgaged premises, or for obtaining payment of any monies hereby assigned or otherwise, in relation to these presents, such costs to be reckoned and allowed as between solicitor and client: PROVIDED ALWAYS that it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, to exercise the power of sale conferred on mortgagees by statute so soon after any principal monies hereby secured shall become payable and liable to be called in, as notice, pursuant to the 20th section of the Conveyancing and Law of Property Act, 1881, requiring payment of such monies, shall have been served on the said [*mortgagor*], his heirs, executors, or administrators, or some or one of them, and default shall have been made in payment of such monies, or any part thereof, for one calendar month after such service, or so soon as some interest under this mortgage shall be in arrear and unpaid for one calendar month after becoming due: PROVIDED ALSO, and it is hereby expressly declared, that the 17th section of the said Act shall

that costs, &c., as between solicitor and client shall be charged on the mortgaged policy.

Proviso as to notices requiring payment.

Proviso affirming right of consolidation.

not apply to these presents, it being the intention of the parties thereto that it shall be lawful for the said [*mortgagee*], his executors, administrators, and assigns, to consolidate this security with any security held by him or them on property other than that herein comprised. IN WITNESS, &c.

XL. **Mortgage of Life Policy under Special Conditions.**

XLI. *MORTGAGE of a* LIFE ESTATE *in* FREEHOLDS *and* POLICY *of* ASSURANCE (*g*).

THIS INDENTURE (*gg*), made the —— day of ——, 18—, BETWEEN [*mortgagor*], of, &c., of the one part; and [*mortgagee*], of, &c., and [*mortgagee*], of, &c., of the other part; WHEREAS, under or by virtue of an indenture of settlement, dated, &c., and made between [*parties*], the said [*mortgagor*] is seised of and entitled to the messuages, lands, and hereditaments described in the first schedule hereunder written for an estate for his life in possession, without impeachment of waste, subject to certain charges and annuities specified in the second schedule hereunder written; AND WHEREAS the said [*mortgagor*] is entitled to a policy of assurance on his own life for the sum of £—— granted by the —— Assurance Society, dated the —— day of —— 18—, and numbered ——, and under the annual premium of £——; AND WHEREAS the said [*mortgagees*] have agreed to lend to the said [*mortgagor*] the sum of £—— upon having the payment thereof with interest at the rate hereinafter mentioned secured in manner hereinafter appearing. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of £—— this day paid to the said [*mortgagor*] by the said [*mortgagees*] out

Parties.

Recitals:

of title;

of mortgagor to life estate in lands;

of title to policy;

of agreement for loan.

Testatum.

Covenant to pay principal and interest.

(*g*) A mortgage of a life estate in realty is generally taken by demise, so as to avoid any risk of the destruction of the powers given by the settlement to the tenant for life; but see this question discussed, *ante*, p. 722, *et seq.* See also sect. 50 of the Settled Land Act, 1882. The words "bargains and sells" are inserted in the operative part in order to give to the mortgagee an actual estate in the land without entry, instead of a mere *interesse termini*.

(*gg*) Stamp, *ad valorem*, on amount secured, *ante*, p. 988.

Stamp.

XLI. Mortgage of Life Estate in Freeholds, &c.

of monies belonging to them on a joint account [*Covenant to pay principal and interest, see ante*, p. 997]. AND THIS INDENTURE ALSO WITNESSETH, that for the consideration aforesaid he the said [*mortgagor*] hereby bargains and sells, and demises, and, as beneficial owner, conveys unto the said [*mortgagees*], ALL and every the messuages, lands and hereditaments situate in the parish of ——, in the county of ——, and in the said indenture of settlement particularly described or referred to, and of or to which the said [*mortgagor*] is seised or entitled for his life, which hereditaments and premises are particularly described with the several admeasurements thereof respectively (be the same more or less) in the First Schedule hereunder written: TO HOLD the premises unto the said [*mortgagees*] for the term of 99 years from the day next before the date of these presents, if the said [*mortgagor*] shall so long live, without impeachment of waste, SUBJECT nevertheless to the several charges and annuities mentioned in the second schedule hereunder written, AND ALSO SUBJECT to the proviso for redemption thereinafter contained. AND THIS INDENTURE ALSO WITNESSETH that for the consideration aforesaid he, the said [*mortgagor*] hereby assigns, and, as beneficial owner, conveys unto the said [*mortgagees*] ALL that the said policy of assurance hereinbefore described, TOGETHER with the sum of £—— thereby assured, and all other monies assured or to become payable by virtue thereof, and the full benefit thereof, TO HOLD the said policy and premises hereby assigned unto the said [*mortgagees*], SUBJECT to the proviso for redemption hereinafter contained: PROVIDED ALWAYS that if the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall pay unto the said [*mortgagees*], their executors, administrators, or assigns, the said sum of £——, with interest for the same in the meantime at the rate of —— per cent. per annum on the said —— day of —— next, without any deduction: then the said [*mortgagees*], their executors, administrators, or assigns, will at any time thereafter upon the request and at the cost of the said [*mortgagor*], his heirs, executors, administrators, or assigns, reconvey and surrender the said hereditaments and premises hereby demised, to the said [*mortgagor*] or his assigns, and reassign the said policy of assurance and premises hereby assigned, to the said [*mortgagor*], his executors, administrators, or assigns, or as he or they shall

Second *Testatum.*

Conveyance of life estate in lands.

Third *Testatum.*

Assignment of policy of life assurance.

Proviso for redemption.

XLI. Mortgage of Life Estate in Freeholds, &c.

direct (*h*): And the said [*mortgagor*] hereby covenants with the said [*mortgagees*] that he the said [*mortgagor*] will not do or suffer anything whereby the said policy hereby assigned, may become void or voidable, or the said [*mortgagees*] their executors, administrators, or assigns, may be hindered from receiving all or any of the monies assured or to become payable by virtue thereof; And that if the said policy shall become void, the said [*mortgagor*] will immediately effect a new policy or policies on his life in the —— Assurance Society, or in some other life assurance society to be approved by the said [*mortgagees*], their executors, administrators, or assigns, in the names of the said [*mortgagees*], their executors, administrators, or assigns, for a sum or sums not less in the whole than the sum of £——, and that every such new policy or policies, and the monies to become payable under the same, shall be subject to the proviso for redemption hereinbefore contained, and to this present security in all respects, in like manner as the said existing policy of assurance, and the moneys to become payable by virtue thereof; And that the said [*mortgagor*], his heirs, executors, or administrators, will, from time to time, pay the said annual premium of £—— and any other premiums or sums for the time being necessary for keeping on foot the said policy hereby assigned, or any policy to be effected as aforesaid on the day on which the same respectively ought to be paid, and forthwith deliver the receipt for the same to the said [*mortgagees*], their executors, administrators, or assigns: And will, on demand, pay to the said [*mortgagees*], their executors, administrators, or assigns, all monies which shall be expended by them in keeping up the said existing policy, or in effecting or keeping up any new policy or policies in lieu thereof, with interest thereon at the rate aforesaid, from the time or respective times of the same having been expended, and that until such monies shall be repaid with interest all and singular the premises hereby demised, and the said existing, or any new policy or policies to be effected as aforesaid, and the monies to become payable under the same, shall be charged with the payment thereof: And further that he, the said [*mortgagor*], will not, without the

Covenant by mortgagor to keep up policy.

Not to exercise powers

(*h*) Here may be inserted, if desired, a proviso for reduction of interest on punctual payment, *ante*, p. 998; or proviso that the principal shall not be called in for a specified time, *ante*, p. 999.

XLI. **Mortgage of Life Estate in Freeholds, &c.**

without consent of mortgagee.

consent in writing of the said [*mortgagees*], their executors, administrators, or assigns, so long as any money shall remain due on this security, execute any of the powers or authorities contained in the said indenture of settlement, or conferred by statute or otherwise, or do or concur in any other act whereby this security shall be in anywise prejudiced or affected. In witness, &c.

The First Schedule above referred to.

The Second Schedule above referred to.

XLII. *MORTGAGE of* Reversionary Life Interest *in* Freeholds, Leaseholds, *and* Monies *to be laid out in* Purchase *of* Lands *to be conveyed to uses of a* Settlement, *and of* Policies *of* Assurance *on the* Life *of the* Mortgagor.

Parties.

THIS INDENTURE (*i*), made the —— day of ——, 18—, Between [*mortgagor*], of, &c., of the first part; [*trustee of a policy*], of, &c., of the second part; and [*mortgagee*], of, &c., of the third part; Whereas, by an indenture of settlement dated the —— day of ——, 18—, and made between [*parties*], divers freehold hereditaments in the county of ——, the particulars whereof are mentioned in the first and second schedules to the same indenture were limited and settled, subject as to part of the said hereditaments to a certain jointure rent-charge of £1,000, which has since determined, to the use of the said [*father of mortgagor*] during his life, without impeachment of waste, with remainder after his death to the use that the said [*wife*], if she should survive him, should receive a jointure rent-charge of £1,200, payable as therein is mentioned, and subject thereto to the use of the said [*trustees*], for a term of 500 years upon the trusts thereinafter declared, being trusts for raising the sum of £—— for portions for the younger children of the said [*father of mortgagor*], and subject thereto to the use of the said [*mortgagor*], for his life without impeachment of waste, with divers remainders over; And in the indenture now in recital

Recitals: of settlement under which mortgagor is entitled to reversionary life interest expectant on death of his father;

Stamp.

(*i*) Stamp, *ad valorem*, on amount secured, *ante*, p. 988.

XLII. Mortgage of Reversionary Life Estate in Realty, &c., and Policies.

are contained powers of sale and exchange, and provisions for the application of the monies to arise from such sale, or to be received for equality of exchange, in discharge of any principal money which should be then a charge upon the said hereditaments, and subject thereto, in the purchase of other hereditaments to be settled to and upon the subsisting uses and trusts of the indenture now in recital, and for the interim investment of such monies, and for the payment of the income of such investments in the manner in which the rents and profits of the hereditaments to be purchased therewith would be payable in case such purchases were then actually made; And by the indenture now in recital, certain leasehold premises therein mentioned or referred to were assigned to the said [*trustees of settlement*] upon such trusts as, regard being had to the difference of the tenure in the premises, would most nearly correspond with the uses thereinbefore declared of the said freehold hereditaments, but so as not to vest absolutely in any tenant in tail male by purchase, unless such person should attain the age of twenty-one years, or leave issue male living at his decease; And in the indenture now in recital is contained a power for the trustees for the time being thereof to purchase the reversion in the said leaseholds out of monies to be raised as therein mentioned, to be conveyed to the uses to which the same would have been conveyed if the same had been purchased with money arising from the exercise of powers of sale and exchange thereinbefore contained; And by the indenture now in recital a certain sum of £10,291 8*s.* 7*d.* £3 per cent. Consolidated Bank Annuities then standing in the names of the said [*trustees*] was settled to upon and subject to certain uses or estates, trusts, and powers therein mentioned, which are in effect to such and the same uses, trusts, and powers as the same would have been subject to in case the same had arisen from a sale or exchange under the powers in the indenture now in recital contained as aforesaid of the said freehold hereditaments; And whereas the said [*mortgagor*] is entitled to the several policies of insurance specified in the schedule hereunder written, of which said policies the first was effected in the name of the said [*trustee of policy*], and is held by him in trust for the said [*mortgagor*], and the others of the said policies were effected in the name of the said [*mortgagor*]; And whereas the said [*mortgagee*]

that mortgagor is entitled to policies of assurance on his life;

of agreement for loan.

XLII. **Mortgage of Reversionary Life Estate in Realty, &c., and Policies.**

has agreed to lend to the said [*mortgagor*] the sum of £——, upon having the repayment thereof with interest at the rate hereinafter mentioned secured in manner hereinafter appearing; AND WHEREAS the said [*trustee of policy*] has agreed to join in these presents for the purpose and in manner hereinafter appearing. NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the sum of £—— now paid to the said [*mortgagor*] by the said [*mortgagee*] (the receipt whereof the said [*mortgagor*] hereby acknowledges), the said [*mortgagor*] hereby covenants, &c. [*Covenant to pay principal and interest, see ante*, p. 994]. AND THIS INDENTURE ALSO WITNESSETH that, for the consideration aforesaid the said [*mortgagor*] hereby grants, assigns, and, as beneficial owner, conveys, according to the nature and tenure of the property respectively, unto the said [*mortgagee*], ALL AND SINGULAR the manors, advowsons, capital and other messuages, farms, rents, tenements, tithes, commutation rent-charge and other hereditaments and premises, both of freehold and leasehold tenure, comprised in and settled by the hereinbefore recited indenture of settlement, SAVE AND EXCEPT out of this present assurance all such parts of the same premises (if any) as, since the date and execution of the said indenture of settlement, have been sold or parted with in exchange under the powers contained in the same indenture; AND ALSO, by way of assurance and not of exception, ALL AND SINGULAR the lands, tenements, and hereditaments (if any) which, under or by virtue of any of the powers in the hereinbefore recited indenture of settlement contained or otherwise, have been purchased or taken in exchange, or conveyed to the uses or upon the trusts of the same indenture; AND ALSO all that the hereinbefore mentioned sum of stock or other (if any) the investment or investments for the time being representing the same, and all monies and investments for money now or hereafter to become subject, under the trusts of the hereinbefore recited indenture of settlement, to be laid out in the purchase of land to be settled to the uses of the same indenture, and the dividends and income of the same stocks, moneys, and investments: AND ALL AND SINGULAR other (if any) the hereditaments, investments, moneys, and premises which are now by any means subject to the subsisting uses or trusts limited or declared by the hereinbefore recited indenture of settlement:

Testatum.

Covenant to pay principal and interest.

Second *Testatum.*

Conveyance of residuary life interest.

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To HOLD all the premises UNTO AND TO THE USE of the said [*mortgagee*], his heirs, executors, administrators, and assigns respectively, according to the nature and tenure of the premises respectively, For all the reversionary life estate, or interest therein of the said [*mortgagor*], expectant on the decease of the said [*father of mortgagor*]; BUT SUBJECT to the life estate therein of the said [*father of mortgagor*], and to the several estates and interests subsisting in or affecting the same hereditaments and premises under or by virtue of the hereinbefore recited indenture of settlement, to take effect in priority to the reversionary life estate therein limited to the said [*mortgagor*] by the same indenture; AND ALSO SUBJECT to the proviso for redemption hereinafter contained. AND THIS INDENTURE ALSO WITNESSETH that in further pursuance of the said agreement and for the consideration aforesaid, the said [*trustee of policy*], at the request of the said [*mortgagor*] hereby assigns, and, as trustee, conveys, and the said [*mortgagor*] hereby assigns and confirms, and, as beneficial owner, conveys unto the said [*mortgagee*], ALL that policy of assurance on the life of the said [*mortgagor*] effected in the name of the said [*trustee of policy*], the particulars whereof are mentioned in the schedule hereunder written; AND all monies assured by or to become payable under the same policy and the full benefit thereof; AND THE SAID [*mortgagor*] hereby also assigns, and, as beneficial owner, conveys unto the said [*mortgagee*] ALL those the policies of insurance on the life of the said [*mortgagor*], effected by him in his own name, the particulars whereof are specified in the schedule hereunder written, and all monies assured by or to become payable under the said last mentioned policies respectively and the full benefit thereof; TO HOLD ALL the said policies, monies, and premises UNTO the said [*mortgagee*], his executors, administrators, and assigns SUBJECT to the proviso for redemption hereinafter contained, that is to say, that on payment on the —— day of —— next, by the said [*mortgagor*], his heirs, executors, administrators, or assigns, to the said [*mortgagee*], his executors, administrators, or assigns, of the sum of £——, with interest thereon in the meantime at the rate of —— per cent. per annum, and of all expenses attendant on or incidental to this security with interest thereon respectively at the rate aforesaid, the life estate policies

Habendum.

Subject to life estate of mortgagor's father,

and to proviso for redemption.

Third *Testatum.*

Assignment of policies of life assurance.

Habendum.

Proviso for redemption.

XLII. Mortgage of Reversionary Life Estate in Realty, &c., and Policies.

and premises hereby conveyed and assigned respectively shall, at the request and cost of the said [*mortgagor*], his heirs, executors, administrators, or assigns, be duly reconveyed and reassigned to him or them according to the nature and tenure of the same respectively; And the said [*mortgagor*] hereby covenants with the [*mortgagee*] in manner following, that is to say [*Covenant to keep up policies of Assurance*, see *ante*, p. 1095.] In witness, &c.

The Schedule above referred to.

XLIII. *MORTGAGE of an unfinished* Leasehold House *where the Money is to be advanced by Instalments as the Building proceeds.* Power *to* Mortgagee to enter *and* complete Buildings.

Parties.

Recitals:

of agreement for loan by instalments according to the progress of the building;

THIS INDENTURE (*k*), made the —— day of ——, 18—, Between [*mortgagor*], of, &c., of the one part; and [*mortgagee*], of, &c., of the other part; Whereas [*recital of building lease to mortgagor, setting out covenant to build a dwelling-house, &c.*]; And whereas the said [*mortgagor*], being desirous of borrowing the sum of £—— in order to enable him to perform his said covenant to erect, upon the piece or parcel of ground so demised to him as aforesaid, a messuage or dwelling-house with proper offices and other conveniences, has applied to the said [*mortgagee*] to advance the same to him, which he has agreed to do in manner hereinafter mentioned (that is to say); the sum of £——, part thereof, when so much of the said intended buildings should be completed to the satisfaction of the surveyor for the time being of the said [*mortgagee*], his executors, administrators, or assigns, as upon a valuation thereof to be made by such surveyor should appear to have cost the sum of £——, and the sum of £——, further part of the said sum

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Stamp.

(*k*) Stamp, *ad valorem* on the total amount of the advances, actual and contemplated, *ante*, pp. 988, 989.

XLIII. Builder's Mortgage by Demise.

when the said intended buildings should have been covered in to the satisfaction of the said surveyor; and the sum of £——, residue of the said sum of £——, when the said intended buildings should be to the satisfaction of the said surveyor completely finished and fit for habitation; AND WHEREAS the said [*mortgagor*] has, to the satisfaction of the said surveyor, completed so much of the said intended buildings, as upon such valuation thereof as aforesaid appears to have cost the sum of £——; AND WHEREAS the said [*mortgagee*], in pursuance of the said agreement in this behalf, did on the —— day of —— last, advance to the said [*mortgagor*] the sum of £——; and for securing to the said [*mortgagee*], his executors, administrators, and assigns, the repayment thereof, and also of such further sums of money as may be advanced by the said [*mortgagee*], in further pursuance of the said agreement, with interest for the same respectively, as hereinafter mentioned, the said [*mortgagor*] has agreed to execute to the said [*mortgagee*], his executors, administrators, or assigns, such security as is hereinafter contained. NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of £—— so by the said [*mortgagee*], to the said [*mortgagor*], advanced as hereinbefore is mentioned, the receipt of which said sum of £—— the said [*mortgagor*] hereby acknowledges, and in consideration that the said [*mortgagee*] has agreed to advance to the said [*mortgagor*] the further sums of £—— and £—— as hereinbefore recited, the said [*mortgagor*] hereby covenants with the said [*mortgagee*] to pay to him, his executors, administrators, or assigns, on the —— day of —— next the sum of £—— [*the original advance*] with interest thereon in the meantime at the rate of —— per cent. per annum; AND ALSO on such —— day of ——, or —— day of —— as shall next happen after the said [*mortgagee*], his executors, administrators, or assigns shall advance any further sum or sums of money in pursuance of the hereinbefore recited agreement in that behalf, to pay to him or them all and every the sum or sums which shall be so advanced, with interest for the same respectively, after the rate aforesaid as from the time of his or their advancing the same respectively; AND ALSO so long as the said sum of £——, or any other sum or sums which may be so advanced as aforesaid, or any part thereof respectively as shall remain unpaid, to pay to the said [*mortgagee*], his executors, ad-

of certain progress made;

of advances made accordingly.

Testatum.

Covenant to pay actual and future advances and interest.

XLIII. **Builder's Mortgage by Demise.**

ministrators, or assigns, interest thereon after the rate aforesaid, by equal half-yearly payments, on the —— day of ——, and the —— day of —— in every year. AND THIS INDENTURE ALSO WITNESSETH that for the consideration aforesaid, he the said [*mortgagor*] hereby demises, and, as beneficial owner, conveys unto the said [*mortgagee*], [*Parcels by reference to lease*]: To HOLD the said piece or parcel of ground, messuage, and premises hereby demised, UNTO the said [*mortgagee*], his executors, administrators, and assigns, henceforth during the unexpired residue of the said term of —— years granted by the said recited indenture of lease, except the last —— days of the same term; SUBJECT nevertheless to the proviso for redemption hereinafter contained. [*Declaration of trust of nominal reversion, ante,* p. 1014]. AND THIS INDENTURE ALSO WITNESSETH that for the consideration aforesaid, the said [*mortgagor*] hereby assigns, and, as beneficial owner, conveys unto the said [*mortgagee*], ALL that the policy of insurance of the premises hereby assigned against loss or damage by fire, and all moneys to be received under or by virtue of the same policy; To HOLD the said policy and premises hereby assigned UNTO the said [*mortgagee*], his executors, administrators, and assigns (*l*); SUBJECT to the proviso for redemption hereinafter contained. PROVIDED ALWAYS, that if the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall pay to the said [*mortgagee*], his executors, administrators, or assigns, the sum of £——, with interest for the same after the rate of —— per cent. per annum, on the —— day of —— next, and in case the said [*mortgagee*], his executors, administrators, or assigns, shall in pursuance of his said agreement in this behalf, or otherwise, advance any further sum or sums to or on the account of the said [*mortgagor*], his executors, administrators, or assigns, then if the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall, on such —— day of ——, or —— day of —— as shall next happen after such advancement or advancements respectively, pay unto the said [*mortgagee*], his executors, administrators, or assigns, all and every the sum or sums of money so advanced by him or them, with

Second *Testatum.*

Demise of leaseholds.

Third *Testatum.*

Assignment of policy of fire insurance.

Proviso for redemption.

(*l*) The consent of the office should be obtained to the assignment of the policy, and indorsed on the mortgage deed.

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interest for the same respectively, after the rate aforesaid, from the time or respective times of his or their advancing the same respectively; THEN, and in such case, he the said [*mortgagee*], his executors, administrators, or assigns, will, upon the request and at the cost of the said [*mortgagor*], his executors, administrators, or assigns, reconvey the premises hereby demised and assigned respectively, unto the said [*mortgagor*], his executors, administrators, and assigns, or as he or they shall direct; AND THE said [*mortgagor*] hereby covenants with the said [*mortgagee*] that he, the said [*mortgagor*], his executors, administrators, or assigns, will within the times and in manner prescribed in and by the hereinbefore recited indenture of lease, and to the satisfaction of the surveyor of the said [*mortgagee*], his executors, administrators, or assigns completely finish the said messuage, and buildings fit for habitation and use; AND FURTHER, will before any further advance or advances shall be applied for or made under or by virtue of these presents, effect such further insurance against loss or damage by fire of the said messuage and premises hereby demised in the office aforesaid, or in some other office to be approved by the said [*mortgagee*], his executors, administrators, or assigns, and in his or their names in such a sum as shall bear the same proportion to the amount of such further advance or advances as the amount in, or for which the said messuage and premises hereby demised are insured by the policy hereby assigned, bears to the sum of £—— so already advanced to the said [*mortgagee*] by the said [*mortgagor*] as aforesaid; AND will also pay all premiums and other moneys which shall become payable in respect of the said policy hereby assigned, and of all policies of such further insurance as aforesaid; AND will within —— days after each premium on any insurance shall fall due, produce the receipt for such premium to the said [*mortgagee*], his executors, administrators, or assigns, and that on the refusal or failure of the said [*mortgagor*], his executors or administrators, to produce any such receipt, pursuant to this covenant, then it shall be presumed that no insurance is being kept up by the mortgagor, in accordance with these presents, and it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, at any time thereafter to effect an insurance of the said messuage and buildings to an amount not exceeding the sum of £——: PROVIDED ALWAYS that if

Covenants by mortgagor: to finish the house;

to effect further insurance.

Power for

XLIII. **Builder's Mortgage by Demise.**

mortgagee to complete messuage, &c., on default of mortgagor in proceeding with works.

the said [*mortgagor*], his executors or administrators, shall at any time neglect or omit to proceed uninterruptedly with the finishing of the said messuage and premises comprised in and demised by the said indenture of lease in accordance with the covenant in that behalf hereinbefore contained, and Mr. ——, of, &c., or some other competent surveyor, shall in writing certify to that effect, or if the said [*mortgagor*] shall become bankrupt or enter into any statutory or other composition or scheme for the arrangement or liquidation of his affairs, then and in any such case, it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, to enter upon, proceed with, and complete the same, and he or they shall be entitled to recover all moneys which he or they shall expend for that purpose from the said [*mortgagor*], his heirs, executors, or administrators, by any action or actions or proceedings, or to prove for the same against his or their estate as may be thought expedient, with interest for the same at the rate of —— per cent. per annum; AND all moneys so expended with interest shall be deemed to be covered by and included in this security: PROVIDED ALWAYS [*Proviso restraining mortgagor's powers of leasing, ante*, p. 996; *Proviso as to consolidation, ante*, p. 1021]; PROVIDED ALSO, that if the said [*mortgagor*] shall become bankrupt or enter into any such composition or scheme as aforesaid, then and in such case the mortgagee's power of sale under or by virtue of these presents, shall forthwith, and without the necessity for any notice or demand for payment whatsoever, become exercisable, and moreover notwithstanding anything herein contained, such powers shall be exercisable either before or after the said messuage and premises shall be completed and finished, and notwithstanding the same shall have been partially completed by the said [*mortgagee*], his executors, administrators, or assigns. IN WITNESS, &c.

Stipulations as to exercise of mortgagee's powers of sale.

XLIV. *MORTGAGE by a* BUILDER *of* PROPERTY *comprised in an* AGREEMENT *for several* BUILDING LEASES. POWER *for* MORTGAGOR *to* WITHDRAW HOUSES *from the Security on* PAYMENT *of* INSTALMENTS *of* LOAN.

THIS INDENTURE (*i*), made the —— day of ——, 18—, BETWEEN [*mortgagor*], of &c., builder, of the one part; and [*mortgagee*], of &c., of the other part; WHEREAS, by an agreement, dated the —— day of ——, 18—, and made between [*lessor*], of the one part, and the said [*mortgagor*], of the other part, it was agreed that when and so soon as the messuages, or dwelling-houses, or buildings, thereinafter agreed to be built, should be built, finished, and made fit for habitation to the satisfaction of the architect or surveyor for the time being of the said [*lessor*], and such architect or surveyor should have certified in writing to that effect, the [*lessor*] would, by one or several leases as therein mentioned, demise unto the said [*mortgagor*] the piece or parcel of land, situate at ——, in the county of ——, and therein particularly described, and the said messuages, or dwelling-houses, and buildings to be built thereon, for the several terms of —— years, to be computed from the —— day of ——, 18—, respectively, at such several yearly rents, with and subject to such exceptions, reservations, covenants, provisoes, and stipulations as are therein mentioned; AND the said [*mortgagor*] thereby agreed with the said [*lessor*] to build and finish, fit for habitation, to the satisfaction of the said architect or surveyor, within the times and in the manner therein mentioned, —— messuages, or dwelling-houses, and buildings, with proper out-buildings, as therein mentioned [*Recite shortly any special stipulations as to the mode of granting leases which may be material as affecting the security*]; AND the agreement now in recital contained a power for the said [*lessor*], his heirs and assigns, upon breach of any of the stipulations contained in the same agreement to re-enter upon the premises thereby agreed to be demised, or such part of the same whereof no such lease as aforesaid should have been actually granted, and for cesser of the same agreement as regards the whole or such part of the premises as should be so entered upon; AND WHEREAS, in pursuance of the hereinbefore recited agreement,

Parties.

Recitals: of agreement for building lease or leases

of commencement of buildings and

(*i*) Stamp, *ad valorem* on amount secured, *ante*, p. 988. Stamp.

XLIV. **Builder's Mortgage of Property Comprised in Agreement.**

agreement for loan.

the said [*mortgagor*] has commenced to build the said messuages and buildings on the said piece or parcel of ground so agreed to be demised as aforesaid, and has applied to the said [*mortgagee*] to lend to him the sum of £—— for the purpose of completing the said messuages or buildings, which he the said [*mortgagee*] has agreed to do upon having the repayment thereof with interest at the rate hereinafter mentioned secured in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of £—— now paid to the said [*mortgagor*], by the said [*mortgagee*], (the receipt whereof the said [*mortgagor*] hereby acknowledges), the said [*mortgagor*] hereby covenants with the said [*mortgagee*] [*Covenant for payment of principal and interest, ante,* p. 994]; AND the said [*mortgagor*] hereby further covenants with the said [*mortgagee*] that he the said [*mortgagor*], his executors or administrators, will, within the times and in manner mentioned in the hereinbefore recited agreement, complete and finish fit for habitation in all respects the said —— messuages and buildings so agreed to be built on the piece or parcel of ground as aforesaid; AND will also, as soon as conveniently may be, at his or their own cost, perform and do all acts and things which may be necessary to entitle him or them to the lease or several leases by the hereinbefore recited agreement agreed to be granted to him or them: AND will immediately upon obtaining any such lease or leases execute a valid legal mortgage by way of assignment, or demise, as the said [*mortgagee*], his executors, administrators, or assigns, shall direct, of the premises comprised in such lease or leases, for such term or respective terms, and with and subject to all such powers, covenants, conditions, and provisoes as the said [*mortgagee*], his executors, administrators, or assigns, may reasonably require: [*Covenant by mortgagor to insure, ante,* p. 996; *power for mortgagee to enter and complete, ante,* p. 1104, *mutatis mutandis;* PROVIDED ALWAYS, that, subject and without prejudice to the power of sale, or any other remedy subsisting under or by virtue of these presents, it shall be lawful for the said [*mortgagor*], his executors, administrators, or assigns, from time to time, in pursuance of six calendar months' previous notice in writing of his intention in that behalf, to withdraw from this security any of the said leases and the premises therein respectively comprised upon payment of such sum of money as is set opposite to the said respective leases in the schedule hereunder written, or upon

Testatum.

Covenants by mortgagor:

to pay principal and interest;

to complete buildings;

to take up leases.

Power for mortgagor to withdraw houses from the security on payment of instalments.

XLIV. Builder's Mortgage of Property Comprised in Agreement.

payment of a sum of money bearing the same proportion to the principal monies for the time being due on this security as the sum or sums set opposite to the lease or leases intended to be withdrawn respectively bears to the sum of £—— (*total amount of advance*); And upon payment also of all interest, and costs, charges, and expenses (if any), for the time being due on the security of these presents; And upon receipt of all monies to be paid for or upon such withdrawal, the said [*mortgagee*], his executors, administrators, or assigns, will, at the cost of the said [*mortgagor*], his executors, administrators, or assigns, assign, surrender, or otherwise convey the premises to be withdrawn to such person or persons and in such manner in all respects as the said [*mortgagor*], his executors, administrators, or assigns shall direct. In witness, &c.

The Schedule above referred to.

XLV. *MORTGAGE by* Builder *of* Monies *due and to become due to him under several* Building Contracts. Interest *to be payable* in Advance. Proviso *that the* Security *shall bind* additional *and* substituted Contracts.

THIS INDENTURE (*k*), made the —— day of ——, 18—, Between [*mortgagor*], of &c., of the one part; and [*mortgagee*], of &c., of the other part; Whereas the said [*mortgagor*] is indebted to the said [*mortgagee*] in the several sums enumerated in the first part of the schedule contained in a memorandum dated this day, and signed by the parties hereto, which sums amount in the aggregate to the sum of £——, and the said [*mortgagee*] has required the said [*mortgagor*] to secure to him in manner hereinafter appearing the payment of the same, and of any sum or sums which may hereafter be advanced by the said [*mortgagee*] to Parties.

(*k*) Stamp *ad valorem* of sufficient value to cover actual and future advances, see *ante*, p. 989. The memorandum will bear a stamp of 10*s.* as a separate schedule. Stamp.

Notice of this assignment must be given to the persons liable to pay the monies under the existing contracts; and upon any future contract being substituted or added to the security, notice must forthwith be given to the persons liable thereunder. As to mortgages of future earnings of a business, see *Pooley* v. *Goodwin*, 4 A. & E. 94; *Ex parte Nicholls*, 22 Ch. D. 782. Notice.

XLV. **Builder's Mortgage of Monies due under Contracts.**

Testatum.

Covenant to repay actual and future advances, and interest in advance.

the said [*mortgagor*], with interest for the same respectively at the rate hereinafter mentioned. NOW THIS INDENTURE WITNESSETH, that in consideration of the principal sum of £——, less the sum of £——, being interest on the total sum of £——, after the rate of —— per cent. per annum for the half-year ending the —— day of ——, 18—, paid in advance, upon the execution of these presents by the said [*mortgagee*] to the said ——, (the receipt whereof the said [*mortgagor*] hereby acknowledges), he the said [*mortgagor*] hereby covenants with the said [*mortgagee*], that he the said [*mortgagor*], his heirs, executors, or administrators, will, on the —— day of ——, 18—, pay to the said [*mortgagee*], his executors, administrators, or assigns, the sum of £—— (*total amount of advances made*), and will also pay to him or them on such —— day of ——, or —— day of —— as shall next happen after any such further advance as aforesaid, the sum or sums so advanced (all interest thereon up to such half-yearly day, to be deducted from the advance at the time of making the same), and that if the said sum of £——, or any part thereof, or any other sum which may hereafter be advanced as aforesaid, shall remain unpaid after the day on which the same is hereinbefore covenanted to be paid, will thenceforth, so long as the same sum, or any part thereof, shall remain unpaid, pay to the said [*mortgagee*], his executors, administrators, or assigns, interest for the said sum of £——, or for so much thereof as shall for the time being remain unpaid, at the rate of —— per cent. per annum, by equal half-yearly payments in advance, on the —— day of —— and the —— day of ——, without any deduction, commencing on the said —— day of ——, 18—. AND THIS INDENTURE ALSO WITNESSETH, that the said [*mortgagor*] hereby assigns, and, as beneficial owner, conveys to the said [*mortgagee*] ALL THOSE several debts or sums of money now due or hereafter to become due, to the said [*mortgagor*], in respect of the several contracts enumerated in the second part of the said schedule, and now being or hereafter to be executed by the said [*mortgagor*]; TO HOLD to the said [*mortgagee*], his executors, administrators, and assigns, as a security for the several sums of money enumerated in the first part of the said schedule, and now or heretofore advanced, or hereafter to be advanced by the said [*mortgagee*] to the said [*mortgagor*], and interest thereon at the rate aforesaid, TOGETHER with power to the said [*mortgagee*] to ask, sue for, recover, and receive and give effectual discharges

Second *Testatum.*

Assignment.

for all or any of the said sums of money, in the name of the said [*mortgagor*], his executors and administrators, and to do all things necessary or auxiliary thereto; AND IT IS HEREBY AGREED that this security shall attach to and bind all sums of money to become due to the said [*mortgagor*] in respect of any contract hereafter to be entered in the second part of the said schedule, in addition to or substitution for any contract now entered therein, and shall enure as a security for any further advance by the said [*mortgagee*] to the said [*mortgagor*], entered in the first part of the said schedule, either in addition to or in substitution for any advance entered therein, and that every additional entry in either part of the said schedule shall be initialled by the said [*mortgagor*], and every cancellation of an entry shall be initialled by the said [*mortgagee*], and that these presents shall from time to time be a security for all advances then appearing uncancelled in the first part of the said schedule, not exceeding at any one time the sum of £——, and shall bind and be an assignment of all sums of money due to the said [*mortgagor*] upon contracts appearing uncancelled in the second part of the said schedule; AND IT IS FURTHER AGREED that this security shall not in any way affect, by way of merger or otherwise, any bills of exchange or promissory notes of the said [*mortgagor*] which the said [*mortgagee*] may hold as a collateral security for all or any of the said advances. IN WITNESS, &c.

XLV. **Builder's Mortgage of Monies due under Contracts.**

Proviso that the security shall attach to future contracts.

XLVI. *MORTGAGE of a Leasehold* PUBLIC-HOUSE *to a* FIRM *of* BREWERS, *to secure a Present Advance, and the Balance of an Account Current for future Advances and Goods to be supplied.* PROVISO *for* REDUCTION *of* INTEREST *so long as the* MORTGAGOR *shall* DEAL EXCLUSIVELY *with the* MORTGAGEES.

THIS INDENTURE (*l*), made the —— day of ——, 18—, BETWEEN [*mortgagor*], of &c., licensed victualler (hereinafter called the mortgagor), of the one part; and [*mortgagee*] and [*mortgagee*], carrying on the business of brewers at ——, in

Parties.

(*l*) Stamp *ad valorem* of sufficient amount to cover actual and future advances, see *ante*, p. 989.

Stamp.

XLVI. Mortgage of Public-house to a Firm of Brewers.

the county of ——, under the style or firm of —— & Co. (hereinafter called the mortgagees), of the other part; WHEREAS [*Recite the lease of the public-house to the mortgagor, ut ante*, p. 1016, *mutatis mutandis*]; AND WHEREAS the mortgagees have agreed to lend to the mortgagor the sum of £——, upon having the repayment thereof, with interest thereon at the rate hereinafter mentioned, and also of any other sum or sums of money from time to time hereinafter to be advanced to or on account of the mortgagor by the mortgagees, or owing to them in account current or stated, for goods supplied or otherwise, from the mortgagor, with interest on any such sums of money so advanced or owing at the rate hereinafter mentioned, secured in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of £——, upon the execution of these presents paid to the mortgagor by the mortgagees (the receipt whereof the mortgagor hereby acknowledges), the mortgagor hereby covenants with the mortgagees that the mortgagor will, on the —— day of ——, 18— next, pay to the mortgagees the sum of £——, with interest for the same in the meantime at the rate of —— per cent. per annum, and will, on such —— day of —— or —— day of —— as shall happen next after the time of the same respectively being advanced or becoming payable, pay to the mortgagees every other sum of money which may hereafter be advanced to or on account of the mortgagor by the mortgagees, or be owing to them by the mortgagor in account current or stated as aforesaid, with interest thereon at the rate of —— per cent. per annum, from the time of the same respectively being advanced or becoming payable; AND ALSO that if the said principal sum of £——, or any sum which may hereafter be advanced to or on account of the mortgagor by the mortgagees, or be owing to them from the mortgagor in account current or stated as aforesaid, shall remain unpaid after the —— day of —— or the —— day of —— on which the same is hereinbefore covenanted to be paid respectively, then so long as the same or any part thereof shall remain unpaid, the mortgagor will pay to the mortgagees interest for the same, or so much thereof as shall for the time being remain unpaid respectively, at the rate aforesaid, by equal half-yearly payments, on the —— day of —— and the —— day of ——: AND THIS INDENTURE FURTHER WITNESSETH, that in further pursuance of

Recitals: of lease; of agreement for loan.

Testatum. Covenant for payment of principal and of further advances, and amount due on account current, and interest.

Second *Testatum.*

XLVI. Mortgage of Public-house to a Firm of Brewers.

the said agreement, and for the consideration aforesaid, the mortgagor hereby demises, and, as beneficial owner, conveys unto the mortgagees all the said public-house and premises by the hereinbefore-recited indenture of lease of the —— day of ——, 18—, demised, together with the rights, easements, and appurtenances thereunto belonging, and the goodwill of the business carried on upon the same premises, and all fixtures and fittings, whether landlord's or tenant's (except trade machinery and personal chattels within the meaning of the Bills of Sale Acts), now or hereafter during the term for which the same are hereby demised to be in or about the said hereditaments, and the licences for carrying on the said business now or hereafter during the same term to be obtained: To HOLD all the premises comprised in the said indenture of lease, and the said goodwill, fixtures, fittings, and licences hereby demised unto the mortgagees for all the residue now to come of the said term of —— years, less the last day thereof, SUBJECT to the proviso for redemption hereinafter contained: PROVIDED ALWAYS, and it is hereby agreed and declared, that if the mortgagor shall on the said —— day of —— next pay to the mortgagees the said sum of £——, with interest for the same from the date of these presents up to the said —— day of —— next at the rate of —— per cent. per annum, and shall on such —— day of —— or —— day of —— as shall happen next after the time of the same respectively being advanced or becoming owing as aforesaid, pay to the mortgagees every other sum of money which may hereafter be advanced to or on account of the mortgagor by the mortgagees, or be owing to them in account current or stated, or otherwise, from the mortgagor as aforesaid, with interest on such sums of money so advanced or owing from the time of the same respectively being advanced and becoming payable at the rate aforesaid, without any deduction, then the mortgagees shall at any time thereafter, upon the request and at the costs of the mortgagor, surrender the said hereditaments and premises hereby demised unto the mortgagor [*Declaration of trust of nominal reversion, ante*, p. 1014]: PROVIDED ALWAYS that if the mortgagor or other the occupier or occupiers for the time being of the premises hereby demised shall during any half-year ending on the —— day of —— or the —— day of ——, while any money is owing on the security hereof, deal exclusively with the mortgagees, for all the porter, stout, beer, ale, and malt liquors consumed or sold

Demise of public-house.

Habendum.

Proviso for redemption.

Proviso for reduction of interest so long as mortgagor shall purchase liquors exclusively from mortgagees.

XLVI. Mortgage of Public-house to a Firm of Brewers.

upon the premises or any premises taken in connection therewith, or in anywise under or by virtue of the licence or licences for the time being in force in respect of the same premises, including any occasional or subsidiary licence (except only such malt liquors, if any, as the mortgagees may from time to time in writing allow to be purchased from other persons), or if during any such half-year as aforesaid, while any money is owing on the security hereof, the mortgagees shall in writing refuse or neglect within a reasonable time (being not less than —— days) after notice in writing by the mortgagor, or such occupier or occupiers, to supply such porter, stout, beer, and ale of the kind and quality, and at the price at which goods of a similar nature shall for the time being be supplied by the mortgagees to their or his ordinary customers, as may be fairly required for sale and consumption upon the premises hereby demised or any premises taken in connection therewith, then and in either of such cases the mortgagees shall accept interest for the principal monies for the time being owing upon the security hereof at the rate of —— [*reduced rate*] per cent. per annum for every half-year during which there shall have been such exclusive dealing, or in which there shall have been such refusal or neglect as aforesaid: PROVIDED ALWAYS, and it is hereby declared, that the mortgagor shall not, before the —— day of ——, 18—, compel the mortgagees to receive the said sum of £——, or any part thereof: PROVIDED ALWAYS, and it is hereby declared that if the mortgagor shall pay interest at the rate at which the same shall for the time being be payable under the provisions in that behalf herein contained on the monies for the time being owing on the security of these presents on the said half-yearly days of payment respectively, or within —— days after each of the said days respectively, and shall perform and observe all and singular the covenants, provisoes, agreements, and declarations herein contained and on the part of the mortgagor to be observed and performed, then the mortgagees will not call in the said principal sum of £——, or any part thereof, before the said —— day of ——, 18—: PROVIDED ALWAYS that it shall be lawful for the mortgagees to enter and take possession of the premises hereby demised at any time hereafter, in case the mortgagor shall cease to carry on the business of a beer retailer in or upon the premises in the usual manner, or shall do or omit, or cause to be done or omitted, anything whereby the licence or licences for the time

Proviso that principal monies shall not be called in for a fixed period.

Proviso for entry by mortgagees on mortgagor's ceasing to carry on business.

being in force in respect of the premises shall become liable to be or become void or voidable or lost or suspended or the renewal thereof withheld; And upon any such entry or upon any sale or foreclosure of all or any of the premises hereby demised, made, or effected, under or by virtue of these presents by the mortgagees, the mortgagor will forthwith use his or their best endeavours to procure the transfer, as well temporary as ultimate, or a renewal of the licence or licences which may for the time being be in force in respect of all or any of the premises hereby demised into or in the name or names of such person or persons as the mortgagees shall direct, and particularly will give the proper notices and attend in person at the next ensuing and all subsequent sessions or meetings of the proper authorities for that purpose; And in addition to but not in substitution therefor, the mortgagor hereby constitutes and appoints the mortgagees his true and lawful attorney and attorneys for him and in his name to make and execute all such transfers of the said licences or apply for renewals of such licence or licences as aforesaid, and to do all such other acts and take all such steps as may be necessary for rendering valid and effectual the transfer or renewal of any such licence or licences as the mortgagor might or could do or might or could have done: Provided always that in these presents, unless the contrary appears, the expression "the mortgagor" shall mean and include the said [*mortgagor*], his executors and administrators, and the expression "the mortgagees" shall mean and include the said [*mortgagees*], their executors, administrators, and assigns, and also any other persons or person who may for the time being constitute or become the successors in business of the firm now known and herein described as —— & Co. In witness, &c.

XLVI. Mortgage of Public-house to a Firm of Brewers.

Power of Attorney.

Interpretation clause.

XLVII. *BILL OF SALE of* Personal Chattels *by way of* Mortgage (*m*).

THIS INDENTURE (*n*), made the —— day of ——, 18—, Between [*mortgagor*], of &c., of the one part; and

Parties.

(*m*) In this precedent the statutory form of a bill of sale is closely followed, the variations and additions being given in

For note (*n*) see next page.

XLVII. Bill of Sale of Personal Chattels.

Testatum.

Assignment of chattels by way of security.

Agreements by mortgagor for payment of principal and interest;

[*mortgagee*], of &c., of the other part, WITNESSETH that, in consideration of the sum of £—— now paid (*o*) to the said [*mortgagor*] by the said [*mortgagee*], (the receipt of which the said [*mortgagor*] hereby acknowledges), he the said [*mortgagor*] doth hereby assign unto the said [*mortgagee*], his executors, administrators, and assigns, ALL AND SINGULAR the several chattels and things specifically described in the schedule hereto annexed [AND ALSO all chattels and things which may at any time hereafter during the continuance of this security be attached, placed, or brought, to, in, or upon the messuage or dwelling-house and buildings, situate, &c., and now in the occupation of the said [*mortgagor*], in substitution for, or in addition to, the chattels and things described in the said schedule (*p*)], by way of security for the payment of the sum of £——, and interest thereon at the rate of —— per cent. per annum: AND the said [*mortgagor*] doth further agree and declare that he will duly pay to the said [*mortgagee*] the principal sum aforesaid, together with the interest then due by equal *monthly* payments of £——, on the —— day of [every month, the first such payment to be made on the —— day of] ——, 18— (*q*);

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brackets: that form expressly provides for variations only as regards the statement of the consideration, the rate of interest, and the stipulated time or times for payment, and also for the insertion of special stipulations or terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance of the security. As a bill of sale given as a security is void unless "in accordance" with the statutory form (see *ante*, p. 806), it will be advisable to make no variations or additions except as expressly provided. Unimportant variations in other respects have, however, in some cases been held to be insufficient to invalidate bills of sale which were otherwise substantially in accordance with the Act: see *Wilson* v. *Kirkwood*, 48 L. T. 821; *Melville & Co.* v. *Houghton & Co.*, W. N., 1883, 223.

Stamp.

(*n*) Stamp, *ad valorem* on principal sum secured, *ante*, p. 988.

Consideration.

(*o*) As to statement of consideration, see *ante*, p. 807. If the consideration is less than 30*l.* the bill of sale will be void. The bill must be duly attested and registered under the Act of 1878 within seven days after its execution: see *ante*, p. 805.

Substituted chattels.

(*p*) The insertion of words here bracketed will not avoid the bill of sale, but they will be good only as against the grantor and his representatives and subsequent assigns: see *Crosser* v. *Maxwell*, W. N. 1885, p. 95.

Date of payment.

Interest.

(*q*) A fixed day for payment must be named; a bill of sale will be void, if the money is payable on demand: *Hetherington* v. *Groome*, 13 Q. B. D. 789; or within a certain time after demand: *Sibley* v. *Higgs*, 15 Q. B. D. 619.

The instalments may, of course, be made payable quarterly or half-yearly, if such is the arrangement; and the rate need not be

And the said [*mortgagor*] doth also agree with the said [*mortgagee*] that he will, [during the continuance of this security, pay all rents, rates, taxes, and outgoings, and observe and perform all covenants, conditions, and stipulations, which ought to be paid, observed, or performed by the tenant or occupier of the said messuage and buildings, or of any other place or places to or upon which the chattels and things comprised in this security or any of them may from time to time be removed or placed, and will on demand produce to the said [*mortgagee*] the last receipts for the payment of such rents, rates, taxes, and outgoings as aforesaid: And also that he will not remove from the said messuage and buildings any of the said chattels and things without the consent of the said [*mortgagee*], except such as are worn out or removed for the purpose of repairs, and will replace any chattels or things so worn out by others of equal or greater value, And will also keep the said chattels and things in good order and repair, and also insured, &c. [*continue ut ante*, p. 996, *mutatis mutandis*]: And that it shall be lawful for the said [*mortgagee*] and his agents, at all reasonable times during the continuance of this security, to enter into and upon the said messuage and buildings, and to inspect the state and condition of the said chattels and things, and to take schedules or inventories thereof, and to give notice to the said [*mortgagor*] of any defect or want of repair thereof, and that the said [*mortgagor*] will thereupon immediately make good and amend such defect or want of repair: And that if the said [*mortgagor*] shall refuse, neglect, or fail to make good and amend such defect or want of repair within —— days after such notice as aforesaid, it shall be lawful for the said [*mortgagee*] to make good or amend the same without prejudice to his other remedies, and that all costs and expenses paid or incurred by him of and incident to making good or amending such defect or want of repair shall be added to the moneys hereby secured and charged upon the chattels and things comprised in this security, with interest thereon at the rate, and payable at the times and in manner, aforesaid, to be com-

to observe conditions of tenancy;

Not to remove chattels;

to permit mortgagee to inspect chattels;

and to repair on notice;

power for mortgagee to repair, &c., on default.

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calculated by the year, *e.g.* it may be (say) *one* per cent. per month or 1*s.* per £1 per month.

The statutory form expressly permits variations as to the stipulated time or times for payment of principal and interest, but the principal and interest are in practice usually made payable by monthly or other instalments.

XLVII. Bill of Sale of Personal Chattels.

puted from the time or respective times of such costs and expenses having been paid or incurred respectively: PROVIDED ALWAYS that if the said [*mortgagor*] shall make default in payment of the said sum of £——, or the interest thereof, at the time herein provided for payment, or in the performance of any covenant or agreement herein contained and necessary for maintaining this security, or during the continuance of this security shall become a bankrupt, or suffer the goods hereby assigned, or any of them, to be distrained for rent, rates, or taxes, or shall fraudulently either remove or suffer to be removed the said goods or any of them from the premises upon which they may be, or shall without reasonable excuse (*u*) neglect or refuse, upon demand in writing by the said [*mortgagee*] to produce to him his last receipts for rent, rates, or taxes, or if execution shall during the continuance of this security be levied against the goods of the said [*mortgagor*] under any judgment at law, then, and in any such case, all principal moneys hereby secured, and for the time being remaining unpaid, together with all interest up to the time of such default or event as aforesaid, shall immediately become payable without the necessity for any notice or demand of payment whatsoever, and it shall be lawful for the said [*mortgagee*] at any time after any such default or event as aforesaid, by himself or his agents or servants, to enter into and upon the said messuage and buildings or other the place or places to or in which the said chattels and things comprised in this security or any of them may have been removed or may happen to be, and to seize and take possession of the said chattels and things or any of them: AND at

Power to seize in certain events (*t*);

and to sell;

(*t*) The events and defaults here enumerated on which the power of seizure is to arise closely correspond with those mentioned in sect. 7 of the Act of 1882, *ante*, p. 802. This appears to be the most prudent course, especially when chattels form the only or principal security for the loan. But it is conceived that a power to seize in general terms (see next Precedent, *post*, p. 1023) if qualified by the limiting proviso according to the statutory form would not invalidate the security. It has been held that a power to seize upon neglect upon demand in writing to produce receipts for premiums of fire-insurance, qualified by the proviso, did not invalidate a bill of sale: *Duff* v. *Valentine*, W. N., 1883, p. 225: see further on this point, *ante*, p. 802.

Reasonable excuse.

(*u*) Where the rent was only a few days overdue, and had not been demanded, it was held that the grantor of a bill of sale had a "reasonable excuse" for not producing the receipt: *Ex parte Cotton*, 11 Q. B. D. 301.

any time after the expiration of five days from such seizure, without the necessity for any notice or demand of payment whatsoever, to sell all or any of such chattels and things either by public auction or private contract, with powers to buy in and rescind or vary any contract for sale, and to resell without being answerable for loss, and to give effectual receipts for the purchase-money, and to deliver any chattels or things sold to the purchaser or respective purchasers thereof, or as he or they may direct, and generally to do all acts and things which may be necessary or expedient for effectuating such sale: And it is hereby agreed that the said [*mortgagee*] shall apply the moneys to arise from any such sale as aforesaid, in the first place, in payment of all costs and expenses of and incident to such sale or otherwise incurred in relation to this security, and in the next place in or towards the payment and satisfaction of all principal, interest, and other moneys for the time being due under this security, and shall pay the surplus (if any) to the said [*mortgagor*], or as he shall direct:] Provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said [*mortgagee*] for any cause other than those specified in section 7 of the Bills of Sale Act (1878) Amendment Act, 1882: [Provided lastly that all rights and obligations of the said [*mortgagor*] under or by virtue of these presents shall extend to his executors, administrators, and assigns, and all powers, rights, and obligations of the said [*mortgagee*] under or by virtue of these presents shall extend to his executors, administrators, and assigns.] In witness, &c.

Application of proceeds of sale.

Saving clause.

Interpretation clause.

The Schedule above referred to.

XLVIII. *MORTGAGE of* Leasehold Coal Mines *and* Machinery (not *to be* registered *as a* Bill of Sale) *by a* Firm *of* Colliery Proprietors, *with the* Licence *of the* Lessor. Variations (*in brackets*) *where the* Lessor postpones *his* right *in respect of the* Rents, &c., *to the* Interest *of the* Mortgagee; Also Variations (*in notes*) *where the* Security *includes* Trade Machinery

XLVIII. **Mortgage of Leasehold Colliery with Machinery, &c.**

and CHATTELS, *and is intended to be* REGISTERED *as a* BILL OF SALE.

THIS INDENTURE (*x*), made the —— day of ——, 18—, BETWEEN [*mortgagor*] and [*mortgagor*], carrying on the business of colliery proprietors, at ——, in the county of ——, in partnership under the style or firm of —— Colliery Company, of the first part; [*lessor*], of &c., of the second part; and [*mortgagee*], of &c., of the third part; [*Recite the lease of colliery to mortgagors, stating parcels with exceptions and reservations, and stating also fully the clauses relating to erection and removal of machinery, &c., and the covenant against assignment or underletting without the lessor's licence* (*y*)]; AND WHEREAS the said [*mortgagors*] are entitled to certain

Parties.

Recitals: of mining lease;

of title of mortgagors

Stamp.

(*x*) Stamp, *ad valorem* on amount secured, *ante*, p. 988.

Recital of lease.

(*y*) In recitals of leases the parcels, with exceptions, &c., and the amount of the rent reserved should generally be fully stated from the lease. In the present instance a full description of the parcels should be given and the easements, liberties, exceptions, and reservations should be stated with sufficient fullness to indicate their nature and effect. The rents in a mining lease are frequently numerous and complex, and if so, they cannot be stated fully without causing the recital to be of an inordinate length. In such a case, as an incomplete statement of the rents and royalties would be apt to be misleading, it will be better to say that the property was demised "subject to the payment or rendering of the rents and royalties thereby reserved and made payable respectively as therein mentioned." This will, of course, be all that is required if the lessor postpones his right to rents, &c.

If the parcels, easements, liberties, exceptions, and reservations are of great length it may be better, instead of giving the full recital of the lease, to proceed, after giving the parties, as follows:—

"AND WHEREAS by an indenture of lease, dated &c., and made between [*parties*], certain mines, seams of coal, and premises, known as the —— Colliery, lying and being under certain lands situate at ——, and therein specifically described, together with such liberties, licences, and privileges, for getting and working minerals and otherwise, and subject to such reservations and exceptions as are therein mentioned respectively were demised unto the said [*mortgagors*] for the term of —— years, at, with and subject to the rents and royalties, covenants, provisoes and stipulations therein mentioned, and to be paid, performed and observed by or on the part of the said [*mortgagors*] respectively, and which indenture contained a covenant [*State literally covenant against assignment or underletting*]."

XLVIII. Mortgage of Leasehold Colliery with Machinery, &c.

buildings, fixtures, fixed engines and machinery and effects erected or fixed on or to the premises demised by the hereinbefore recited indenture of lease (the fixtures and machinery which are not removable by the said [*mortgagors*] under the covenants of the hereinbefore recited indenture of lease being specifically described in the first schedule hereunder written, and the fixtures, machinery and effects which are so removable being specifically described in the second schedule hereunder written) (*z*); And whereas the said [*mortgagors*] have applied to the said [*mortgagee*] to lend to them the sum of £—— for the purposes of the said colliery and works, which he has agreed to do upon having the repayment of the same with interest secured in manner hereinafter appearing; And whereas the said [*lessor*] has at the request of the said [*mortgagor*] agreed to concur in these presents in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement in this behalf, and in consideration of the sum of £——, now paid to the said [*mortgagors*] by the said [*mortgagee*], (the receipt whereof the said [*mortgagors*] respectively acknowledge), the said [*mortgagors*] hereby do, and as a separate covenant each of them doth [*Covenant for payment of principal and interest, ante*, p. 994]: AND THIS INDENTURE ALSO WITNESSETH that, in further pursuance of the said agreement, and for the consideration aforesaid, the said [*mortgagors*], with the licence and consent of the said [*lessor*], testified by his being a party to and executing these presents, hereby demise, and, as beneficial owners, convey unto the said [*mortgagee*] All those pieces of land, mines, seams of coal, minerals, hereditaments and premises, easements, rights, privileges and authorities comprised in and demised by the hereinbefore recited indenture of lease; And also all the buildings, fixtures, fixed engines, and machinery and effects which, since the making of the said indenture of lease, have been built, erected, or fixed upon or to the said hereditaments

to fixed machinery, &c.;

of agreement for loan;

of agreement by lessor to concur.

Testatum.

Covenant for payment of principal and interest.

Second *Testatum.*

Demise of leasehold colliery and irremovable buildings, fixtures, fixed machinery, &c.

(*z*) If the mortgage is to contain trade machinery and chattels so as to require registration, insert here the following recital:—

Recital of title of mortgagors to movable machinery, plant, &c.

"And whereas the [*mortgagors*] are also entitled to the movable machinery, engines, waggons, trucks, plant, tools, implements, chattels and effects belonging to or used upon the said colliery and works, which are specifically described in the third schedule hereunder written."

XLVIII. **Mortgage of Leasehold Colliery with Machinery, &c.**

and premises therein comprised, and which are not removable by the said [*mortgagors*] as aforesaid, and are specifically described in the first schedule hereunder written; AND ALSO all other buildings, fixtures, fixed engines and machinery which may at any time be built, erected, or fixed upon or to the said hereditaments and premises comprised in the hereinbefore recited indenture of lease, and which shall not be removable by the said [*mortgagors*], their executors, administrators, or assigns, under or by the covenants contained in the same indenture: To HOLD all the premises hereby demised unto the said [*mortgagee*], his executors, administrators, and assigns, for the residue now unexpired for the said term of —— years, therein granted by the hereinbefore recited indenture of lease, except the last —— days thereof, SUBJECT to the proviso for redemption hereinafter contained: AND THIS INDENTURE ALSO WITNESSETH that, in further pursuance of the said agreement, and for the consideration aforesaid, the said [*mortgagors*], hereby assign, and, as beneficial owners, convey unto the said [*mortgagee*], ALL AND SINGULAR the fixed machinery, fixtures, fixed engines and effects specifically described in the second schedule hereunder written; AND ALSO all other fixed machinery, fixtures, and effects which are now, or may at any time hereafter be erected or fixed upon or to the said hereditaments and premises, and which are or shall be removable by the said [*mortgagors*]; AND ALSO all coal, cannel, slack, coke, ironstone and minerals which now are or which at any time during the continuance of this security shall be raised, and be upon or out of the said hereditaments and premises, To HOLD all the premises hereby assigned unto the said [*mortgagee*], his executors, administrators, and assigns, SUBJECT to the proviso for redemption hereinafter contained: PROVIDED ALWAYS, that if the said [*mortgagors*], or the persons or person hereafter for the time being constituting the said —— Colliery Company, or any of them, their or any of their heirs, executors, or administrators shall, on the —— day of ——, 18—, pay to the said [*mortgagee*], his executors, administrators, or assigns, the sum of £—— and interest thereon at the rate aforesaid, then the said [*mortgagee*], his executors, administrators, or assigns will, at the request and cost of the said [*mortgagors*], their executors, administrators, or assigns, re-convey, surrender, and assign, the premises hereby demised and assigned respectively to the said [*mort-*

Habendum.

Third *Testatum.*

Assignment of removable fixtures, fixed machinery, &c

Proviso for redemption.

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gagors], their executors, administrators, or assigns, according to the nature of the premises respectively, or as they or he shall direct (*a*) [*Declaration of Trust of the nominal reversion of the leaseholds, ante*, p. 1017]. [AND the said [*lessor*], in pursuance of the hereinbefore recited agreement in this behalf, and for the purpose of giving priority to the interest on the said sum of £——, hereinbefore covenanted to be paid over the rents and royalties reserved by the hereinbefore recited indenture of lease, but not so as to affect or prejudice the rights or remedies of the said [*lessor*], his heirs or assigns, as against the said [*mortgagors*], their executors or administrators, under or by virtue of the said indenture of lease, hereby covenants with the said [*mortgagee*], that the interest on the said sum of £—— shall be deemed to have priority over the said rents and royalties reserved by the said indenture of lease, so that as between the said [*lessor*], his heirs and assigns, and the said [*mortgagee*], and his executors, administrators, and assigns, no such rents or royalties shall be recoverable by the said [*lessor*], his heirs or assigns, for any half-year, until after the interest due on the said sum of £—— for the then current half-year, and all arrears (if any) of such interest shall have been paid to the said [*mortgagee*], his executors, administrators, or as-

Covenant by lessor to postpone the right to rents, &c.

(*a*) If the mortgage is to include trade machinery and chattels, so as to require registration, insert here the following witnessing part:—

Fourth *Testatum*.

"AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreement, and for the consideration aforesaid, the said [*mortgagors*] hereby assign and convey unto the said [*mortgagee*], his executors, administrators, and assigns, all the moveable machinery, engines, waggons, trucks, plant, tools, implements, chattels, and effects, specifically described in the third schedule hereunder written (and also all other moveable machinery, &c., chattels, effects, and things which now are or hereafter may be attached, brought, or used to, upon, or in the said colliery and premises, either in addition to or in substitution for the same), by way of security for the payment on the —— day of ——, 18—, of the said sum of £—— and interest thereon at the rate aforesaid."

Assignment of moveable machinery, plant, and chattels.

The assignment of the property mentioned within the brackets will be valid only as against the grantors, their representatives, and assigns: see *ante*, p. 1114, note (*p*).

XLVIII. **Mortgage of Leasehold Colliery with Machinery, &c.**

signs]: And the said [*mortgagors*] hereby covenant with the said [*mortgagee*], that they the said [*mortgagors*], their executors or administrators, will, at all times during the continuance of this security, keep up to a total value of £——, at the least, the fixtures, fixed engines, and machinery, both irremoveable and removeable by the said [*mortgagors*] under the covenants of the hereinbefore recited indenture of lease, and hereby demised and assigned respectively, And will not pull down or remove any of the buildings (*b*), fixtures, engines, machinery, and effects hereby demised and assigned respectively, except for the purpose of rebuilding, repairing, reinstating, or replacing the same respectively, without the consent of the said [*mortgagee*], his executors, administrators, or assigns (*c*); And will replace any of the same premises which may be removed, lost, destroyed, or worn out, by others of similar nature and quality, and of at least equal value; And also will keep all the said buildings, fixtures, engines, machinery, and effects hereby demised and assigned respectively in good and sufficient repair; And also will insure [*continue ut ante*, p. 996]; And that it shall be lawful for the said [*mortgagee*], his executors, administrators, and assigns, at all reasonable times during the continuance of this security, to enter into and upon the said colliery and premises comprised in the hereinbefore recited indenture of lease, and to inspect the state and condition of the premises hereby demised

Covenants by mortgagors:

to maintain fixtures, &c., to a certain value;

not to remove buildings, fixtures, &c.;

to replace fixtures, &c.;

to repair and insure.

Power for mortgagee to enter, inspect, take inventories, and give notice of improper working, want of repair, and the like.

(*b*) If moveable machinery, plant, and tools are included say:—

"Fixtures, fixed and moveable engines, machinery, plant, tools, implements, chattels, effects, and premises."

Covenant where plant and tools, &c., are included.

(*c*) Notwithstanding covenants against removal, such as that given in the text, much trouble and loss has occasionally been caused to mortgagees owing to mortgagors of collieries, factories, &c., removing machinery and effects for the ostensible purpose of replacing them, and then replacing them by other machinery and effects purchased on the three years' hire system (as to which see *ante*, tit. Agreements, Vol. I. p. 631, note (*a*)) without notice of the mortgage to the vendor. To obviate this danger it may be prudent to insert here the following clause:—

Provision to secure that mortgagee shall have notice of removal of machinery.

"And will not remove any of the same fixtures, engines, machinery, or effects, either for any such excepted purpose as aforesaid or otherwise, without giving to the [*mortgagee*], his executors, administrators, or assigns, —— days previous notice in writing of such intended removal."

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and assigned respectively, and to take schedules or inventories of the fixtures, machinery, and effects hereby demised and assigned respectively, and to give notice to the said [*mortgagors*], their executors, administrators, or assigns, of any unworkmanlike or improper working, getting, or using of the said colliery and minerals or the works connected therewith, or of any defect or want of repair in or of any of the premises hereby demised and assigned respectively, and that the said [*mortgagors*], their executors, administrators, or assigns, will thereupon make good and amend such unworkmanlike or improper working, getting, or user, defect or want of repair accordingly; And that if the said [*mortgagors*], their executors, administrators, or assigns, shall refuse, neglect, or fail to make good and amend any such working, getting, user, defect, or want of repair as aforesaid, within —— days after such notice as aforesaid, it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, to make good and amend the same, without prejudice to his and their other remedies, and that all costs and expenses incurred by him or them of and incidental to making good or amending any such working, getting, user, defect, or want of repair as aforesaid, shall be added to the monies hereby secured, and be a charge upon the premises hereby demised and assigned respectively, with interest thereon at the rate and payable at the times and in manner aforesaid, to be computed from the time or respective times of such costs and expenses having been paid or incurred respectively: Provided always [*Proviso restricting mortgagors' power of leasing, ante*, p. 996]: Provided always, and it is hereby agreed, that if default shall be made in payment of the said principal sum of £——, or any part thereof, on the —— day of —— next, it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, at any time thereafter without any further consent of the said [*mortgagors*], their executors, administrators, or assigns, by themselves or their agents or servants, to enter into and upon the said colliery and premises hereby demised, or other the place or places to or in which any of the fixtures, engines, machinery, or other effects comprised in this security (other than such as are not removeable by the said [*mortgagors*] under the covenants contained in the hereinbefore recited indenture of lease) may have been removed or may happen to be, and seize and take possession of the same, or any of them, and to

Power for mortgagee to repair, &c., on mortgagor's default.

Power to seize machinery and effects.

XLVIII. **Mortgage of Leasehold Colliery with Machinery, &c.**

sell the same, or any of them, either together with or separate from the soil or buildings to, upon, or in which the same or any of them may be affixed or placed: PROVIDED ALWAYS, that until any entry shall have been actually made under the proviso lastly herein contained, or until notice in writing to the contrary shall have been given to or left on the said colliery and premises for the said [*mortgagors*], their executors, administrators, or assigns, requiring them to desist from selling, removing, or otherwise disposing of the coal and other minerals comprised in this security, but not after any such entry or notice shall have been made, given, or left as aforesaid, it shall be lawful for the said [*mortgagors*], their executors, administrators, or assigns, to sell, remove, and otherwise dispose of such coal and other minerals as they shall think proper pursuant to the hereinbefore recited indenture of lease: PROVIDED ALWAYS, that upon any sale of all or any of the premises hereby demised and assigned respectively, the power of sale conferred on mortgagees by the Conveyancing and Law of Property Act, 1881, shall be exercisable by the said [*mortgagee*], his executors, administrators, and assigns, in all respects with and pursuant to the powers, provisions, and regulations contained in the said Act with regard to the exercise of such power of sale, except that such power of sale shall be exercisable if and whenever notice requiring payment of the mortgage money shall have been served on the said [*mortgagors*], or either of them, or their or his executors, administrators, or assigns, and default shall have been made in payment of the mortgage money, or of part thereof, for *two* calendar months after such notice, or if and whenever some interest under this security shall be in arrear and unpaid for *one* month after becoming due (*d*):

Proviso that mortgagors may remove and sell coal, &c., until entry or notice.

Proviso as to exercise of statutory power of sale.

(*d*) If trade machinery and chattels are to be included in the security, insert here the following proviso (see *ante*, p. 1116, n.):—

Proviso as to liability to seizure of plant, tools, &c.

"PROVIDED ALWAYS, that the moveable machinery, engines, waggons, trucks, tools, implements, chattels, and effects specifically described in the third schedule hereunder written [and also all other moveable machinery, &c., chattels, effects, and things, which now are or may be added to or substituted for the same] shall not be liable to seizure for any cause other than those specified by the sect. 7 of the Bills of Sale Act (1878) Amendment Act, 1882."

XLVIII. Mortgage of Leasehold Colliery with Machinery, &c.

PROVIDED ALWAYS, and it is hereby expressly agreed, that these presents shall not be registered as a Bill of Sale, and that no trade machinery, chattels, effects, or things, shall be deemed to be included in this security, the inclusion whereof would render such registration necessary to the validity or effect of these presents, anything herein contained to the contrary notwithstanding. IN WITNESS, &c.

Proviso that the security shall not be registered as a bill of sale (*e*).

THE FIRST SCHEDULE ABOVE REFERRED TO.

THE SECOND SCHEDULE ABOVE REFERRED TO (*f*).

XLIX. *SUBMORTGAGE or* MORTGAGE *of a* MORTGAGE DEBT *and the security for the same.*

THIS INDENTURE (*g*), made the —— day of ——, 18--, BETWEEN [*mortgagor*] of &c., of the one part; and [*mortgagee*] of &c., of the other part; WHEREAS by an indenture of mortgage dated the —— day of ——, 18—, and made between [*A.B.*] of the one part, and the said [*mortgagor*] of the other part, All those, &c. [*describe parcels*] were conveyed unto and to the use of the said [*mortgagor*], his heirs and assigns, by way of mortgage, for securing the repayment to the said [*mortgagor*], his executors, administrators, or assigns, of the sum of £—— and interest at the rate of —— per cent. per annum; AND WHEREAS the said sum of £—— still remains owing to the said [*mortgagor*] on the security of the said indenture of mortgage, together with arrears of interest thereon amounting to the sum of £—— [*or* "but all interest thereon has been paid up to the date of these presents"]. AND WHEREAS the said [*mortgagee*] has agreed to lend to the said [*mortgagor*] the sum of £—— upon having the repayment of the same, with interest at the rate hereinafter mentioned, secured in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of £—— now

Parties.

Recitals: of mortgage;

of state of mortgage debt;

of agreement for loan.

Testatum.

Covenant for payment of principal and interest.

(*e*) Of course if trade machinery, &c., is included, this proviso must be omitted.

(*f*) If necessary add here,

THE THIRD SCHEDULE ABOVE REFERRED TO.

(*g*) Stamp, *ad valorem* on amount secured, *ante*, p. 988. See as to submortgages, *ante*, p. 816 *et seq.*

Stamp.

XLIX. **Submortgage.**

paid to the said [*mortgagor*] by the said [*mortgagee*], (the receipt whereof the said [*mortgagor*] hereby acknowledges), the said [*mortgagor*] hereby covenants [*Covenant for payment of principal and interest, ante*, p. 994]. AND THIS INDENTURE ALSO WITNESSETH, that for the consideration aforesaid the said [*mortgagor*] hereby assigns and, as beneficial owner, conveys unto the said [*mortgagee*] the said principal sum of £—— owing on the security of the hereinbefore recited indenture as aforesaid; AND ALL interest now due and henceforth to accrue due thereon, and the benefit of all securities for the same and of all powers (including the statutory power of sale) and remedies thereby conferred, TOGETHER with full power for the said [*mortgagee*], his executors, administrators, or assigns in the name or names of the said [*mortgagor*], his executors, administrators, or assigns, or otherwise to demand, sue for, receive, and give effectual discharges for the said principal sum and interest, or any part thereof respectively, and to settle all accounts in respect thereof: TO HOLD all the premises hereby assigned UNTO the said [*mortgagee*], his executors, administrators, and assigns, subject to the proviso for redemption hereinafter contained: AND THIS INDENTURE ALSO WITNESSETH that for the consideration aforesaid the said [*mortgagor*] hereby grants, and, as beneficial owner, conveys unto the said [*mortgagee*] all the hereditaments and premises hereinbefore described, and all other, if any, the hereditaments comprised in the hereinbefore recited indenture of mortgage, TO HOLD UNTO AND TO THE USE of the said [*mortgagee*], his heirs and assigns, SUBJECT to such right or equity of redemption as is now subsisting therein by virtue of the hereinbefore recited indenture of mortgage and also to the proviso for redemption hereinafter contained: PROVIDED ALWAYS, that if the said sum of £——, with interest thereon at the rate aforesaid, shall be paid on the —— day of —— in pursuance of the covenant in that behalf hereinbefore contained, then the said principal sum and interest, hereditaments, and premises hereby assigned and granted respectively, shall, at the request and cost of the said [*mortgagor*], his executors, administrators, or assigns, be reconveyed, as to the said principal sum and interest hereby assigned, to the said [*mortgagor*], his executors, administrators and assigns, or as he or they shall direct; and as to the said hereditaments and premises to the use of the

Second *Testatum.*

Assignment of mortgage debt and security.

Power of attorney.

Habendum.

Third *Testatum.*

Grant of freeholds comprised in mortgage.

Proviso for redemption.

XLIX. Submortgage.

said [*mortgagor*], his heirs and assigns, or as he or they shall direct, but as to such last-mentioned premises, subject to such right or equity of redemption as shall for the time being be subsisting therein under or by virtue of the hereinbefore recited indenture of mortgage: PROVIDED ALWAYS, and it is hereby agreed, that it shall not be obligatory on the said [*mortgagee*], his executors, administrators, or assigns, to demand or require payment of, or institute, maintain, or do any act or thing for the recovery of, the said principal sum and interest hereby assigned or any part thereof, nor shall he or they be responsible for any loss which may be occasioned by his or their omitting or neglecting to enforce any rights or remedies in respect of the said principal sum and interest or any part thereof: PROVIDED ALWAYS that the receipt in writing of the said [*mortgagee*], his executors, administrators, or assigns, shall be a sufficient discharge for any monies arising under the said indenture of mortgage of the —— day of ——, 18—, or under the statutory power of sale thereby conferred: AND the said [*mortgagor*] hereby covenants with the [*mortgagee*] that the principal sum of £——, [together with arrears of interest thereon amounting to the sum of £——] is now due and owing to the said [*mortgagor*] on the security of the hereinbefore recited indenture of mortgage. IN WITNESS, &c.

Proviso that mortgagee shall not be bound to enforce security

Receipt clause.

Covenant that mortgage debt is due.

L. *MORTGAGE of a* LEGACY. VARIATION *where the Mortgage is of a* REVERSIONARY UNDIVIDED SHARE *in* GENERAL PERSONAL ESTATE; *Also, where it is of a* FUND *in* COURT.

THIS INDENTURE (*f*), made the —— day of ——, 18—, BETWEEN [*mortgagor*], of, &c., of the one part; and [*mortgagee*], of, &c., of the other part; WHEREAS [*testator*], of ——, deceased, the father of the said [*mortgagor*], by his will dated the —— day of ——, 18—, bequeathed unto each of his children the sum of £1,000, to be payable when such children

Parties.

Recital of will bequeathing legacy.

(*f*) Stamp, *ad valorem* on amount secured, *ante*, p. 988.

Stamp.

L. **Mortgage of a Legacy or Share of Residue.**

should respectively attain the age of twenty-one years (*g*), and appointed [*executors*], executors of his said will; AND WHEREAS the said [*testator*] died on the —— day of —— without having revoked or altered his said will, which was duly proved by the said [*executors*], on the —— day of ——, in the Principal Registry of the Probate Division of Her Majesty's High Court of Justice (*h*); AND WHEREAS the said [*mortgagor*] attained his age of twenty-one years on the —— day of —— (*i*); AND WHEREAS the said legacy has not yet been paid, and the said [*mortgagee*] has agreed to lend the said [*mortgagor*] the sum of £——, at interest, on the security thereof: NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of £—— this day paid by the said [*mortgagee*] to the said [*mortgagor*], (the receipt whereof the said [*mortgagor*] hereby acknowledges), he the said [*mortgagor*] covenants [*Covenant to pay principal and interest, ante*, p. 994]: AND THIS INDENTURE ALSO WITNESSETH, that, for the consideration aforesaid, he the said [*mortgagor*] hereby assigns, and, as beneficial owner, conveys unto the said

Of death of testator and probate of will;

That mortgagor is entitled to legacy;

That legacy still unpaid and agreement for loan.

Testatum.

Second *Testatum.*

Assignment of legacy.

Recital of will bequeathing share of general personal estate.

(*g*) Or "bequeathed unto [*trustees*], all his personal estate whatsoever and wheresoever, UPON TRUST, to pay the income thereof to [*wife*] his wife, during her natural life, and, at her decease, to divide the same personal estate equally between his children, share and share alike, for their respective absolute use and benefit."

Recital that widow still living and of title of mortgagor.

(*h*) "AND WHEREAS the said [*wife*], the widow of the said [*testator*] is still living; AND WHEREAS the said [*testator*] left four children living at his decease, and the said [*mortgagor*] is one of such children."

(*i*) If an action has been instituted for carrying into effect the trusts of the testator's will, in which an order has been made, say—

Recital of administration action.

"AND WHEREAS, by an order of the Chancery Division of Her Majesty's High Court of Justice, dated the —— day of ——, made by his Lordship, Sir [A. B.], one of the judges of the said Court, in an action wherein [C. D.] and others are plaintiffs, and the said [*executors*] are defendants: [*recite the introductory part of the order*] It was ordered that the trusts of the said [*testator's*] will should be established and carried into execution, and that it should be referred," &c. [*state the terms of the order, and the subsequent proceedings, if any, in Chambers*].

L. Mortgage of a Legacy or Share of Residue.

[*mortgagee*], ALL THAT the (*k*) legacy or sum of £1,000 so bequeathed to him the said [*mortgagor*] by the hereinbefore recited will of the said [*testator*], deceased, as aforesaid, and all monies to become due and payable in respect of the same legacy (*l*); TOGETHER with full power to demand, sue for, recover, receive, and give effectual discharges for the same legacy and monies in the name or names of the said [*mortgagor*], his executors or administrators, or otherwise: TO HOLD the said legacy (*m*) and other the premises hereby assigned unto the said [*mortgagee*], his executors, administrators, and assigns, UPON TRUST to receive the same, and thereout in the first place to pay all costs and expenses of and incidental to obtaining payment thereof, and in the next place to retain to himself and themselves all principal monies and interest which shall then be due to him or them under or by virtue of this security; AND to pay the surplus (if any) of the said legacy and premises unto the said [*mortgagor*], his executors, administrators, or assigns (*n*). IN WITNESS, &c.

Habendum.

Or share of residue.

(*k*) "One undivided fourth part or share of him the said [*mortgagor*], and all other his part and share of and in the personal estate of the said [*testator*], deceased, given and bequeathed in and by his hereinbefore-recited will, and all and every sums," &c.

(*l*) Add, if the assignment is of a fund in Court—

"And all and every such sums or sum of money as shall be payable to or recoverable by the said [*mortgagor*], under or by virtue of the hereinbefore-recited order, or otherwise in the hereinbefore-mentioned action."

(*m*) "undivided part or share."

Power to obtain stop-order.

(*n*) If the assignment is of a fund in Court, proceed as follows:— "AND the said [*mortgagor*] hereby empowers the said [*mortgagee*], his executors, administrators, and assigns, at the cost of the said [*mortgagor*], his executors or administrators, to apply for, and obtain, and in the name or names of the said [*mortgagor*], his executors or administrators, to concur in obtaining, or to consent to an order in the said action for the purpose of preventing the payment or transfer of the monies and premises hereby assigned to any person or persons other than the said [*mortgagee*], his executors, administrators, or assigns, without due notice thereof to him or them, and to instruct solicitor and counsel accordingly.

As to the course to be pursued by an assignee of a fund in

LI. *MORTGAGE of* Reversionary Interest *in a* Fund *in* Court. Proviso *for* capitalization *of* Interest. Powers *for* Mortgagee *to obtain a* Stop-Order *and* institute *and* defend proceedings *in* Action.

Parties. THIS INDENTURE (*o*), made the —— day of ——, 18—, Between [*mortgagor*], of, &c., of the one part; and [*mortgagee*], of, &c., and [*mortgagee*], of, &c., of the other part; Whereas the said [*mortgagor*], as one of the children of [*A. B., mother of mortgagor*], is or claims to be entitled, under a will dated the —— day of ——, 18—, of [*testator*], deceased, in reversion expectant on the death of [*person entitled to life interest in the fund*], to one equal —— part, or share of and in the residuary estate of the said [*testator*] and the monies, stocks, funds, and securities for the time being consituting or representing the same; And whereas [*Recite any proceedings in the action, ante*, p. 1128, n. (*i*).]; And whereas the stocks, funds, and investments now constituting or representing the residuary estate of the said [*testator*] are now the following, that is to say, the sum of £16,214 19*s.* 6*d.* £3 per cent. Consolidated Bank Annuities, and £6647 12*s.* 10*d.* £3 per cent. Reduced Bank Annuities, standing in the name of the Paymaster-General of the Chancery Division of Her Majesty's High Court of Justice in the said action; And whereas the said [*mortgagees*] have agreed to lend to the said [*mortgagor*] the sum of £—— upon having the repayment of the same with interest at the rate

Recitals: of title or claim of mortgagor;

of proceedings in action, and state of fund in court;

of agreement for loan.

Court, *vide ante*, p. 823. The nature and effect of stop-orders has there been considered.

Charging orders. An order charging stock or shares may be made by a Divisional Court or a Judge under Order XLVI., rule 1, of the Rules of the Supreme Court, 1883, the effect of which will be to create an immediate charge on the debtor's beneficial interest in the property: *Montefiore* v. *Behrans*, L. R. 1 Eq. 171; *Re Blakely Ordnance Co.*, 46 L. J. Ch. 367. The order may in the first instance be made *ex parte*, and notice being given to the bank or company will operate as a *distringas* and prevent a transfer of the stock or shares. The order is served on the debtor, and may name a reasonable time within which to show cause why the order should not be made absolute; no proceedings may be taken to realize the security till after six months from the date of the order: see stats. 1 & 2 Vict. c. 110, ss. 14, 15; 3 & 4 Vict. c. 82, s. 1; *Robinson* v. *Burbidge*, 9 C. B. 289.

Stamp. (*o*) Stamp, *ad valorem* on amount secured, *ante*, p. 988.

LI. Mortgage of Reversionary Interest in Fund in Court.

hereinafter mentioned secured in manner hereinafter appearing; AND it has also been agreed that the said loan shall be continued and the interest to accrue upon the said sum of £—— shall be forborne and allowed to accumulate by way of compound interest at the option of the said [*mortgagor*] in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement and in consideration of the sum of £—— now paid to the said [*mortgagor*] by the said [*mortgagees*] out of monies belonging to them on a joint account (the receipt of which sum of £—— the said [*mortgagor*] hereby acknowledges), the said [*mortgagor*] hereby covenants, &c. [*Covenant for payment of principal and interest, ante*, p. 994.]: AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreement and for the consideration aforesaid, the said [*mortgagor*] hereby assigns, and, as beneficial owner, conveys unto the said [*mortgagees*], ALL THAT part or share to which he the said [*mortgagor*], as one of the three children of the said [*A. B., mother of mortgagor*], is entitled under the hereinbefore recited will of the said [*testator*], or otherwise, of or in the said sums of stock respectively now constituting or representing the residuary estate of the said [*testator*] as aforesaid, and of or in all other (if any) the monies, stocks, funds, and securities, for the time being constituting or representing the said residuary estate; TO HOLD all the premises hereby assigned UNTO the said [*mortgagees*], their executors, administrators, and assigns, SUBJECT to the proviso of redemption following, that is to say [*Proviso for redemption, ante*, p. 996]: PROVIDED ALWAYS, that during the period of —— years from the date of these presents, if the said [*person entitled for life*] and [*mortgagor*] shall both of them so long live, the said principal sum of £—— shall not, nor shall any part thereof, be called in, and in the like event the interest accruing upon the said principal sum of £—— during such period of —— years, and also all interest accruing upon that or any other interest forborne and allowed to accumulate by virtue of this present proviso, shall from time to time, and as the same shall accrue half-yearly, be forborne and added to the said principal sum of £—— as or in the nature of a further advance; AND shall carry interest at the rate of —— per cent. per annum, which shall be considered to be accrued due and payable from time to time on the respective half-yearly

Testatum.

Covenant to pay principal and interest.

Second *Testatum.*

Proviso that principal shall not be called in during joint lives of life tenant and mortgagor, and for capitalization of interest.

LI. Mortgage of Reversionary Interest in Fund in Court.

days hereinbefore appointed for payment of interest on the said principal sum of £——, so that by the addition and capitalization of interest as aforesaid, the total principal monies hereby secured may be augmented upon the footing of an accumulation at compound interest computed at the rate of —— per cent. per annum, with rests taken or made half-yearly on the —— day of —— and the —— day of —— respectively; And it is hereby agreed that all such additions by means of capitalized interest, whether on the said principal sum or any interest added thereto in the nature of further advances, shall be charged upon all and singular the premises hereby assigned, and shall to all intents and purposes be within the scope and operation of the present security; And further, that all such additions to the said principal sum in the nature of further advances shall be payable by the said [*mortgagor*], his heirs, executors, and administrators, upon the same being demanded by the said [*mortgagees*], their executors, administrators, or assigns; And he the said [*mortgagor*] hereby covenants for payment thereof upon demand accordingly; But, nevertheless, it is hereby agreed that in the event hereinbefore specified for the continuance of the said principal sum of £——, any additions made thereto as aforesaid shall not, nor shall any part thereof or interest thereon, be called in during the said determinable period of —— years from the date of these presents: Provided always that, notwithstanding anything hereinbefore contained, it shall be lawful for the said [*mortgagor*], at any time within —— days after any half-yearly day appointed for the payment of interest under these presents, to pay the interest accruing on such half-yearly day, which would under the proviso hereinbefore in that behalf contained be treated as or on the footing of a further advance made on that day; And every such payment of interest within —— days after the appointed half-yearly day, shall wholly prevent the capitalisation of the interest so paid, but without interfering with the computation and capitalization of prior or subsequent interest; And that in the event of the death of the said [*person entitled to life interest*] or of the said [*mortgagor*] taking place within the said period of —— years, then immediately and without any notice being given or any step taken for the purpose, the said provisions hereinbefore contained for continuance of the said principal sum of £—— and

Proviso that mortgagor may nevertheless pay interest so as to prevent capitalization.

Proviso determining provision for continuance of loan and capitalization of interest in certain events.

LI. Mortgage of Reversionary Interest in Fund in Court.

forbearance of interest shall cease to have any further or prospective operation, except so far as may be necessary for ascertaining the amount of the principal monies and interest owing upon the present security at the time of the happening of such event: PROVIDED ALWAYS that it shall be lawful for the said [*mortgagees*], their executors, administrators and assigns, at any time during the subsistence of this security, to appear either as plaintiffs or defendants for the said [*mortgagor*], his executors or administrators in the said action or any proceedings taken or to be taken therein for the purpose of obtaining a stop-order or stop-orders, or of protecting the share, right, and interest of the said [*mortgagor*] in the premises and otherwise to act in relation to the premises as the said [*mortgagees*], their executors, administrators, or assigns, shall from time to time think proper, without the necessity of serving any notice or order upon the [*mortgagor*], his executors, administrators, or assigns, or any person or persons in his or their behalf, or of obtaining his or their concurrence, and for the purposes aforesaid to instruct solicitors, counsel, and others, as the said [*mortgagees*], their executors, administrators, or assigns may be advised: PROVIDED ALSO that for the purpose of enabling the said [*mortgagees*], their executors, administrators, and assigns, to obtain the full benefit and advantage of the assignment hereby made the said [*mortgagor*] hereby authorises and empowers the said [*mortgagees*], their executors, administrators, and assigns, to institute, prosecute, defend, appear or concur in, or compromise, or put an end to all such actions or other proceedings as the said [*mortgagees*] shall think expedient to institute, or which shall have been instituted either for recovering possession or obtaining payment of the several parts, shares, and premises hereby assigned, or any of them, or any monies which shall or may become recoverable or receivable in respect of the same or any of them, when and as the premises shall cease to be reversionary and become recoverable or receivable, and generally for such purposes, or any of them, to execute and give all such receipts, agreements, and releases by deed or otherwise as he or they shall think reasonable and proper, and to use the name or names of the said [*mortgagor*], his executors or administrators, as the said [*mortgagees*] shall think fit; AND it is hereby expressly agreed that all costs, charges, and expenses as between solicitor and client to be incurred in the

Power to obtain stop-order.

Power for mortgagee to institute and defend proceedings.

LI. Mortgage of Reversionary Interest in Fund in Court.

exercise of the powers hereby given, or any of them, shall be considered as covered by this present security, and be allowed accordingly. IN WITNESS, &c.

LII. *MORTGAGE* (*pursuant to an* ORDER *of* COURT) *of the* CONTINGENT REVERSIONARY INTEREST *of a* FEMALE INFANT *in* PERSONALTY, *to the Trustees of a Life Assurance Society to raise* ANNUAL SUMS, *increasing in amount, for* MAINTENANCE *and* EDUCATION *of the* INFANT, *and of a* PRESENT SUM *to defray* COSTS. SPECIAL PROVISOES *as to* REDEMPTION, &c.

Parties.

THIS INDENTURE (*p*) made the —— day of ——, 18—, BETWEEN [*mortgagor*], of, &c. [*mortgagor*], of, &c., and [*mortgagor*], of, &c., [*trustees of the will*] of the one part; and [*mortgagee*], of, &c., [*mortgagee*], of, &c., and [*mortgagee*], of, &c. (which last-mentioned three persons are trustees of the —— Life Assurance Society), of the other part;

Recitals: of will, by virtue whereof the infant is entitled to reversionary interest in fund;

WHEREAS [*testator*], late of ——, in the county of ——, Esquire, deceased, duly made and executed his will dated the —— day of ——, 18—, and thereby gave and devised to [*original trustees*], their heirs and assigns, ALL THAT his estate called the —— Hall Estate, situate in the parishes of —— and ——, in the county of —— aforesaid, and all other his lands and hereditaments in the same parishes respectively, and in the parish of —— in the same county: TO HOLD the same premises to the use of the trustees or trustee for the time being of that his will, and their or his executors or administrators for the term of one thousand years, upon the trusts thereinafter declared concerning the same, with remainder, to the use of his son [*father of infant*] during his life, with remainder to the use of his grandson [*infant's eldest brother*] and the heirs of his body, with divers remainders over: AND the testator thereby declared that the said trustees or trustee should hold the said estate so limited to them or him for the term of one thousand years as aforesaid, upon trust by and out of the rents and profits thereof, or by mortgaging,

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(*p*) Stamp, *ad valorem* on amount secured.

LII. Mortgage under Order of Court for Maintenance of Infant.

selling, or leasing the same, or any parts or part thereof, for all or any part of the same term, or by the sale of timber thereon, or minerals thereunder, or by all or any of the ways or means aforesaid, or any other lawful and reasonable ways or means, to raise and to pay to [*infant's mother*], the wife of the said [*infant's father*], in case she should survive him, an annuity of £—— during her widowhood, and from and after her decease or marriage, whichever should first happen, to levy and raise the sum of £10,000, and all costs and expenses incidental to the execution of the trusts last aforesaid; And the testator thereby declared that when and so soon as the trust last aforesaid should be fully performed, or should fail of effect, the said term of 1000 years should absolutely cease and determine; And the testator thereby directed that the said trustees or trustee should invest the said sum of £10,000 so directed to be levied and raised as aforesaid in their or his names or name, in some or one of the stocks, funds, shares, or securities therein mentioned, with power for the said trustees or trustee to vary the said stocks, funds, shares and securities as therein mentioned; And should hold the said sum of £10,000, and the stocks, funds, shares, and securities in or upon which the same should be invested, and the annual income thereof, In trust for such of the children of the said [*infant's father*] and [*mother*], his wife, other than and except the said [*infant's eldest brother*], as being sons or a son, should attain the age of twenty-one years, or being daughters or a daughter should attain that age or marry, in equal shares, if more than one, and if but one such child then in trust for such one child; And the testator thereby bequeathed all his personal estate (except what he otherwise bequeathed by his said will) unto the said [*original trustees*], their executors, administrators, and assigns, upon trust that the said trustees or trustee should as soon as conveniently might be sell, call in, and convert into money, such part of his said personal estate as should not consist of money, and should, by and out of the monies which should arise from such sale, calling in, and conversion, and the monies of which the testator should be possessed at his death, pay his funeral and testamentary expenses and debts, and the legacies bequeathed by his said will, or any codicil thereto, and should invest the residue of such monies in the names or name of the said trustees or trustee in or upon some or one of the stocks, funds, shares

LII. Mortgage under Order of Court for Maintenance of Infant.

and securities thereinbefore mentioned, with power for the said trustees or trustee to vary such stocks, funds, shares and securities at their or his discretion; And the testator thereby declared that the said trustees or trustee should hold the monies to arise from his said personal estate lastly thereinbefore bequeathed, and the stocks, funds, shares and securities in or upon which the same should be invested, and the annual income thereof, upon the trusts following, that is to say, As to one undivided equal moiety or half part thereof, upon trust for the said [*infant's father*] during his life, with remainder In trust for all the children or any the child of the said [*infant's father*], either by his then present or any future wife, who being sons or a son should attain the age of twenty-one years, or being daughters or a daughter should attain that age or marry, and if more than one in equal shares, but if there should be only one such child, then for such one or only child; And the testator thereby appointed

Death of testator.

the said [*original trustees*] executors of his said will; And whereas the testator died on the —— day of ——, 18—, without having altered (except by a codicil thereto not

Probate of will.

material to be here recited) or revoked his said will, and the said will and codicil were duly proved by the said [*original trustees*] on the —— day of —— in the Principal Registry of the Probate Division of Her Majesty's High Court of Justice;

Appointment of new trustees;

And whereas by an indenture dated the —— day of ——, 18—, and made between [*parties*], in pursuance of a power contained in the hereinbefore recited will, the said [*mortgagors*] were duly appointed to be trustees in the place of the said [*original trustees*] for the purposes of the said will and codicil, And the trust premises subject to the trusts of the said will were thereby or immediately after the execution of the same indenture duly assured or transferred so as to vest the same premises in the said [*mortgagors*] as such trustees

of sale of settled lands by tenant for life;

as aforesaid; And whereas the said —— Hall Estate in the said will mentioned has recently been sold by the said [*infant's father*] as tenant for life under the provisions of the Settled Lands Act, 1882, for the price of £——, which sum has been paid to the said [*mortgagors*] as trustees of the settlement created by the said will: And whereas the residuary personal estate of the testator is now represented by the stocks, funds, and securities specified in the schedule

of state of family;

hereunder written: And whereas there has been issue of the

LII. Mortgage under Order of Court for Maintenance of Infant.

of order for raising sums for costs, and for maintenance, &c., of infant;

said [*infant's father*] by his present wife the said [*infant's mother*] —— children and no more: And [*infant*] is one of such —— children, and has not yet attained the age of 21 years: And whereas by an order of Her Majesty's High Court of Justice, Chancery Division, made by Mr. Justice —— in chambers, on the —— day of ——, 18—, in the matter of the estate of the said testator [*testator*], deceased, and in an action of [*A.* v. *B.*], in which the said infant [*infant*] is one of the plaintiffs, and the said [*mortgagors*] are defendants, the judge being of opinion that it was fit and proper and for the benefit of the said [*infant*] that the sum of £100 per annum for a period of two years from the —— day of ——, 18—, and a further sum of £120 per annum for a period of two years from the —— day of ——, 18—, be allowed for her maintenance and education if she should so long live and should not have been married, and that the costs of all parties of and incidental to that application, and the costs of and incidental to the reversionary mortgage or charge thereinafter mentioned, and of an indenture of charge of her annuity supplemental thereto to be executed by the said [*infant's mother*] the wife of the said [*infant's father*], and of the notices in lieu of distringas thereinafter mentioned, should be provided for: And it appearing that the only fortune of the said [*infant*] was her contingent or expectant share of the said sum of £10,000, secured upon a term of 1000 years, created by the will of the said testator [*testator*] over the said estate at ——, in the county of —— aforesaid as therein mentioned (which had recently been sold), subject to the life interest of the said [*infant's father*] her father therein, and of her contingent or expectant share of and in the residuary personal estate of the said testator [*testator*], the income from neither of which sources was applicable to the maintenance of the said infant, and it having been proposed and submitted to the judge by or on behalf of the said infant [*infant*] that the said [*mortgagees*], three of the trustees of the —— Life Assurance Society, had agreed to make a present advance of £—— in respect of the assessed costs of all parties of and incidental to that application, and the costs of the reversionary mortgage or charge thereinafter mentioned and of the said supplemental charge, and of the notices in lieu of distringas, to be placed on the stocks representing the residuary personal estate of the said testator, and the proceeds of sale of the said —— Hall estate so sold as aforesaid: And

LII. Mortgage under Order of Court for Maintenance of Infant.

ALSO to advance or pay the further annual sum of £100 for a period of two years, to be computed from the —— day of ——, 1886, and a further annual sum of £120 for a period of two years, to be computed from the —— day of ——, 1888, and to accrue from day to day and to be payable quarterly on the usual quarter days for the maintenance and education of the said [*infant*] if she should so long live and should not have been married, upon the terms following, that is to say, Upon an insurance for the sum of £—— being effected on the life of the said [*infant*] with the —— Life Assurance Society, to subsist until the said [*infant*] should attain the age of twenty-one years, and upon the sum of £—— being then secured to be paid to the said [*mortgagees*], their executors, administrators, and assigns, on the death of the said [*infant's father*], the father of the said [*infant*], such sum to carry interest at the rate of 5 per cent. per annum from such date until actual payment, and such principal sum and interest to be secured by a reversionary mortgage on the interest of the said [*infant*] in the said sum of £10,000 and the residuary personal estate of the said testator [*testator*], such mortgage to contain a proviso that [*set out from the order the several provisoes thereby directed to be inserted in the mortgage, the nature of which will sufficiently appear from the clauses inserted in this precedent*], such mortgage to be settled by the judge; AND it was ordered that the said defendants should pay the said sum of £——, the amount of the said costs of and incidental to that application, and the said assessed costs of the said reversionary mortgage and supplemental charge, and of the said notices in lieu of distringas, and that the said defendants also apply the said annual sums of £100 and £120, as and when the same should accrue due and become payable for the maintenance and education of the said infant until further order; AND WHEREAS, in pursuance of the hereinbefore recited order of the —— day of ——, 18—, the said [*mortgagees*] have this day paid to the said [*mortgagors*] the said sum of £—— for the purposes in such order mentioned as they the said [*mortgagors*] hereby acknowledge: AND WHEREAS in further pursuance of the said order the said [*mortgagees*] have effected in their own names an assurance for the sum of £—— on the life of the said [*infant*] with the said —— Life Assurance Society, by a policy dated the —— day of ——, 18—, numbered ——, and under the annual

of advance by mortgagees of present sum for costs;

LII. Mortgage under Order of Court for Maintenance of Infant.

premium of £——; AND WHEREAS the present indenture has been settled and approved by the judge as a proper mortgage to be executed in pursuance of the hereinbefore recited order of the —— day of ——, 18—, as appears by the certificate of the chief clerk of the said judge, dated the —— day of ——, 18—: NOW THIS INDENTURE, in pursuance of the said recited order of the —— day of ——, 18—, and in consideration of the premises, WITNESSETH as follows:—

of approval of mortgage by the judge.

1. The said [*mortgagees*] hereby covenant with the said [*mortgagors*] that the said [*mortgagees*], or the trustees or trustee for the time being of the —— Life Assurance Society, will from time to time pay to the said [*mortgagors*], their executors, administrators, or assigns, the annual sums following, that is to say, the annual sum of £100 during a period of two years, to be computed from the —— day of ——, 1886, and the annual sum of £120 during a period of two years, to be computed from the —— day of ——, 1888, such annual sums respectively to accrue from day to day, but to be payable quarterly by equal quarterly payments, during the respective terms aforesaid, if the said [*infant*] shall so long live and remain unmarried, but to determine on her death or marriage, the same respective annual sums to be applied for the purposes of the hereinbefore recited order of the —— day of ——, 18—: AND, moreover, that the said [*mortgagees*], their executors, administrators, or assigns, will henceforth, during the minority of the said [*infant*], from time to time pay the annual premiums on the said policy of assurance on the life of the said [*infant*], and keep the same policy on foot.

Covenant by mortgagees to pay maintenance-money.

2. The said [*mortgagors*] do and each of them doth hereby assign, and, as trustees, convey unto the said [*mortgagees*] all and singular the shares or interest of the said [*infant*] in the said sum of £10,000, so by the said will of the said [*testator*] directed to be raised in trust as aforesaid, and of and in the one equal undivided moiety or half-part or share by the same will directed to be held upon trust for the said [*infant's father*] during his life, with remainder upon trust for such of his children as aforesaid, of or in the said residuary personal estate of the said [*testator*], and the stocks, funds, shares, and securities representing or hereafter to represent that estate: TO HOLD the same unto the said [*mortgagees*], their executors, administrators, and assigns, subject to the prior

Assignment of infant's reversionary share in legacy and residuary personal estate.

LII. Mortgage under Order of Court for Maintenance of Infant.

estates or interest subsisting therein under the hereinbefore-recited will, and also subject to redemption as next hereinafter mentioned.

Proviso for redemption.

3. PROVIDED ALWAYS, that on payment on the day of the death of the said [*infant's father*], by the trustees or trustee for the time being of the hereinbefore-recited will, or by the said [*infant*], to the said [*mortgagors*], their executors, administrators, or assigns, of the sum of £——, the premises hereinbefore described and hereby assigned shall, at the request and cost of the person or persons making such payment, be duly reconveyed to him or to them.

Interest.

4. PROVIDED FURTHER, that the said principal sum of £——, if not paid on the day of the death of [*infant's father*] as aforesaid, shall carry interest at the rate of 5 per cent. per annum from that day until actual payment thereof.

Proviso as to redemption if infant shall attain 21 years, or marry during father's life.

5. PROVIDED FURTHER, that if the said [*infant*] shall during the lifetime of the said [*infant's father*] attain the age of twenty-one years, or marry under that age, the said premises shall, on the said [*infant*] attaining the age of twenty-one years, be redeemable on actual payment within six calendar months thereafter to the said [*mortgagees*], their executors, administrators, or assigns, of the sum of £——, or, as the case may be, on the said [*infant*] marrying under the age of twenty-one years, be redeemable on actual payment, within six calendar months thereafter, to the said [*mortgagees*], their executors, administrators, or assigns, of a proportionately less sum than the last-mentioned sum, and in either case with interest on the said redemption sum at the rate of 5 per cent. per annum from the time of the said [*infant*] attaining the age of twenty-one years or marrying under that age, until the date of such actual payment.

Proviso as to redemption, if father shall die before infant attains 21 years or marries.

6. PROVIDED FURTHER, that in the event of the said [*infant's father*] dying before the said [*infant*] shall attain the age of twenty-one years or marry under that age, the premises hereby assigned shall, on the said [*infant*] attaining the age of twenty-one years, be redeemable on payment to the said [*mortgagees*], their executors, administrators, or assigns, of the sum of £——, or, as the case may be, on the said [*infant*] marrying under the age of twenty-one years, be redeemable on payment to the said [*mortgagees*], their executors, administrators, or assigns, of a proportionately less sum than the last

mentioned sum, and with interest on such redemption sum at the rate of 5 per cent. per annum from the time of the said [*infant*] attaining the age of twenty-one years, or marrying under that age, as the case may be, until actual payment.

LII. Mortgage under Order of Court for Maintenance of Infant.

7. And lastly, it is hereby agreed and declared that the said principal sums and interest respectively shall not constitute debts from, and shall not be recoverable against the said [*mortgagors*] or their respective heirs, executors, or administrators, or any of them personally.

Exoneration of mortgagors from personal liability.

In witness, &c.

The Schedule above referred to.

Investments now representing the residuary personal estate of the above-named [*testator*].

LIII. *MORTGAGE of* Letters-Patent (*o*).

THIS INDENTURE (*p*), made the —— day of ——, 18—, Between [*mortgagor*], of &c., of the one part; and [*mortgagee*], of &c., of the other part; Whereas by letters-patent under the Great Seal of the United Kingdom, dated the —— day of ——, 18—, the sole licence and privilege was granted to the said [*mortgagor*], his executors, administrators, and assigns, of making, using, and vending within the United Kingdom of Great Britain and Ireland, the Channel Islands, and the Isle of Man, an invention for, &c. [*Set forth the terms of the patent*]; And whereas the said [*mortgagor*], on the —— day of ——, 18—, duly filed in the Great Seal Patent Office a proper specification of the said invention, showing the nature thereof, and the manner in which the same is to be performed, pursuant to a proviso in that behalf contained in the same letters patent; And whereas the said

Parties.

Recitals: of letters-patent;

of filing of specification;

of agreement for loan.

(*o*) See as to the law with regard to patents generally, *post*, tit. Patent and Copyright.

(*p*) Stamp, *ad valorem* to a sufficient amount to cover the actual advance, and expenses likely to be incurred and included in the security, *ante*, p. 988.

Stamp.

LIII. **Mortgage of Letters-Patent.**

[*mortgagee*] has agreed to lend to the said [*mortgagor*] the sum of £—— upon having the repayment thereof with interest at the rate hereinafter mentioned, secured in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of £—— now paid to the said [*mortgagor*] by the said [*mortgagee*], (the receipt whereof the said [*mortgagor*] hereby acknowledges), the said [*mortgagor*] covenants, &c. [*Covenant for payment of principal and interest, ante*, p. 994]: AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreement and for the consideration aforesaid the said [*mortgagor*] hereby assigns, and, as beneficial owner, conveys unto the said [*mortgagee*], ALL THOSE the hereinbefore recited letters-patent, and the exclusive right and benefit of the invention therein mentioned, and all and singular the liberties, privileges, profits, emoluments, and advantages whatsoever, appertaining or belonging thereunto, or in anywise to be had or made therefrom; TO HOLD all the premises unto the said [*mortgagee*], his executors, administrators, and assigns, for all the residue now unexpired of the term of fourteen years by the said letters-patent granted, and for all other the term and interest (if any) of the said [*mortgagor*] therein, but SUBJECT to the proviso for redemption following, that is to say [*Proviso for redemption, ante*, p. 1016]: AND the said [*mortgagor*] hereby covenants with the said [*mortgagee*] as follows, that is to say, that the said letters-patent are now valid and not void or voidable; AND THAT the said [*mortgagor*], his executors or administrators, will, so long as any principal monies or interest shall remain owing upon this security, use his and their utmost endeavours to detect any infringement that shall be made, or attempted to be made, of any of the rights and privileges granted by, or incident to, the letters-patent hereby assigned, or any letters-patent which shall hereafter be assigned to the said [*mortgagee*], his executors, administrators, or assigns, pursuant to the covenant of the said [*mortgagor*] hereinafter contained; AND WILL forthwith communicate the same, when discovered, to the said [*mortgagee*], his executors, administrators, or assigns; AND WILL render his or their utmost assistance to the said [*mortgagee*], his executors, administrators, or assigns, for the purpose of enabling him or them to protect or defend the said rights or privileges granted

First *Testatum.*

Covenant for payment of principal and interest.

Second *Testatum.*

Assignment of patent.

Habendum.

Proviso for redemption.

Covenants by mortgagor: that letters patent are valid;

to assist in detecting infringement;

LIII. Mortgage of Letters-Patent.

by or incident to the said letters-patent, or to prosecute any action or proceeding against any person or persons infringing the same as aforesaid; AND FURTHER, that in case and so often as it shall happen that any money should be owing on the security of these presents, within one calendar month before the time when it shall become necessary, under the condition in that behalf contained in the said letters-patent, to pay any additional stamp-duty or money for the purpose of keeping the said letters-patent and the privileges thereby granted on foot, he the said [*mortgagor*] will, without the necessity of any notice or request to that effect being given to him by or on behalf of the said [*mortgagee*], pay such stamp-duty or respective stamp-duties or monies, and do or procure to be done all such other acts and things as may be necessary to be done for the purpose of keeping such letters-patent and privileges on foot, and deliver the receipts for or evidence of each such payment to the said [*mortgagee*], at least one calendar month before the last day for making such payment, in default whereof it shall be lawful for (but not incumbent on) the said [*mortgagee*] to make any such payment or payments, and to do or cause to be done any such acts or things, and to add the amount of the costs and expenses thereof respectively to the principal monies hereby secured, to be recovered with interest at the rate aforesaid by any of the means and remedies hereby provided for recovering principal or interest monies: PROVIDED ALWAYS, that in case the said sum of £——, and interest thereon as aforesaid, or any part thereof respectively, shall remain unpaid after the day mentioned in the proviso for redemption hereinbefore contained, it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, without any further consent of the said [*mortgagor*], his executors, administrators, or assigns, to grant such general or special, or other exclusive licence or licences to exercise and use the said invention during such term or terms of years, upon such conditions, for such considerations by way of fine, premium, royalty, or otherwise, and generally in such manner as the said [*mortgagee*], his executors, administrators, or assigns may think fit; AND ALSO, whether any such licence or licences shall have been granted by them as aforesaid or not, absolutely to sell the said letters-patent, invention, and premises hereby assigned, and it is hereby agreed that in the event of any such sale all the powers and

to pay stamp-duties.

Power for mortgagee to pay duties, &c., on default of mortgagor;

to grant licences;

to sell.

LIII. Mortgage of Letters-Patent.

authorities in that behalf vested in mortgagees by the Conveyancing and Law of Property Act, 1881, shall, subject to the statutory regulations relating thereto, so far as applicable to the premises hereby assigned, be exercisable by the said [*mortgagee*], his executors, administrators, and assigns: PROVIDED ALWAYS that the said [*mortgagee*], his executors, administrators, or assigns, shall not exercise the aforesaid powers of granting licences and of sale or either of them, unless and until a notice pursuant to the said Act requiring payment of the mortgage-money shall have been served upon the said [*mortgagor*], his executors, administrators, or assigns, and default shall have been made in payment thereof for six calendar months after service of such notice, or unless and until the whole or part of some half-yearly payment of interest which shall become due by virtue of this security shall be in arrear for three calendar months: PROVIDED ALSO, and in addition to the provisions in the said Act contained for the protection of purchasers upon any such sale as aforesaid, it is hereby agreed that no person shall be concerned to inquire as to the necessity or expediency of any condition of sale or as to the necessity or regularity or propriety of any such licence as aforesaid, or of any stipulation subject to which the same may be granted, or as to whether or not the power of sale was or was not properly exercised; AND that the remedy of the said [*mortgagor*], his executors, administrators, or assigns, in respect of any unauthorised, improper, or irregular grant of any such licence, shall be in damages only. IN WITNESS, &c.

Restriction on powers.

Protection of purchasers.

LIV. *MORTGAGE DEBENTURE issued by a* LIMITED COMPANY, *payable to* BEARER, *subject to* ENDORSED CONDITIONS (*there being no* TRUST-DEED), *and operating as a* FLOATING SECURITY, *so as not to* HINDER DEALINGS *with the* PROPERTY CHARGED (*q*).

No. ——, MORTGAGE DEBENTURE (*r*), £——.

The —— Company, Limited.

Incorporated under the Companies Acts, 1862 to 1883.

Registered Office, ——.

Bankers, —— & Co.

Issue of £—— £— per cent. mortgage debentures, ranking *pari passu* and numbered from —— to ——.

Covenant to pay principal and interest.

The —— Company, Limited (hereinafter called the company), in consideration of £—— paid to them by the person to whom this debenture is issued, and in pursuance of the powers and provisions in that behalf contained in their articles of association, hereby covenant (*s*) with the bearer hereof, that they will, on the —— day of ——, 18—, pay to the bearer hereof (*t*), on presentation and delivery up

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(*q*) As to the powers of companies to issue debentures, see *ante*, p. 838 *et seq.*

Stamp on debenture payable to bearer.

(*r*) Stamp, *ad valorem* on amount secured by the debenture, at the rate of 1*s.* for every 10*l.*, or fraction of 10*l.*: see stat. 48 & 49 Vict. c. 51, sect. 21.

(*s*) "Promise to pay," or "bind themselves to pay," or simply "will pay," are the terms sometimes employed instead of "covenant," and will impose on the company a valid obligation to pay: see *Crouch* v. *Crédit Foncier of England*, L. R. 8 Q. B. 374; *Morton* v. *Florence Public Works Co.*, 7 Ch. D. 332.

Debentures payable to bearer.

(*t*) Debentures are frequently issued to bearer with the following objects, viz., to render them negotiable without the necessity for a deed of assignment; to render them transferable free from equities affecting the assignor; to render the delivery of the debentures and coupons a good discharge to the company; to enable the bearer to sue in his own name; and to give the bearer a good title notwithstanding any defects in the title of the person from whom he acquires the debentures: see Palmer's Company Precedents, 250.

Validity of such debentures.

Before the Judicature Acts a debenture could not have been sued on at law by the bearer or assignee; indeed, it would seem that a covenant for payment to bearer was at law absolutely void; but a contract in this form, although by deed, is clearly valid in equity, and the assignee of such a debenture, whether by writing or mere delivery, may prove upon the winding up of the company in his own name: see *Re Blakely Ordnance Co.*, L. R. 3 Ch. A.

LIV. **Mortgage Debenture to Bearer.**

of this debenture at the registered office of the company in England, the principal sum of £——; And will also in the

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at pp. 158, 159; see also *Re Natal Investment Co.*, L. R. 3 Ch. A. 355. An instrument under the seal of the company under the form of a debenture payable to bearer or order may be construed as a promissory note so as to be negotiable at law: *Re General Estates Co.*, L. R. 3 Ch. A. 758; *Re Imperial Land Co. of Marseilles*, L. R. 11 Eq. 478. As to the invalidity of debentures issued with blanks for the holder's name, &c., see *Enthoven* v. *Hoyle*, 13 C. B. 373.

It is a general rule that an assignee of a debenture takes it subject to subsisting equities against the assignor: *Mangles* v. *Dixon*, 3 H. L. C. 702; and see sect. 25 (6) of the Judicature Act, 1873 (36 & 37 Vict. c. 66). But the company may release such equities either expressly or impliedly as by recognising and registering the assignment: *Re Northern Assam Co.*, L. R. 10 Eq. 458; or by accepting notice of the assignment: *Re Brunton's Claim*, L. R. 19 Eq. 302; or may otherwise estop themselves by their conduct from availing themselves of such equities: see *Webb* v. *Herne Bay Commissioners*, L. R. 5 Q. B. 642. And it has been expressly held that a debenture payable to bearer is not subject to the equities affecting the original holder: *Re Northern Assam Co.*, L. R. 10 Eq. 458; *Ex parte Colborne*, L. R. 11 Eq. 478; *Re Brunton's Claim*, L. R. 19 Eq. 302. So a stipulation that a debenture shall be transferable free from equities is valid: *Re Agra and Masterman's Bank*, L. R. 2 Ch. A. 397; *Re Blakely Ordnance Co.*, L. R. 3 Ch. A. 159. But a debenture payable to the holder "for the time being" is not free from equities affecting the assignor, in the absence of stipulation: *Re Natal Investment Co.*, L. R. 3 Ch. A. 355; *Ex parte James*, L. R. 8 Eq. 225; and a person taking, after the commencement of a winding-up, an assignment of debentures from a shareholder, will take subject to calls subsequently made: *Re China Steamship Co.*, L. R. 7 Eq. 240.

A debenture may contain a stipulation that the receipt of the bearer giving up the instrument shall be a sufficient discharge to the company: *Crouch* v. *Crédit Foncier of England*, L. R. 8 Q. B. at p. 385; see also the observations of Lord *Cairns*, C. in *Re Natal Investment Co.*, L. R. 3 Ch. A. at p. 361.

The bearer of a debenture is regarded as the equitable assignee of the contract, and accordingly may sue in his own name: *Re Blakely Ordnance Co.*, L. R. 3 Ch. A. 154; *Re Natal Investment Co.*, L. R. 3 Ch. A. 355.

It would seem that it is not competent for the parties to a debenture to stipulate thereby that a *bonâ fide* transferee shall have a good title notwithstanding defects in the title of the transferor: see *Crouch* v. *Crédit Foncier of England*, L. R. 8 Q. B. at p. 386. But it appears clear that a good title can be ensured by an independent contract: see *Re Agra and Masterman's Bank*, L. R. 2 Ch. A. 397; *Re General Estates' Co.*, L. R. 3 Ch. A. 762; *Re Merchants' Banking Co.*, L. R. 5 Ch. D. 216; and see *Goodwin* v. *Robarts*, 1 App. Ca. 476.

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meantime and until the said principal sum shall be payable, and also afterwards until the same shall be paid by the company, pay to the bearer of this debenture interest on the said principal sum at the rate of — per cent. per annum, half-yearly, on the —— day of ——, and the —— day of ——, at the bank of the Messrs. ——, —— Street, London, or other the bankers for the time being of the company, on presentation and delivery up of the coupon representing such interest (coupons for the interest payable on his debenture being hereunto annexed); And for the consideration aforesaid, the company hereby further declare that the bearer of this debenture is entitled to a first charge *pari passu* (*u*) with bearers of other debentures of this issue on the property and undertaking of the company; And the company also charge the lands, buildings, works, machinery, plant, effects, general property, assets, and undertaking of the company both present and future (*x*),

Declaration of charge on property of company.

(*u*) Where a debenture creates a *pari passu* charge, one debenture-holder cannot take an additional security from the company: *De Winter* v. *Mayor of Brecon*, 26 Beav. 533. A debenture-holder must sue on behalf of himself and his co-holders: *Potts* v. *Warwick, &c., Navigation Co.*, Kay, 142; *Fripp* v. *Chard Railway Co.*, 11 Ha. 241; *Mellish* v. *Brooks*, 3 Beav. 22.

Pari passu charge.

(*x*) If it is intended that the debenture should include future property of the company, such property should be expressly mentioned: see *Re New Clydach, &c., Co.*, L. R. 6 Eq. 514; see *Holroyd* v. *Marshall*, 10 H. L. C. 191. The term "undertaking" will, however, include all the property, present and future, of the company as a going concern: *Re Panama, &c., Mail Co.*, L. R. 5 Ch. A. 318; but not unpaid capital: *King* v. *Marshall*, 33 Beav. 565. The term "property" will include book debts of the company: *Bloomer* v. *Union Coal Co.*, L. R. 16 Eq. 383. The validity of a general charge on all the property of a company present and future may be regarded as fully established: *Re Panama, &c., Mail Co.*, L. R. 5 Ch. A. 318; *Re General South American Co.*, 2 Ch. D. 337; *Re Florence Land Co.*, 10 Ch. D. 530; *Re Colonial Trusts Corporation*, 15 Ch. D. 473.

Present and future property.

Unpaid calls cannot be included in the debentures or mortgages of a company in the absence of express authority for that purpose in the regulations of the company: *Stanley's Case*, 4 De G. J. & S. 407: *King* v. *Marshall*, 33 Beav. 565; *Bank of South Australia* v. *Abrahams*, L. R. 6 P. C. 265. But calls in arrear may be mortgaged: *Re Sankey Brook Coal Co.*, L. R. 9 Eq. 721; *S. C.* L. R. 10 Eq. 381; and calls already made but not yet payable: *Pickering* v. *Ilfracombe Rail. Co.*, L. R. 3 C. P. 235. If it is intended to include unpaid calls they must be expressly mentioned: *Re Marine Mansions Co.*, L. R. 4 Eq. 601; *Re Colonial Trusts Corporation*, 15 Ch. D. 473.

Unpaid calls.

LIV. Mortgage Debenture to Bearer.

including uncalled capital of the company, as a floating security (*y*) for the payment of the principal and interest for the time being due on this debenture.

THIS DEBENTURE is issued subject to the conditions endorsed hereon [*or* annexed hereto].

As witness, &c.

The common seal of the company was hereto affixed in the presence of ——.

Conditions.

The Conditions upon which this debenture is issued are:—

That debenture is one of a series.

1. The within [*or* above] written debenture is one of a series of debentures for £—— each —— to —— inclusive, and all in the same form, which debentures have been or are about to be issued by the company.

As to rights of bearer of debentures *inter se* (*z*).

2. The bearers of the debentures of this series shall be entitled *pari passu*, and without preference or priority one over another, to a first charge upon the lands, buildings, works, machinery, plant, effects, general property, assets, and undertaking of the company, both present and future, including uncalled capital of the company, charged by the within [*or* above] written debenture, as a floating security, and not so as to hinder any dealings by the company with such general property, assets, or undertaking, and every holder of debentures of this series shall be bound by the conditions in the same manner and to the same extent as if he were a party hereto.

Floating security.

(*y*) Where a debenture charges all the property of a company it will, if possible, be construed as a floating security: *Re Florence Land Co.*, 10 Ch. D. 530; *Re Colonial Trusts Corporation*, 15 Ch. D. 707. But it is advisable that the intention should be expressed in the debenture so as to put the point beyond question: see *Re General South American Co.*, 2 Ch. D. 337. A floating security binds all the property and assets of the company for the time being, up to the commencement of the winding-up, subject to specific charges or alienations in the meantime; so that the company may in the course and for the purposes of its business sell, lease, exchange, or otherwise deal with its property for the time being as may be expedient: see *Hodson* v. *Tea Co.*, 10 Ch. D. 859; *Re Hamilton's Windsor Iron Works*, 12 Ch. D. 707; *Re Colonial Trusts Corporation*, 15 Ch. D. 473; *Re Horne and Helland*, 29 Ch. D. 736.

(*z*) As to the rights as regards priority of different classes of debenture-holders, see *Gortsich* v. *Silkstone, &c., Colliery Co.*, 21 Ch. D. 762.

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3. This debenture shall be transferable to bearer by delivery; but every bearer of this debenture may register his name and address in a book to be kept for that purpose at the registered office of the company, and shall, when applying for such registration, produce the debenture at the same office.

As to transfer of security.

4. The bearer of this debenture shall be entitled to the full benefit thereof, and all persons may act accordingly, and shall be deemed to have accepted this condition.

5. The company shall not be bound to inquire into the title of any bearer for the time being of this debenture, or of any coupon, but such bearer shall be capable of giving an effectual discharge to the company for the principal or interest, as the case may be, which may be payable, or be paid by the company in respect hereof, whether such bearer shall or shall not be registered or have any title thereto.

Title of bearer not to be inquired into.

Receipt clause.

6. Annexed to this debenture are coupons providing for the payment half-yearly up to the —— day of ——, 18—, of interest on the said sum of £——, at the rate of — per cent. per annum. If this debenture shall remain after the said —— day of ——, 18—, the company will issue fresh coupons, if and as occasion may require, to the bearer of this debenture on his application at the registered office of the company.

As to coupons.

7. The bearer of this debenture shall not be entitled, either on or after the said —— day of ——, to call in or compel payment of the said principal sum of £—— hereby secured, unless either default shall have been made in payment of interest thereon, such default continuing for —— calendar months after any half-yearly day herein provided for payment of interest, or such bearer shall have given one year's previous notice in writing to the secretary of the company at the registered office of the company, to pay such principal sum. The company may pay off the said principal sum on the —— day of ——, 18—, on giving three calendar months' previous notice of their intention so to do; but the company shall not be entitled to pay off the said principal sum after the —— day of ——, 18—, unless the same be so called in as aforesaid without giving one year's previous notice of their intention so to do. In case any such notice as aforesaid, whether of calling in, or of an intention to pay off the said principal sum, shall be given, the same principal sum shall, upon the expiration of such notice, cease to carry interest, unless default be made in payment of this debenture on presenta-

Payment of principal not to be required until default in payment of interest, or one year's notice.

LIV. **Mortgage Debenture to Bearer.**

tion, in which case interest shall run from the date of such presentation until actual payment. Any notice to be given by the company under this present clause may be given by the same being posted in a registered letter addressed to the person, or the last person who shall be registered as the bearer of this debenture, at his registered address, and such notice shall be sufficient, notwithstanding that the company or their officer sending such notice may have knowledge or notice that such registered person has ceased to be the bearer of this debenture, or that such registered address has ceased to be correct.

As to calling in debentures.

8. This debenture may be called in or paid off separately from any of the other debentures of this issue.

As to appointment of a receiver.

9. The right to apply for a receiver of the property charged by this debenture shall only be exercised by debenture-holders holding in the aggregate one-fifth of the amount of the debentures of the company of this issue for the time being issued and unpaid, and then only upon default being made in payment of interest, and such default continuing for two of the successive half-yearly days herein provided for payment of such interest: PROVIDED ALWAYS that in the event of a petition being presented to wind up the company, or of a meeting called of the shareholders of the company for the purpose of passing a resolution to wind up, or in the event of execution being issued against the property or effects of the company, and not being satisfied by the company, the holder of this debenture shall be entitled, either alone or in conjunction with any other debenture holder or holders of this issue, to apply for a receiver of such property.

Proviso as to winding up the company.

Form of Coupon annexed.

—— Company, Limited.

Mortgage Debenture No. ——, Interest Coupon No. ——.

For £——.

Half-year's interest payable on the —— day of ——, 18—, at the bank of the Messrs. ——, —— Street, London, less income-tax.

——, Secretary.

LV. *MORTGAGE DEBENTURE issued by a* MINING COMPANY, LIMITED, *secured by* TRUST-DEED, *and intended to be* REGISTERED (*a*).

THE —— Mining Company, Limited.

Incorporated, &c.

Issue of £—— £—— per cent. mortgage debentures, ranking *pari passu*.

DEBENTURE (*b*).

1. The —— Mining Company, Limited (hereinafter called the company), will on the —— day of ——, 18—, pay to the bearer, or, when registered, to the registered holder, on presentation of this debenture, the sum of £—— at the registered office of the company, situate at No. ——, ——, in the county of ——. Payment of principal.

2. The company will in the meantime pay interest thereon at the rate of —— per cent. per annum from the date hereof by equal quarterly payments on the —— day of ——, the —— day of ——, the —— day of ——, and the —— day of ——. Interest.

3. The company will, in case default shall be made in payment of the said sum of £—— and interest as aforesaid, thereafter pay interest upon the said sum at the rate of —— per cent. per annum, such interest to be payable when demanded.

4. The company hereby charges with such payments all its property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being. Charge.

5. The holder of this debenture will be entitled, with the other holders of debentures of the above issue *pari passu*, to the benefit of and be subject to the provisions contained in an indenture dated the —— day of ——, 18—, and made between the company of the one part, and [*trustee*] of, &c., and [*trustee*] of, &c., of the other part, whereby all the property of the company was vested in trustees for securing the payment of principal monies and interest payable in respect of the said debentures. Holder to be entitled to benefit of trust-deed.

Given, &c.

(*a*) See Precedent LVI., *post*, p. 1154, for a form of Trust-Deed for securing payment of the series of debentures to which this debenture belongs.

(*b*) Stamp, see *ante*, p. 1145, note (*r*). Stamp.

LV. Mortgage Debenture Secured by Trust-Deed.

CERTIFICATE.

THIS IS TO CERTIFY that the above debenture is one of the issue of £—— life debentures, numbered —— to —— inclusive, secured by the indenture therein referred to.

(*Signatures of trustees.*)

THE CONDITIONS WITHIN REFERRED TO.

Debenture one of a series.

1. This debenture is one of a series of —— debentures, each for securing the payments of the sum of £—— issued or about to be issued by the company. Such debentures of the said series are all to rank *pari passu*, as a charge on the property hereby charged, subject only as herein mentioned, without any preference or priority one over another, and the charge thereby created is to be a floating security, but so that the company is not to be at liberty to create any mortgage or charge in priority to the said debentures.

Equities not to be regarded.

2. The principal monies and interest hereby secured will be paid without regard to any equities between the company and the original or any intermediate holder thereof.

Receipt.

3. The delivery to the company of this debenture shall be a good discharge for the principal monies and interest therein respectively specified. Nevertheless, when registered, the receipt of the registered holder of any debenture, his executors or administrators, shall alone be a good discharge for such principal monies.

Principal to become payable, in what events.

4. The principal monies hereby secured shall immediately become payable: (*a*) if the company makes default in the payment of any interest hereby secured for a period of one month, and the bearer or registered holder hereof, before such interest is paid, by notice in writing to the company calls in such principal monies; (*b*) if an order is made or an effective resolution is passed for the winding-up of the company.

Transfer of debenture.

5. Except when registered this debenture is transferable by delivery, but the company will at any time, upon request of the bearer while unregistered, register him or his nominee in the register below mentioned as the holder of this debenture, and indorse a note of such registration hereon; and the company will also at any time, upon the request of the registered holder, his executors or administrators, can-

LV. Mortgage Debenture Secured by Trust Deed.

cel the registration and the note thereof endorsed thereon, and thereupon this debenture will again become transferable by delivery. A fee of —— shall be paid to the company upon every such registration or cancellation.

Register.

6. A register of the debentures will be kept at the company's registered office, wherein will be entered the names, addresses, and descriptions of the registered holders, and particulars of the debentures held by them respectively.

Trusts not to be registered.

7. The registered holders will be regarded as exclusively entitled to the benefit of their debentures, and all persons may act accordingly; and the company shall not be bound to enter in the register notice of trust, or to recognise any right in any other person save as herein provided.

Transfer of registered debenture.

8. Every transfer of this debenture when registered must be in writing under the hand of the registered holder or his legal personal representative. The transfer must be delivered at the registered office of the company, with a fee of ——, and such evidence of identity or title as the company may reasonably require, and thereupon the transfer will be registered.

Transfer in case of joint holders.

9. In the case of joint registered holders, no transfer will be registered during the —— days immediately preceding the days by this debenture fixed for payment of interest.

Holder may have fully paid up shares in lieu of debenture.

10. The bearer or registered holder, as the case may be, may at any time before the principal monies hereby secured have been paid off, direct the company to issue to him fully paid up shares in the capital of the company equal in nominal amount to such principal monies, and in satisfaction and discharge thereof, and the company shall, upon the surrender of the debenture or debentures in respect whereof such direction is made, comply with such direction.

LVI. *TRUST DEED for securing* MORTGAGE DEBENTURES *issued by a* MINING COMPANY *to* PAY OFF *an existing* MORTGAGE, *and for the* PURPOSES *of the* COMPANY (*c*).

Parties.

THIS INDENTURE (*d*) made the —— day of ——, 18—, BETWEEN the —— Tin and Copper Mining Company, Limited (hereinafter called the company) of the one part; and [*trustee*], of, &c., and [*trustee*], of, &c. (hereinafter called the trustees, which expression, where the context requires or admits, includes the survivor of them, and the executors or administrators of such survivor, and other the trustees or trustee for the time being of these presents) of the other part; WHEREAS the company is possessed of the several licences, liberties, powers, authorities, mines, minerals, and mining rights, or agreements to grant the same, (the particulars of which are shortly mentioned in the third column of the first schedule hereunder written,) for the several terms of years mentioned in the second column of the same schedule, and granted, or agreed to be granted by the several indentures and agreements mentioned, with the dates and parties thereof respectively, in the first column of the same schedule, at the rents and royalties, and subject to the several covenants, conditions, and provisoes in the said several indentures and agreements respectively reserved and contained, but otherwise, save as is hereinafter mentioned, free from incumbrances; AND WHEREAS the company is possessed also of certain machinery, plant, and stock in trade, the particulars whereof are mentioned in the second schedule hereunder written, and also of other personal property, consisting of debts and other choses in action, monies, chattels, and effects; AND WHEREAS, by an indenture of mortgage, dated the —— day of ——, 18—, and made between the company of the one part, and [*mortgagees*] of the other part, all the hereditaments, licences, and premises comprised in

Recitals: of title of company to mines, &c.;

of title of company to plant, &c.;

of mortgage of mines, plant, &c.;

(*c*) Trust deeds for securing debentures vary considerably according to the nature of the undertaking and the property charged, and also according to mode and terms of repayment. In the text of the present precedent will be found the provisions usually inserted in ordinary cases.

Stamp.

(*d*) This deed will require an *ad valorem* stamp of 6*d.* per cent. as collateral security: see *ante*, p. 988.

LVI. Trust Deed to secure Debentures.

the several indentures and agreements mentioned in the first schedule hereunder written, and also all the plant, machinery, fixtures, and chattels then belonging, or thereafter to belong, to the company, and described in the schedule to the indenture now in recital, were assured to the said [*mortgagees*], subject to a proviso therein contained for redemption, upon payment to the said [*mortgagees*] of the sum of £——, and interest as therein is mentioned; AND WHEREAS the directors of the company in exercise of the powers in that behalf given to them by the regulations of the company are about to raise the sum of £—— for the purposes of the company by the issue of debentures, bearing interest at the rate of —— per cent. per annum, and are desirous of securing the said sum of £——, and the interest from time to time to become payable on such debentures, and on any debentures which may be issued in substitution therefor (all which debentures, original as well as substituted, are to be in the form mentioned in the third schedule hereunder written, and are hereinafter referred to as the debentures), in manner hereinafter appearing; and out of the proceeds of the said issue to discharge the principal and interest monies for the time being due upon the hereinbefore recited indenture of mortgage, as is hereinafter provided: NOW THIS INDENTURE WITNESSETH, and it is hereby agreed and declared as follows:—

of issue of debentures.

Testatum.

1. THE company hereby grants, and, as beneficial owner, conveys unto the trustees all the licences, liberties, powers, authorities, mines, minerals, mining rights, and premises comprised in and granted by, or held under, the said several indentures and agreements hereinbefore mentioned and specified in the first schedule hereunder written, TOGETHER with all the benefit and advantage of the said respective indentures and agreements, and of all right of renewal thereunder; AND ALSO all the fixtures, machinery, plant, materials, chattels and things mentioned in the second schedule hereunder written, which now are attached to, or standing, or being in, or upon, or belonging to or used in connection with the mine or mines and works known as the —— Tin and Copper Mines, and all other property whatsoever, and wheresoever situate, of or to which the company now is, or, during the continuance of this security, shall become entitled, except the last day of each of the several terms of years specified in

Conveyance to trustees of mines, &c.;

and fixtures, plant, &c.

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the first schedule hereunder written; To HOLD UNTO the trustees, as to the said licences, liberties, mines and premises mentioned in the first schedule hereunder written for the several terms of years mentioned in the second column of the same schedule, except the last day of each of such terms; and as to all the premises hereinbefore expressed to be hereby conveyed (which are hereinafter collectively referred to as the premises) upon and for the trusts and purposes hereinafter expressed of and concerning the same.

Habendum.

Covenant by company to apply moneys raised by debentures in paying off mortgage.

2. THE first monies, to an adequate amount, which shall be received by the company in respect of the debentures shall be applied by the company in or towards payment of the principal monies and interest for the time being due under the hereinbefore recited indenture of mortgage, and the company will, upon such payment, do all things necessary or proper, which shall be required by the trustees for effectually vesting in them the estate and interest of the persons or person respectively entitled to receive payment of the said principal monies and interest respectively, except any estate or interest in such last days of the said terms as aforesaid.

Trusts of premises conveyed;

to permit company to hold premises till default, &c.;

3. THE trustees shall hold the premises upon trust for securing to the holders of the debentures respectively without preference or priority, the principal monies and interest payable thereunder in manner following, that is to say, UPON TRUST that until default shall be made in payment of some principal or interest monies secured by the debentures, or any of them, for the period of —— days after such monies respectively shall become due according to the terms of the debentures, or until default shall be made by the company in the performance or observance of some covenant or condition herein contained, and on the part of the company to be performed or observed, or until an order of some Court of competent jurisdiction shall be made, or an effective resolution of the company shall be passed for the winding-up of the company, or until a distress or execution shall be levied or sued out upon or against any property of the company, the trustees shall permit the company to hold and enjoy the premises, and to carry on their business therein and therewith; AND in particular, and notwithstanding anything herein contained, shall permit the company to have and retain full discretionary power, in order to enable them to continue and carry on their business, to deal with the premises, or any of them, in the ordinary course of

to permit company to deal with property.

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their business as the company may think fit, it being the true intent and meaning of these presents that a floating security only shall be hereby constituted, and that neither these presents nor the debentures shall hinder any such dealing as aforesaid, but the same respectively shall have effect and operate over and attach upon the property for the time being of the company: PROVIDED ALWAYS that the company shall not be entitled to create any mortgage or charge in priority to or overriding these presents, or the debentures.

After default trustees on request of debenture holders to sel property.

4. AFTER any such default, order, or resolution shall have been made or passed, or distress or execution levied or sued, as is mentioned in Clause 3 hereof, the trustees shall, subject to the proviso contained in Clause 5 hereof, upon the request of any holders of debentures (*e*) of an aggregate amount of not less than £——, whose principal or interest monies shall be so in arrear as aforesaid, and may in their discretion without any such request as aforesaid, without any further consent on the part of the company, anything by law requiring any notice or imposing any restriction on the exercise by mortgagees of their powers of sale notwithstanding, enter upon and take possession of the premises, and shall, upon the like request, sell and convert into money, call in and collect the premises respectively (*f*).

(*e*) Sometimes the entry is to be made "upon the request of any holder of a debenture or debentures whose principal," &c. Sometimes the entry is to be made only pursuant to a resolution to be passed at a general meeting of debenture holders.

Additional proviso when undertaking of company not exclusively carried on in England.

(*f*) If the company's undertaking is in England the auxiliary powers and provisions of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41) sects. 35—38, may generally be relied on. If, however, the undertaking is abroad it will be well to add here:—

"PROVIDED ALWAYS that for the purposes of such sale, conversion, calling in, and collection as aforesaid, the trustees may sell, or concur with any other persons or person in selling, the premises or any part thereof, either subject to prior charges or not, and either together or separately, and either by public auction or private contract, and subject to any stipulations as to title or evidence or commencement of title or otherwise, as the trustees shall think proper, with full power to vary any contract for sale, or to buy in at any auction, or rescind any contract for sale, and to resell without being answerable for

LVI. Trust Deed to secure Debentures.

Trustees to give notice to company of request for sale.

5. THE trustees, upon receiving any such request as aforesaid to make entry or sale, shall, unless the company shall have then gone into liquidation, give written notice of such request to the directors of the company through their secretary, and shall not enter or sell in pursuance of such request if the directors shall prove to the satisfaction of the trustees that the interest (if any) in arrear has been paid, or that the default of the company in the performance or observance of any such covenant or condition as aforesaid has been made good, as the case may be, within —— days after such notice shall have been given to them.

Protection of purchaser.

6. PROVIDED ALWAYS that, upon any sale purporting to be made in exercise of the power or trust in that behalf herein contained, the purchaser or purchasers shall not be bound or concerned to see or inquire whether any such request or notice as aforesaid has been made or given, or any such default order or resolution as aforesaid has been made or passed, or whether any money remains owing on the security of these presents, or as to the necessity or expediency of the stipulations, subject to which such sale shall have been made, or otherwise as to the propriety or regularity of such sale; and notwithstanding any impropriety or irregularity whatsoever in such sale, the same shall, as far as regards the safety and protection of the purchaser or purchasers, be deemed to be within the aforesaid power in that behalf, and be valid and

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any loss occasioned thereby; and may also accept any composition or any security, real or personal, for any debt owing to or for any property, real or personal, claimed by the company, and may allow time for payment of any debt, and may compromise, submit to arbitration, or otherwise settle any debt, amount, claim, or thing relating to the property of the company, and for the purposes aforesaid or any of them, may execute, give, enter into, and do all such assurances, releases, arrangements, and things as they shall think proper: PROVIDED ALSO that, upon any such sale, conversion, calling in, and collection as aforesaid, the receipt in writing of the trustees for any purchase or other monies paid to them shall effectually discharge the purchasers or purchaser, or other persons or person paying the same therefrom and from being concerned to see to the application thereof, or being accountable for any loss or misapplication thereof."

effectual accordingly, and the remedy of the company, in respect of any breach of the proviso lastly hereinbefore contained, or of any impropriety or irregularity in such sale, shall be in damages only.

Trusts of proceeds of sale.

7. The trustees shall hold the monies which shall arise from any sale made in pursuance of the power or trust in that behalf aforesaid, upon trust in the first place, by and out of the same monies, to reimburse themselves, or pay and discharge all the costs and expenses incurred in or about such sale, or otherwise in relation to the premises, or the execution of the powers and trusts of these presents: And in the next place, by and out of the same monies, to pay the monies for the time being owing for principal and interest, under or by virtue of the hereinbefore recited indenture of mortgage; And, subject thereto, to pay the monies for the time being owing on the debentures, and to pay the surplus (if any) of the monies arising from such sale to the company or their assigns: But in case such monies shall be insufficient, after payment of the costs and expenses aforesaid, and of the said principal and interest monies payable under the hereinbefore-recited indenture of mortgage, to pay in full the principal monies due and owing on the debentures, the same shall be apportioned rateably and without any preference or priority among all the holders of the debentures according to the amount thereof, and be paid to them respectively.

Receipts of debenture holders to be good discharges.

8. The receipt of the holder of each of the debentures for the principal monies and interest secured by such debenture shall be a good discharge to the trustees.

9. Upon payment off of any debenture the same is to be produced to the trustees, who shall cause a memorandum of the amount and date of payment to be indorsed thereon.

Power for trustees to obtain renewals of leases.

10. It shall be lawful for the trustees before they shall have entered upon the premises, at the request and cost of the company, to obtain a renewal or extension of any lease, term, or licence, of or in any part of the mortgaged premises, and for that purpose to surrender any subsisting lease or licence which may be taken in their names, or in the names of any nominees or nominee of the company, but in that case only as trustees for the company, and subject to the trusts of these presents.

Power for trustees to sell on request of the com-

11. At any time before the trustees shall have made such entry as aforesaid they may, upon the application and at the cost of the company, sell, call in, and convert or concur in

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pany before entry.

selling, converting, calling in, and collecting all or any of the premises in the same manner as they could do if the aforesaid trust in that behalf had then arisen, and shall hold the net proceeds so to arise, upon trust to lay out the same, if they shall think fit, in works of a permanent nature suitable to the purposes of the company, or in the purchase of hereditaments suitable to be held in connection with such other property, or in the purchase of machinery or other effects necessary or convenient for the purposes of the company, or otherwise to apply the same as the trustees may think calculated to promote the interests of the company; And until such investment the trustees shall invest the said net proceeds in Government or Bank Stock, or place the same on deposit, with power to vary such interim investments, and such interim investments shall be held, until the primary trust for conversion shall arise, upon trust to pay the income thereof to the company, and after such primary trust shall have arisen, upon and for the trusts and purposes hereinbefore expressed concerning the proceeds of the said primary trust; Provided always that in default of such primary trust for conversion arising, and after payment and satisfaction of all monies intended to be secured by these presents, the said investments and the income thereof shall be held in trust for the company.

Power to trustees to raise monies necessary for purposes of business.

12. If at any time during the continuance of this security any sum or sums of money shall be required for all or any of the purposes following, that is to say: for paying off any principal or interest monies secured by the hereinbefore recited indenture of mortgage, or by any other mortgage or charge on the premises or any part thereof in priority to these presents, and of defraying any costs, charges, losses, and expenses incurred by the trustees in relation to these presents, then and in any such case it shall be lawful for the trustees to raise the sum or sums of money which shall be so required at such rate of interest and generally on such terms as the trustees may think proper, by mortgaging or otherwise charging the premises in such manner and form as the trustees shall think proper. It shall also be lawful for the trustees, if and whenever they shall deem proper or expedient, to concur in the transfer of any mortgage or charge for the time being affecting the premises or any part thereof in priority to these presents, and may redeem, or concur in redeeming, the premises or any part thereof from any such

mortgage or charge, and for the purposes aforesaid may execute and do all such assurances and things as they shall think fit: PROVIDED ALWAYS that no person or persons advancing money to the trustees shall be bound or concerned to see to the application thereof or to inquire whether the power to raise such money has arisen.

Covenants by company for payment of monies secured by the debentures.

13. THE company will duly pay the principal and interest monies secured by the debentures in accordance with the terms thereof respectively, and such principal and interest monies shall be a first charge on the premises (subject only to the hereinbefore recited indenture of mortgage), and shall take precedence of all monies which may hereafter be raised by the company by any means whatever; the debentures shall, as between the several holders thereof, rank *pari passu* without any preference or priority by reason of date of issue, or otherwise.

To keep register of debentures.

14. THE company will at all times keep a correct register of all the debentures of the company for the time being outstanding, showing the date when, and the amount for which, each debenture is issued, and the number thereof, such register to be open to the inspection of the trustees and the debenture holders.

Power for trustees to distrain.

15. IF and so often as it shall happen that interest to the amount of £—— on the debentures shall be in arrear for —— days after any of the days by the debentures appointed for payment thereof, and before the trustees shall have entered upon and taken possession under or by virtue of clause 4 hereof, it shall be lawful for the trustees, into and upon the premises or any part thereof to enter, and such interest in arrear, and the costs and expenses of the trustees incurred by reason of the non-payment thereof, to distrain, and the distresses then and there found to dispose of in due course of law as landlords may do in respect of distress for rent reserved upon leases, to the intent that all such interest in arrear, costs, and expenses, including costs of distress as aforesaid, may be paid and satisfied.

Power for trustees to carry on business of company.

16. IT shall be lawful for the trustees after they shall have entered upon and taken possession of the premises, and until the same shall be sold in exercise of the power or trusts in that behalf hereinbefore contained, to carry on the business of the company upon, in, and with the premises, and to manage and conduct such business as they shall in their discretion

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think fit: And to repair and keep in repair the premises, and replace and renew any of the premises which shall be worn out or destroyed, and to insure the premises or such of them as shall require or admit of insurance against loss or damage by fire, in such sums and with such offices as they shall think fit, and generally do or cause to be done all such things as they could do if they were the absolute owners thereof, and without being answerable for any loss or damage which may be occasioned thereby: And it shall be lawful for the trustees, at their discretion, to demise or let the premises or any part or parts thereof, at such rents, for such terms, subject to such conditions, and generally in such manner as they shall think fit.

Application of monies received by trustees.

17. The trustees shall, by and out of the rents and profits of the premises, and the monies which shall be received by them in respect of the business of the company so carried on by them as aforesaid, in the first place pay and discharge all rates, taxes, and outgoings payable in respect of the premises, and the expenses of and incident to the management of the said business, or of and incident to the exercise of any of the powers or trusts aforesaid, or otherwise in relation to the premises, which they shall think fit to pay, and shall pay and apply the residue of the said rents, profits, and monies in or towards satisfaction of the interest on the debentures *pari passu*, and without any preference or priority; And shall accumulate the residue of the said rents, profits, and monies, by investing the same and the resulting income thereof in manner hereinbefore provided with regard to interim investments, and may apply any of such accumulations for any of the purposes lastly hereinbefore mentioned, and subject thereto shall hold the same upon the like trusts as if the same had arisen from a sale under the power or trust in that behalf hereinbefore contained.

Power for trustees to appoint receivers and delegate powers, &c. (*g*).

18. The trustees may at any time hereafter appoint any receiver or receivers, manager or managers, agent or agents for any of the purposes aforesaid, upon such terms and at such salaries or other remuneration as they shall think proper, and may delegate by power of attorney or otherwise, to any persons or person so appointed, any of the trusts, powers, and dis-

(*g*) This power of delegation is often convenient, especially where the company's undertaking and property are abroad.

cretions vested in the trustees under or by virtue of these presents, including these powers of appointment and delegation respectively.

Company to convey lands to trustees if required.

19. The company will, if and when required by the trustees, in the event of any sale of the premises under the power or trust in that behalf hereinbefore contained, and at the expense of the company, execute a formal conveyance or assurance to the trustees, or as they may direct of the lands and hereditaments comprised in the indentures and agreements hereinbefore mentioned.

Company to keep mortgaged premises in repair and working order and insured.

20. The company will, during the continuance of this security, keep the premises in good and substantial repair and effective working order, and will from time to time reinstate such of the plant, machinery, and chattels forming part of the premises as may be worn out or lost or otherwise become unserviceable, and will keep the premises or such part thereof as shall require or admit of insurance insured against loss or damage by fire to the full value thereof respectively; and will punctually pay the premiums and other monies necessary for keeping on foot any policy or policies of insurance, and will immediately after every such payment produce the receipt for the same to the trustees if they shall so require; And will forthwith apply all monies which shall be received by virtue of any such policy in making good the damage or injury to the premises which shall have been sustained.

Power to trustees to repair, insure, &c., on default by company.

21. If default shall be made in respect of any of the matters mentioned in the last preceding clause hereof, it shall be lawful for the trustees to repair, put in order, reinstate, or insure the premises or any part thereof, as the case may require, and the company will on demand pay to the trustees all such sums of money as they shall expend in or about any of the purposes or matters aforesaid, with interest for the same at the rate of —— per cent. per annum as from the time of the same having been expended respectively, and the same shall until repayment be a charge upon the premises.

Company will pay rents and observe covenants of leases, and indemnify trustees therefrom.

22. The company will from time to time during the continuance of this security pay, perform, and observe all the rents and royalties, rates, taxes, outgoings, and payments, covenants, conditions, and stipulations reserved by and contained in the said several indentures and agree-

LVI. Trust Deed to secure Debentures.

ments hereinbefore mentioned, and on their part to be paid, performed, and observed respectively, and will keep the trustees and each of them and their and his executors, administrators, estates, and effects indemnified against all actions, proceedings, damages, costs, charges, claims, and demands whatsoever which shall or may be brought, incurred, or made by reason of the non-payment or non-observance or non-performance of the said rents and royalties, rates, taxes, outgoings, and payments, covenants, conditions, and stipulations, or any of them, or which may be brought, incurred, or made in respect of the exercise of any of the powers or trusts hereof, or otherwise in relation to these presents.

23. The trustees shall hold the premises subject to the security intended to be hereby effected in trust for the company.

Trustees' remuneration.

24. The company will, in consideration and by way of remuneration for the services to be rendered by the trustees as aforesaid, pay to each of them the sum of £—— per annum during the continuance of this security by equal half-yearly payments on the —— day of ——, and the —— day of —— in every year, the first of such half-yearly payments to be made on the —— day of ——, 18—.

In witness, &c.

The First Schedule above referred to.

An indenture dated, &c., and made between [*parties*].	Twenty-one years from the 29th day of September.	Liberty to dig for copper and other, &c., in part of the Manor of ——, within the limits therein mentioned as shown on a map endorsed thereon.
&c., &c.	&c., &c.	&c., &c.

The Second Schedule above referred to.

Inventory of Plant and Machinery, &c.

The Third Schedule above referred to.

Form of Debenture (*see Precedent LV., ante, p.* 1151).

LVII. *TRANSFER of* DEBENTURE *of* LIMITED COMPANY (*h*).

LVII. Transfer of Debenture.

I (*i*) [*transferor*], of &c. [or *the within-named transferor*], in consideration of the sum of £—— paid to me by [*transferee*], of &c., do hereby transfer to the said [*transferee*], his executors, administrators, and assigns, a certain mortgage debenture, number ——, made by the —— Company Limited, dated the —— day of ——, 18—, for securing the sum of £—— and interest [*or*, the within debenture], and all my right, estate, and interest in and to the money thereby secured; To HOLD the same subject to the conditions indorsed on [*or*, annexed to] the same debenture.

[*Seal and signature of transferor.*]

Mortgage of debentures and bonds of companies.

(*h*) A mortgage of mortgage debentures or bonds of a company is usually effected by a transfer to the mortgagee, or sometimes by causing the debentures or bonds to be issued direct to him, the transfer or issue being accompanied by a deed of defeasance: see next Precedent. The mode of transfer will vary according to the form of the security, and the constitution and regulations of the company, but it is usually effected by deed indorsed on or separate from the security transferred, as may be most convenient. This form of transfer given in the text is taken from Schedule E. to the Companies Clauses Act, 1845 (8 & 9 Vict. c. 16), being the form prescribed by sect. 46 of that Act. Transfers of mortgages and bonds under that Act must be registered, and until registration the company is not in any manner responsible to the transferee: see sects. 45, 47. A transferee of a debenture under this Act is entitled (independently of the Judicature Acts) to sue in his own name: *Vertue* v. *East Anglian Rail. Co.*, 5 Exch. 280.

If the mortgage is effected by a mere deposit of the debenture or if the transfer is not at once registered, notice should be given to the company with a request not to pay the principal monies secured by the debenture to the mortgagor; if the company is being wound up, notice to the official liquidator will be sufficient: *Re Breech-loading Armoury Co.*, L. R. 5 Eq. 284. As a debenture is a chose in action within the exception to the reputed ownership clause in the Bankruptcy Act, 1883, sect. 44 (iii.) (set out *ante*, p. 771), notice to the company is not necessary to give the assignee a good title as against the trustee in bankruptcy of the assignor: *Re Pryce*, 4 Ch. D. 685.

Stamp.

(*i*) Stamp *ad valorem* at rate of 6*d.* per £100 on amount secured.

LVIII. *DEED of* DEFEASANCE *to* ACCOMPANY TRANSFER *of* DEBENTURES *and* SHARES *in a* COMPANY (*k*).

Parties.

THIS INDENTURE (*l*), dated the —— day of ——, 18—, BETWEEN [*mortgagor*], of &c., of the one part; and [*mortgagee*], of &c., of the other part; WHEREAS the said

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Mortgage of shares in company.

(*k*) As to mortgages of debentures, see *ante*, p. 1165, note (*h*). Mortgages of fully paid up shares are usually effected by a transfer of the shares to the mortgagee duly registered, accompanied by a deed of defeasance. If, however, the shares are not fully paid up it will generally be more prudent for the mortgagee not to take a complete registered transfer to himself, and so incur the liabilities of a shareholder: see *Re Newry Rail. Co.* v. *Moss*, 14 Beav. 64; *Re Land Credit Co. of Ireland*, L. R. 8 Ch. A. 831. In such a case the mortgagee should require the certificates to be delivered to him, and also take a transfer to himself executed only by the mortgagor which the mortgagee can at any time render complete by executing it himself and registering it. The mortgagee should, however, give immediate notice of the transfer to the company, as a protection against the assignor's trustee in case of bankruptcy; for shares, unlike debentures, are [not] choses in action within the exception to the reputed ownership clause in the Bankruptcy Act, 1883 (46 & 47 Vict. c. 51), sect. 44 (iii.) (set out *ante*, p. 771): see *Ex parte Union Bank of Manchester*, L. R. 12 Eq. 354; *Colonial Bank* v. *Chinnery*, 30 Ch. D. 261.

The transfer must be in the form prescribed by statute or by the regulations of the company; and the company may refuse to register transfers not according to the prescribed form: *R.* v. *General Cemetery Co.*, 6 E. & B. 415. Unless required by the regulations, a transfer of shares in a company governed by the Companies Act, 1862, need not be under seal: *Re Tahiti Cotton Co.*, L. R. 17 Eq. 273. See sects. 14, 15 of the Companies' Clauses Act, 1845, as to the transfer of shares in companies governed by that Act.

If the shares are not fully paid up, and consequently the transfer is not registered, it has been a frequent practice for the mortgagee to take either a transfer in blank, or a mere deposit of the shares, together with a power of attorney to execute a transfer in the name of the mortgagor; the mortgagee's name would thus not appear on the register, and he would be enabled to transfer the shares directly to a purchaser; see, however, as to the risks attending the taking of transfers of shares in blank, where such transfers are required to be by deed: *Société Générale de Paris* v. *Walker*, 11 App. Ca. 20. If no time is fixed for repayment of the loan the depositee will not be entitled to sell or charge the shares without having previously demanded payment: *France* v. *Clark*, 22 Ch. D. 830. A mere depositee of personal chattels has not the same right of foreclosure as a depositee of title deeds: *Carter* v. *Wake*, 4 Ch. D. 605; but this rule does not apply to shares actually

LVIII. Deed of Defeasance to accompany Transfer of Debentures and Shares in Company.

[*mortgagor*] has this day transferred to the said [*mortgagee*] certain mortgage debentures for the sum of £—— respectively issued by the —— Company, Limited, and numbered —— to —— respectively, and also —— shares in the said company, numbered —— to —— respectively, for the purpose of securing the repayment of the sum of £—— advanced by the said [*mortgagee*] to the said [*mortgagor*], with interest thereon at the rate hereinafter mentioned (*m*): NOW THIS INDENTURE WITNESSETH, that in consideration of the premises the said [*mortgagor*] covenants to, &c. [*covenant to pay principal and interest, ante*, p. 994]: AND it is hereby agreed, that if the said principal sum of £—— and interest thereon as aforesaid shall be duly paid pursuant to the covenant in that behalf hereinbefore contained, then the said debentures and shares respectively shall, at the request and cost of the said [*mortgagor*], his executors, administrators, or assigns, be retransferred to him or them, or as he or they shall direct (*n*); AND in the meantime, and until default shall be made in payment of the said principal sum and interest, or some part thereof respectively pursuant to the said covenant, the interest and dividends to accrue due in respect of the said debentures and shares respectively shall belong to the said [*mortgagor*], his executors, administrators, and assigns. IN WITNESS, &c.

Defeasance.

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transferred by way of mortgage: *General Credit and Discount Co.*, 22 Ch. D. 549.

A director is not disqualified by mortgaging his qualification shares: *Cumming* v. *Prescott*, 2 Y. & C. Ex. 488.

(*l*) Stamp, *ad valorem* on amount secured, *ante*, p. 988.

Stamp.

(*m*) If the transfers of the shares have not been registered, say:—

"And has deposited the certificates for the said shares with the said [*mortgagee*], but the transfers thereof have not been registered."

(*n*) If the transfers have not been registered, say:—

"The said transfers shall be avoided respectively, and in the meantime," &c.

LIX. *LLOYD'S BOND* (*o*).

Acknowledgment of amount stated.

THE —— COMPANY (*p*) hereby acknowledge themselves to owe to [*creditor*], of &c., the sum of £—— for lands found and provided, works executed, and materials supplied for the purposes of their undertaking; and the said company, in consideration of the premises and of the agreement of the said [*creditor*] to forbear and give time for the payment of the said sum of £—— until the day and year hereinafter mentioned,

Promise to pay.

hereby undertake to pay to the said [*creditor*], his executors, administrators, and assigns, the sum of £—— on the —— day of ——, 18—, with interest thereon in the meantime after the rate of —— per cent. per annum, payable half-yearly on the —— day of —— and the —— day of ——.

Given under the common seal of the —— Company this —— day of ——, 18—.

LX. *TRANSFER of a* LLOYD'S BOND (*q*).

I (*r*), the undersigned [*transferor*], in consideration of the sum of £—— paid to me by [*transferee*], of &c., do hereby assign and transfer to the said [*transferee*], his executors, administrators, and assigns, a certain bond numbered —— made by the ——

Nature and effect of Lloyd's Bonds.

(*o*) Lloyd's Bonds are instruments under seal, amounting to an account stated and containing a promise to pay: Fish. Mortg. 251 n. Such bonds if given in respect of money simply lent are wholly invalid: *Chambers* v. *Manchester and Milford Rail. Co.*, 5 B. & S. 588; *Fountaine* v. *Carmarthen Rail. Co.*, L. R. 5 Eq. 316; but they may be given for money due to contractors and others to whom the company is indebted for work done or goods, &c. supplied: *Re Cork and Youghal Rail. Co.*, L. R. 4 Ch. A. 748; *Dickson* v. *Swansea Vale, &c., Rail. Co.*, L. R. 4 Q. B. 44. Although a Lloyd's Bond does not create a charge upon the property of the company, this seems an appropriate place for introducing a precedent of such an instrument.

Stamp.

(*p*) Stamp, *ad valorem* on amount secured, *ante*, p. 988.

(*q*) Before the Judicature Acts the assignee of a Lloyd's Bond could not sue in his own name: *Williams* v. *Sidmouth, &c., Rail. Co.*, L. R. 2 Ex. 284.

Stamp.

(*r*) Stamp, *ad valorem*, as a transfer at the rate of 6*d.* per 100*l.*

Company to me, bearing date the —— day of ——, for securing the sum of £——, with interest thereon after the rate of —— per cent. per annum, and all my right, estate, and interest in and to the money thereby secured, together with full power for the said [*transferee*], his executors, administrators, or assigns, to demand, sue for, recover, and give valid receipts for the said principal sum of £——, and all interest due or to become due for the same in my name, or in the name of my executors or administrators, and for the purposes aforesaid, or any of them, to execute and do all such instruments and things as shall in his or their opinion be necessary or expedient in that behalf. IN WITNESS, &c. LX. **Transfer of Lloyds' Bond.**

LXI. *MORTGAGE of a* SHARE *in a* PARTNERSHIP BUSINESS, *the* PRINCIPAL *to be* PAID *by* MONTHLY INSTALMENTS (*s*).

THIS INDENTURE (*t*), made the —— day of ——, 18—, BETWEEN [*mortgagor*], of &c., of the one part; and [*mortgagee*], of &c., of the other part; WHEREAS the said [*mortgagor*] is a partner in the firm of ——, carrying on the business of ——, at ——, in the county of ——, under articles of partnership dated the —— day of ——, 18—; AND WHEREAS the said [*mortgagee*] has agreed to lend to the said [*mortgagor*] the sum of £——, Parties. Recitals: of partnership; of agreement for loan.

(*s*) A person may generally advance money to a partnership firm or to one of its members on the security of the property or of a share in the property of the partnership, without thereby becoming a partner: see *post*, tit. PARTNERSHIP. Although a partner cannot by assigning or charging his share impose the mortgagee on the firm as a partner, there is nothing to prevent partners from assigning or charging their shares without the consent of their co-partners; the assignee or incumbrancer of a share acquires a right to payment of what, upon the accounts being taken, appears to be due to the partner in respect of the share: *Glyn* v. *Hood*, 1 De G. F. & J. 334; *Smith* v. *Parkes*, 16 Beav. 115; see *Cavander* v. *Bulteel*, L. R. 9 Ch. A. 78. The mortgagee of a share can require an account of the mortgagor's interest in the partnership, as from the date when the mortgagee proceeded to take possession under the mortgage, or if a dissolution has previously taken place, then as from the date of the dissolution: *Whetham* v. *Davey*, 30 Ch. D. 574. Mortgage of share in a partnership.

(*t*) Stamp, *ad valorem* on amount secured, *ante*, p. 988. Stamp.

LXI. **Mortgage of Share in Partnership Business.**

upon having the repayment of the same by instalments, with interest for the same, or for so much thereof as shall for the time being remain unpaid secured in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement and in consideration of the sum of £—— now paid to the said [*mortgagor*] by the said [*mortgagee*], (the receipt whereof the said [*mortgagor*] hereby acknowledges), the said [*mortgagor*] hereby covenants with the said [*mortgagee*] to pay to him the sum of £—— (*u*) within the period of —— calendar months from the date of these presents by equal monthly instalments, the first of such payments to be made on the —— day of —— next, and the last of such payments to be made on the —— day of ——, 18—: AND THIS INDENTURE ALSO WITNESSETH that the said [*mortgagor*] hereby charges ALL THAT his share and interest in the said business, and in the goodwill thereof, and in the capital, book debts, and assets thereof, other than personal chattels within the meaning of the Bills of Sale Acts (*x*), with the repayment to the said [*mortgagee*], his executors, administrators or assigns, of the monies hereby secured at the times and in manner aforesaid; AND the said [*mortgagor*] hereby covenants with the said [*mortgagee*] that he the said [*mortgagor*] will, so long as he shall continue a partner in the said firm, and during the continuance of this security, duly observe and perform all the covenants, conditions and stipulations contained in the said articles, and on his part to be observed and performed; AND that he will not do or suffer anything whereby the said partnership may be determined, or the said share or interest, and premises hereby charged, or any of them, may be incumbered or alienated, save in the ordinary course of business (*y*), or otherwise prejudicially in any way whatsoever; AND that he will at

Testatum.

Covenant to pay principal and interest by monthly instalments.

Second *testatum.*

Charge of shares in partnership.

Covenants by mortgagor: to observe articles of partnership;

to devote himself to the business:

(*u*) This sum will be the aggregate amount of principal and interest, an equal part of which will be repaid monthly by way of instalments.

(*x*) This security is not made to include the mortgagor's share in the chattels and effects of the partnership, as otherwise it would require registration under the Bills of Sale Acts. If it is intended to include such property a separate witnessing part should be added according to the prescribed form (see *ante*, p. 1113), and an inventory of the chattels must be annexed to the mortgage.

(*y*) This exception, if not expressly mentioned, would be implied: see *Taylor* v. *McKeand*, 5 C. P. D. 358.

LXI. Mortgage of Share in Partnership Business.

all times devote his time and attention to the said business, and diligently and faithfully employ himself therein, and use his utmost endeavour to carry on the same to advantage; And that he will from time to time inform and keep informed the said [*mortgagee*], his executors, administrators and assigns, if and whenever requested so to do, of the state and condition of the affairs of the said business, and of the liabilities, assets, profits and losses thereof; And will insure or cause to be insured the leasehold premises in —— street, in —— aforesaid, or any other premises in which the same business may for the time being be carried on, together with the fittings and fixtures thereof, against loss or damage by fire to the full value thereof: Provided always, that any insurance of the same premises, effected or to be effected pursuant to the covenants in that behalf contained in the lease or leases under which such premises are held, shall be deemed to be *pro tanto* a performance of this covenant; And the said [*mortgagor*] hereby irrevocably appoints the said [*mortgagee*], his executors, administrators and assigns, to be his lawful attorney and attornies in the name and on behalf of the said [*mortgagor*] to give notice of dissolution of the said partnership, and to demand and take all accounts pursuant to the said articles of partnership, and to demand, sue for, recover, receive and give valid receipts for all monies, effects and things to which the said [*mortgagor*] is entitled under the said articles of partnership, or otherwise in relation to the premises, and for the purposes aforesaid or any of them to execute and do all such instruments and things as may be deemed necessary or expedient: Provided always, that if the said [*mortgagor*] shall die, or if he or the said firm shall become bankrupt, or enter into any composition or scheme for the arrangement or liquidation, statutory or otherwise, of his or their affairs, for the benefit of his or their creditors generally, or if he shall fail to observe and perform any of the covenants herein contained and on his part to be observed and performed, and particularly if he shall at any time during the continuance of this security absent himself from the said business at any time for more than —— days, except in case of illness, without the consent of the said [*mortgagee*], his executors, administrators and assigns, then and in any such case the whole of the said sum of £—— [*principal and interest*] shall immediately become due and payable: Provided always, that if the whole of the

to give information as to state of business;

to insure the partnership premises;

insurance under lease to be *pro tanto* performance of this covenant.

Power of attorney.

Proviso that in certain events the whole amount secured shall become payable.

Proviso as to exercise of

LXI. Mortgage of Share in Partnership Business.

statutory power of sale.

said sum shall become so due and payable as aforesaid, then the statutory powers of sale conferred on mortgagees by the Conveyancing and Law of Property Act, 1881, shall immediately become exerciseable without any restrictions as to giving notice or otherwise. IN WITNESS, &c.

LXII. *MEMORANDUM of* DEPOSIT *of* TITLE-DEEDS (*z*).

Memorandum of deposit.

MEMORANDUM (*z*) that on the —— day of ——, 18—, I [*depositor*], of &c., deposited with [*depositee*], of &c., the title-deeds and documents relating to certain lands and hereditaments situate at ——, in the county of ——, and specified in the schedule hereto, to secure the repayment to him, on the —— day of —— next, of £—— this day advanced to me by him, and any further advances which he may hereafter make to me with interest at the rate of — per cent. per annum and costs.

(*Signature of depositor.*)

THE SCHEDULE ABOVE REFERRED TO.

Effect of simple memorandum of eposit.

(*z*) A memorandum in this form need not be under seal, and requires no stamp: *Meek* v. *Bayliss*, 31 L. J., Ch. 448; and the mortgagee does not thereby acquire any powers of sale, &c., by virtue of the Conveyancing and Law of Property Act, 1881. In case of default on the part of the mortgagor the remedy of the mortgagee is by foreclosure: *James* v. *James*, L. R. 16 Eq. 153; *Backhouse* v. *Charlton*, 8 Ch. D. 444; but he may have an order in his foreclosure action for sale of the mortgaged property: see *ante*, p. 911. In *Oldham* v. *Stringer*, W. N. 1884, p. 235 (*S. C.* 33 W. R. 251; 51 L. T. 895), an order for sale was made where there was a deposit of deeds unaccompanied by any memorandum. A deposit of deeds is an imperfect mortgage, which the mortgagee is entitled at any time to have perfected by a formal mortgage: *Parker* v. *Housefield*, 2 My. & K. 419.

LXIII. *MEMORANDUM of* AGREEMENT *and* CHARGE *to accompany* DEPOSIT *of* TITLE-DEEDS *to secure repayment of a loan.*

MEMORANDUM OF AGREEMENT (*a*) made the —— day of ——, 18—, BETWEEN [*mortgagor*], of the one part; and [*mortgagee*], of &c., and [*mortgagee*], of &c., of the other part; WHEREAS, at the request of the said [*mortgagor*], the said [*mortgagees*] have this day advanced to him out of monies belonging to them on a joint account the sum of £—— (the receipt whereof is hereby acknowledged), to bear interest after the rate of —— per cent. per annum from the day of the date of these presents; AND WHEREAS the said [*mortgagor*] has this day deposited with the said [*mortgagees*], by way of equitable mortgage for securing the sum of £—— and interest, after the rate aforesaid, the several deeds and documents of title mentioned in the schedule hereunder written, which deeds and documents relate to certain lands and hereditaments of the said [*mortgagor*], at ——, in the county of ——: NOW THESE PRESENTS WITNESS that in consideration of the premises, the said [*mortgagor*] hereby charges all his estate and interest of and in the said lands and hereditaments, with the said principal sum of £—— and interest thereon at the rate and in manner aforesaid, and agrees that he, the said [*mortgagor*], will at his own cost perfect and evidence the title to the said estate to the satisfaction of the counsel in the law of the said [*mortgagees*], and at the like cost, on their request, execute a legal mortgage of the said estate, to be prepared by their solicitor, and to contain all such powers and provisions as their counsel in the law shall advise: AND IT IS HEREBY ALSO AGREED that in the meantime the said [*mortgagees*] and the survivors and survivor of them, and the executors or administrators of such survivor, and their or his assigns, shall have all such remedies as they or he would be entitled to as equitable mortgagees by deposit of deeds, and also all such other remedies (if any) as they or he ought to have or be held entitled to in consequence

Parties.

Recitals: of loan;

of deposit of deeds.

Agreement to perfect title and execute mortgage;

that meanwhile mortgagees shall be entitled to remedies, &c.

(*a*) This memorandum should be executed in duplicate and stamped; it would seem that in strictness a mortgage *ad valorem* stamp is necessary. 5s 5&6/Vict [Inland Revenue] & S.S.

Stamp.

LXIII. Memorandum of Deposit and Charge.

or by virtue of the said advance or of these presents. As WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

LXIV. *MEMORANDUM of* DEPOSIT *by way of* EQUITABLE MORTGAGE *to a* BANK *to secure balance of account current.*

To the —— Banking Company.

Memorandum of deposit.

MEMORANDUM (*b*): WE, the undersigned [*mortgagor*], of &c., and [*mortgagor*], of &c., hereby declare that the several documents mentioned in the schedule hereunder written have been deposited, and shall remain with you as a security for the payment to you of all money due or to become due, or from time to time accruing due from us to you on any account whatsoever, including charges for interest, discount, commission, and all costs, charges, and expenses which you may incur in enforcing or obtaining payment of such money, or in realising this or any further security; AND we hereby agree to pay to you immediately upon demand all such money; AND we hereby charge the hereditaments and premises comprised in such documents respectively, and all fixtures now or hereafter to be thereon, with the payment to you of all such money; AND we hereby declare that the powers given to mortgagees by provisions applicable to mortgages under the Conveyancing and Law of Property Act, 1881, are intended to and shall apply to the security intended to be hereby created, but with the variation that the power of sale conferred by the Act shall not be subject to the provisions contained in the 20th section thereof, but shall be exerciseable at any time hereafter immediately upon any money becoming due from us to you; AND we agree to execute any further deed or document for assuring the hereditaments and premises aforesaid unto and vesting the same in you, with all such powers of entry, leasing, sale, and otherwise for securing immediate payment of all such money as your solicitor may advise, such

Agreement to repay loan.

Charge of lands, &c.

Declaration that mortgagees may exercise statutory powers.

Agreement to execute mortgage.

Stamp.

(*b*) Stamp, *ad valorem* on probable amount of advances, *ante*, p. 988.

LXIV. Equitable Mortgage by Deposit to Bank.

deeds and documents respectively to be prepared by such solicitor at our expense; And we further hereby declare, that so long as any such money shall be due or accruing due to you [*trustees*], the present trustees of the will of [*testator*] mentioned in the said schedule, will stand possessed of the legal estate in the said hereditaments and premises, Upon trust for you and any purchaser or purchasers from you, and that you may at any time appoint a new trustee or trustees thereof in the place of the said [*trustees*]; And we hereby appoint your general manager for the time being, receiver of the rents and profits of the said hereditaments and premises, and also attorney for us, to sign, seal, and deliver any such further deed or document as aforesaid; And we further hereby declare, that all money (including penalties) which shall be paid by you or on your behalf for stamping this and any other document of title shall, for all the purposes of this deed, be considered as money due from and payable by us, and be included in and covered by this security. As witness, &c.

Appointment of receiver and power of attorney.

The Schedule above referred to.

LXV. *EQUITABLE CHARGE by way of* Second Mortgage, *as an* Additional Security (*c*).

KNOW ALL MEN by these presents (*d*), That I [*mortgagor*], of &c., hereby charge all my estate and interest of and in the land and hereditaments, known as the —— Farm, situate in the parish of ——, in the county of ——, and containing by admeasurement —— acres or thereabouts, with the payment to [*mortgagee*], of &c., his executors, administrators, or assigns, on the —— day of —— next [*or* on demand], of all principal and interest monies secured by an

Charge of lands.

(*c*) This security may of course be effected by a formal second mortgage (for a precedent of which see *ante*, p. 1006). A charge in the above form should be by deed, so as to attach to itself the statutory power of sale, &c. Notice of this charge should be given to the prior incumbrancer.

(*d*) Stamp, *ad valorem* on amount secured, *ante*, p. 988. Stamp.

LXV. **Equitable Charge of Lands as Additional Security.**

indenture of mortgage, dated the —— day of ——, 18—, and made between myself of the one part, and the said [*mortgagee*] of the other part, with interest thereon at the rate of —— per cent. per annum; SUBJECT, nevertheless, to an indenture, dated the —— day of ——, 18—, and made between [*parties*], whereby the premises were conveyed to the said [*first mortgagee*] by way of mortgage, to secure the payment of a principal sum of £—— and interest thereon at the rate of —— per cent. per annum; AND I hereby agree at any time upon the request of the said [*mortgagee*], his executors, administrators, or assigns, to make and execute to him or to them, at my own cost, a legal mortgage of the premises hereby charged with such powers, covenants, and conditions, and with such restrictions upon the exercise by me of any statutory or other powers, and generally in such manner and form as he or they may require, and that meanwhile I will not exercise any of such powers without the previous consent in writing of the said [*mortgagee*], his executors, administrators, or assigns; AND I hereby agree that I will at all times hereafter during the continuance of this security, upon the request of the said [*mortgagee*], his executors, administrators, or assigns, produce to him or to them, or to such person or persons as he or they shall direct, the receipt for the payment of the interest which shall have accrued due under the said indenture of mortgage of the —— day of ——, 18— [*the first mortgage*], on the half-yearly day appointed for payment of such interest, immediately preceding the making of such request. IN WITNESS, &c.

Agreements by debtor: to execute mortgage;

to produce receipts for interest on first mortgage (*e*).

(*e*) This proviso may usefully be inserted in any *puisne* mortgage or charge where the amount secured by the first mortgage bears a considerable proportion to the estimated value of the property.

LXVI. *DEED of* FURTHER CHARGE *by* INDORSEMENT (*f*).

THIS INDENTURE (*g*), made the —— day of ——, 18—, BETWEEN the within-named [*mortgagor*] of the one part; and the within-named [*mortgagee*] of the other part, WITNESSETH that in consideration of the sum of £—— now paid to the said [*mortgagor*] by the said [*mortgagee*], the receipt whereof the said [*mortgagor*] hereby acknowledges, the said [*mortgagor*] hereby covenants with the said [*mortgagee*] to pay to him, his executors, administrators, or assigns, on the —— day of ——, 18— (*h*), the sum of £—— and interest thereon in the meantime at the rate of —— per centum per annum; and also so long after that day as any principal money shall remain due under this security, to pay to him or them interest thereon at the rate aforesaid, by equal half-yearly payments on the —— day of —— and the —— day of ——: AND FURTHER, that all the lands and hereditaments [*or* property] comprised in the within-written indenture shall stand charged with the payment to the said [*mortgagee*], his executors, administrators, or assigns, of the said sum of £—— and the interest thereon hereinbefore covenanted to be paid, as well as of the sum of £—— and interest secured by the within-written indenture. IN WITNESS, &c.

Parties.

Testatum.

Covenant to pay principal and interest.

Charge.

(*f*) See Form II. given in the 4th Schedule to the Conveyancing and Law of Property Act, 1881, from which this Precedent is adapted. A deed of further charge should if possible be indorsed on the original mortgage so as to be inseparable therefrom. If, however, the mode of engrossment or other circumstances render this impossible or inconvenient, the deed will generally be made supplemental to the original mortgage, so as to avoid the necessity of reciting it: see the next Precedent. A form of further charge by independent deed reciting the mortgage is given *post*, Precedent LXX., p. 1184.

(*g*) Stamp, *ad valorem* on amount secured, *ante*, p. 988.

Stamp.

(*h*) This will be the next ensuing half-yearly day appointed by the original mortgage for payment of interest.

LXVII. *DEED of* Further Charge *by* Deed Supplemental *to the* Original Mortgage.

Parties.

THIS INDENTURE (*i*), made the —— day of ——, 18—, Between [*mortgagor*], of &c., of the one part; and [*mortgagee*], of &c., of the other part; and supplemental to an indenture of mortgage (hereinafter referred to as the principal indenture), dated the —— day of ——, 18—, and made between [*parties*] for securing the sum of £—— and interest thereon at the rate of —— per cent. per annum on a messuage and lands [*parcels*] situate in the parish of —— in the county of ——, and particularly described in the principal

Testatum.

indenture, WITNESSETH that in consideration of the sum of £—— now paid to the said [*mortgagor*] by the said [*mortgagee*], the receipt whereof the said [*mortgagor*] hereby acknowledges, &c. [*covenant for payment of principal and interest, and charge as in last Precedent, substituting the words* "principal indenture" *for* "within-written indenture"]. In witness, &c.

Covenant and charge.

LXVIII. *DEED of* Further Charge *on* Reversionary Interest *in a* Fund *in* Court. Alteration *of* Terms *of original* Mortgage *as to* Capitalization *of* Interest; *such* Terms *as altered to* apply *to this* Security. Proviso *for* Reduction *of* Interest *on punctual payment after expiration of period of capitalization of interest* (*k*).

Parties.

THIS INDENTURE (*l*), made the —— day of ——, 18—, Between [*mortgagor*], of &c., of the one part; and [*mortgagee*], of &c., and [*mortgagee*], of &c., of the other part; And sup-

---

Stamp.

(*i*) Stamp, *ad valorem* on amount secured, *ante*, p. 988.

(*k*) For a form of an original mortgage such as that here referred to as "the principal indenture": see *ante*, Precedent LI., p. 1130.

Stamp.

(*l*) Stamp, *ad valorem* on amount of further advance, and also deed stamp of 10*s.* in respect of the alteration of the terms of the mortgage.

LXVIII. Further Charge of Reversionary Interest.

PLEMENTAL to an indenture of mortgage (hereinafter referred to as the principal indenture), dated the —— day of ——, 18—, and made between the same parties as are parties to these presents for securing payment by the said [*mortgagor*] to the said [*mortgagees*] of the principal sum of £1500 and interest; WHEREAS the sum of £1500 secured by the principal indenture is still owing, with interest thereon, from the —— day of ——, 18—, capitalized pursuant to the provisions in that behalf contained in the principal indenture; AND WHEREAS the said [*mortgagees*] have agreed to lend to the said [*mortgagor*] the further sum of £500 on having the repayment thereof, with interest, secured to them in manner hereinafter appearing, it having been also agreed that the said loan shall be continued and the interest to accrue upon the said sum of £500 forborne and allowed to accumulate by way of compound interest at the option of the said [*mortgagor*] in manner hereinafter appearing; AND WHEREAS as part of the agreement for the advance of the further sum of £500, it has also been agreed that the period during which the said sum of £1500 by the principal indenture agreed to be continued, and the interest to accrue on the same sum to be forborne, shall be altered in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of £1500 now owing by the said [*mortgagor*] upon the security of the principal indenture, and of the further sum of £500 this day paid to the said [*mortgagor*] by the said [*mortgagees*] out of monies belonging to them on a joint account (the receipt whereof the said [*mortgagor*] hereby acknowledges), the said [*mortgagor*] hereby covenants with the said [*mortgagees*] to pay to them on the —— day of —— next the sum of £2000, with interest for the same, for and during the period of ten years from the date of these presents, at the rate of —— per cent. per annum (reducible as hereinafter provided), computed as to the sum of £1500, part of the said sum of £2000, as from the —— day of ——, 18—, and as to the sum of £500, the remainder of the said sum of £2000 as from the date of these presents, and also so long as any principal money shall remain due upon the security of the principal indenture, or of these presents, to pay to the said [*mortgagees*] interest thereon after the rate aforesaid respectively by equal half-yearly payments on the

Recitals:

of state of mortgage debt;

of agreement for further loan, and

for alteration of term of repayment of original advance.

Testatum.

Covenant for payment of original and further advances and interest.

LXVIII. **Further Charge of Reversionary Interest.**

—— day of —— and the —— day of —— in every year: AND IT IS HEREBY AGREED, that all and singular the premises comprised in and conveyed or assured by the principal indenture shall stand charged with and remain a security for the payment to the said [*mortgagees*] as well of the said sum of £500 and the interest for the same, as of the said sum of £1500 and the interest for the same, pursuant to the covenant in that behalf herein contained, and to the provisions of the principal indenture as hereby altered, and shall not be redeemable until both the said principal sums of £1500 and £500, and the interest thereof respectively, shall be fully paid and satisfied; AND IT IS HEREBY ALSO AGREED, that all covenants, trusts, powers, and provisoes, in and by the principal indenture contained and implied by virtue of any statute or otherwise for securing the payment of the said sum of £1500 and the interest thereon, shall extend to and be applicable so as to be also a security for the said sum of £500, and the interest thereon, as if the said sum of £500 had formed part of the principal money secured by the principal indenture: PROVIDED ALWAYS, and it is hereby agreed, that the period of twenty years during which the said sum of £1500 under the provisions in that behalf in the principal indenture contained is agreed not to be called in, and during which interest is agreed to be forborne and capitalized in manner in the same indenture mentioned, shall be reduced to a period of ten years from the date of these presents; AND accordingly that the covenants, agreements, and provisoes in the principal indenture contained with regard to the continuance of the said loan of £1500, and to the forbearance, capitalization, and accumulation of interest, shall apply and take effect in all respects as if throughout such covenants, agreements, and provisoes, a period of ten years had been mentioned or referred to wherever the period of twenty years is therein respectively mentioned or referred to, AND as if the sum of £2000 had been therein mentioned or referred to wherever the said sum of £1500 is therein mentioned or referred to: PROVIDED that such period of ten years shall be determinable in the same manner and events as under the said provisions the said period of twenty years was determinable: AND IT IS HEREBY FURTHER AGREED that the said covenants, agreements, and provisoes in the principal indenture contained as to the continuance of the said loan of £1500, and as to the capitaliza-

Charge of property comprised in original mortgage.

Powers, &c., of original mortgage to extend to further advance.

Proviso for alteration of terms of principal indenture as to capitalization of interest, &c.

Terms of principal indenture as to capitalization, &c., as altered to

LXVIII. Further Charge of Reversionary Interest.

tion of the interest payable in respect thereof, and for securing all additions in respect of capital and interest, but altered as aforesaid, shall extend and be applicable to the said sum of £500 now advanced, and the interest thereon, in the same manner in all respects as if the same covenants, agreements, and provisoes so altered as aforesaid had been therein made in respect of a principal sum of £2000 (of which the said sum of £500 had formed part) and the interest thereon; And the said [*mortgagor*] hereby empowers the said [*mortgagees*], at the cost of the said [*mortgagor*], to apply for and obtain an order in the cause in the principal indenture mentioned in respect of this present security similar to that which they are by the provisions in that behalf in the same indenture contained empowered to apply for and obtain, and either in addition to any such order which they may already have applied for and obtained or otherwise; And upon such application to use the name of the said [*mortgagor*], and to instruct solicitors and counsel in the same manner as by the principal indenture they were empowered to do in the case of an application under the provisions in that behalf contained in the same indenture: Provided always, that from and after the determination of ten years from the date of these presents, if the said [*mortgagor*], his executors, administrators, and assigns shall, on every —— day of —— and —— day of ——, so long as the said sum of £2000 or any part thereof shall remain unpaid, or within —— days after each of the said days respectively, pay interest for the same at the rate of —— [*reduced rate*] per cent. per annum, then the said [*mortgagees*], their executors, administrators, or assigns, will accept such reduced rate of interest for every half year for which the same shall be paid within the —— days aforesaid. In witness, &c.

apply to further advance.

Power to obtain charging order.

Proviso for reduction of interest (*m*).

(*m*) For a proviso that the proviso for reduction of interest in the original mortgage shall extend to a further advance, see *post*, p. 1210.

LXIX. *DEED of* Further Charge *on a* Life Interest *in* Real *or* Personal Property. Assignment *of a* Further Policy *of* Insurance *on the* Life *of the* Mortgagor.

Parties.

THIS INDENTURE (*n*), made the —— day of ——, 18—, Between [*mortgagor*], of &c., of the one part; and [*mortgagee*], of &c., and [*mortgagee*], of &c., of the other part; And supplemental to an indenture (hereinafter referred to as the principal indenture), dated the —— day of ——, 18—, and made between [*parties*]; Whereas all the estate and interest of the said [*original mortgagees*] under the principal indenture is now vested in the said [*mortgagees*]; And whereas the sum of £1500 secured by the principal indenture is still owing, with interest thereon, from the —— day of —— now last past, but all interest thereon up to that date has been duly paid and satisfied; And whereas the said [*mortgagees*] have agreed to lend to the said [*mortgagor*] the further sum of £500, upon having the payment of the same with interest thereon at the rate of —— per cent. per annum, and the payment of the said sum of 1500*l.* secured by the principal indenture further secured in manner hereinafter appearing; And whereas as part of the such intended security the said [*mortgagor*] has effected a further insurance on his own life in the sum of £—— with the —— Life Assurance Society, by a policy numbered —— and dated the —— day of ——, 18—, and under the annual premium of £——: NOW THIS INDENTURE WITNESSETH [*covenant for payment of original and further advances and interest, ante*, p. 1179]: AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreement, and for the consideration aforesaid, he the said [*mortgagor*] hereby assigns, and, as beneficial owner, conveys unto the said [*mortgagees*] all the said further policy of assurance hereinbefore described, together with the sum of £—— thereby assured, and all other monies assured or to become payable by virtue thereof, and the full benefit thereof, To hold the said policy and premises hereby assigned unto the said [*mortgagees*], their executors, administrators, and assigns,

Recitals:
of change in title of mortgagees;
of state of mortgage debt;
of agreement for further advance;
of further policy of life assurance.

Testatum.

Covenant for payment of original and further advances and interest.

Second *testatum.*

Assignment of further policy.

Habendum.

Stamp.

(*n*) Stamp, *ad valorem* on amount of further advance as a mortgage, and also on amount of original advance at the rate of 6*d.* per £100 as an additional security for the same, *ante*, p. 988.

LXIX. Further Charge on Life Interest and Assignment of fresh Policy.

SUBJECT to the proviso for redemption hereinafter contained: PROVIDED ALWAYS, that if the said [*mortgagor*], his executors or administrators, shall, on the —— day of ——, pay to the said [*mortgagees*], their executors, administrators, or assigns, the said sum of £1500, with interest thereon, from the —— day of ——, 18—, at the rate aforesaid, And also the sum of £500 with interest thereon as from the date of these presents at the rate aforesaid, then the said [*mortgagees*], their executors, administrators, or assigns, will, at the request of the said [*mortgagor*], his executors, administrators, or assigns, re-assign the said further policy and premises hereinbefore expressed to be hereby assigned unto the said [*mortgagor*], his executors, administrators, or assigns, or as he or they shall direct: AND IT IS HEREBY AGREED, that all and singular the life estate or interest, policy, and premises comprised in and conveyed or assured by the principal indenture, And also any new policy or policies which may be effected under the powers and provisions contained in the same indenture, shall stand charged, &c. [*continue ut ante*, p. 1180; *proviso that powers of principal indenture shall extend to further advance, ibid*]; AND FURTHER, that all the covenants, trusts, powers, and provisions contained in the principal indenture and relating to the said policy of assurance thereby assigned, or any new or substituted policy or policies to be effected as therein mentioned, or the monies to be received under or by virtue thereof respectively, shall extend and be applicable to the said further policy and premises hereinbefore expressed to be hereby assigned in the same manner in all respects as if such covenants, trusts, powers, and provisions contained in the same indenture were herein repeated, with such alterations only as are required by reason of the difference in the amounts assured and intended to be secured respectively. IN WITNESS, &c.

Proviso for redemption.

Charge on property comprised in original mortgage and substituted policies.

Powers, &c., of original mortgage to extend to further advance and to further policy of assurance.

LXX. *DEED of* FURTHER CHARGE *on* FREEHOLDS (*by Independent Deed*) *where the* ORIGINAL ADVANCE *and* ARREARS *of* INTEREST *are* CONSOLIDATED *with the Further Advance, and the* RATE *of* INTEREST *and half-yearly* DAYS *of* PAYMENT *are* ALTERED. *A* MESNE INCUMBRANCER *joins for the purpose of* POSTPONING *his* SECURITY. MORTGAGE *of* ADDITIONAL FREEHOLDS *as a Further Security for the original and Further Advances.*

Parties.

THIS INDENTURE (*o*), made the —— day of ——, 18—, BETWEEN [*mortgagor*], of &c., of the first part; [*mesne incumbrancer*], of &c., of the second part; and [*mortgagee*], of &c., of the third part; WHEREAS, by an indenture dated the —— day of ——, and made between [*mortgagor*] of the one part, and [*mortgagee*] of the other part, in consideration of the sum of £—— [*original advance*] paid to the said [*mortgagor*] by the said [*mortgagee*], the said [*mortgagor*] covenanted with the said [*mortgagee*] to pay to him, on the —— day of ——, the sum of £—— [*original advance*], with interest thereon in the meantime at the rate of 4 per cent. per annum, and also as long after that day as any principal money should remain due thereunder, to pay to him interest thereon at the same rate by equal half-yearly payments, on the first day of January and the first day of July in every year; AND by the indenture now in recital, certain freehold lands and hereditaments situate in the parish of ——, in the county of ——, and therein particularly described, were conveyed or assured unto and to the use of the said [*mortgagee*] his heirs and assigns, subject to redemption of the same premises, on payment to the said [*mortgagee*], his executors, administrators, or assigns, of the said sum of £—— [*original advance*], with interest thereon at the rate aforesaid, on the said —— day of ——, 18—; AND by the indenture now in recital it was provided, &c. [*Recite any special provisions as to insurance, &c.*]; AND WHEREAS, by an indenture dated the —— day of ——, 18—, and made between the said [*mortgagor*], of the one part, and the said [*mesne*

Recitals: of first mortgage;

of second mortgage;

Stamp.

(*o*) Stamp, *ad valorem* on amount of arrears of interest and further advance as a mortgage, and on the amount of the original advance at the rate of er 100*l.* as an additional security for the same.

LXX. Further Charge and Mortgage of Additional Freeholds.

incumbrancer], of the other part, the said lands and hereditaments comprised in the hereinbefore-recited indenture of the —— day of ——, 18—, were conveyed or assured unto and to the use of the said [*mesne incumbrancer*], his heirs and assigns, by way of mortgage, to secure the payment to the said [*mesne incumbrancer*], his executors, administrators, or assigns, of the sum of £——, with interest thereon as therein mentioned; AND WHEREAS the said sum of £—— with the sum of £—— for interest thereon from the —— day of ——, 18—, is now due and owing on the security of the hereinbefore-recited indenture of the —— day of ——, 18—, [*the first mortgage*]; AND WHEREAS the said [*mortgagee*] has agreed to lend to the said [*mortgagor*] the further sum of £——, upon the terms hereinafter appearing; AND WHEREAS upon the treaty for the said further advance, it was agreed that the said principal sum of £—— [*original advance*], and the said sum of £—— so owing for interest thereon as aforesaid, and also the said further sum of £—— [*further advance*], should be consolidated, and should henceforth bear interest at the rate hereinafter mentioned, and that the payment of the said aggregate sum of £——, with interest thereon, should be secured in manner hereinafter appearing; AND that the said [*mesne incumbrancer*] should join in these presents for the purpose of postponing the said principal sum of £—— and interest thereon secured by the hereinbefore-recited indenture of the —— day of ——, 18— [*second mortgage*], and the securities for the same respectively, so far as relates to the said lands and hereditaments comprised in the hereinbefore-recited indenture of the —— day of ——, 18— [*first mortgage*], to the principal monies and interest intended to be hereby secured, and the security intended to be hereby effected: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the said principal sum of £——, and of the sum of £—— for interest thereon, now owing as aforesaid, and of the further sum of £—— now paid to the said [*mortgagor*] by the said [*mortgagee*], the receipt of which further sum of £—— the said [*mortgagor*] hereby acknowledges, making together the aggregate sum of £——, the said [*mortgagor*] hereby covenants, &c. [*covenant for payment of aggregate sum and interest at the new rate, ante*, p. 479]: AND THIS INDENTURE ALSO WITNESSETH, that in further

of state of mortgage debt;

of agreement for further advance;

of terms of further advance.

Testatum.

Covenant for payment of aggregate principal sum and interest.

Second *testatum.*

LXX. Further Charge and Mortgage of Additional Freeholds.

pursuance of the said further agreement, and for the consideration aforesaid, it is hereby agreed and declared, that the said lands and hereditaments comprised in and assured by the hereinbefore-recited indenture of the —— day of ——, 18— [*first mortgage*], shall henceforth be freed and discharged from the equity of redemption therein subsisting under or by virtue of the same indenture, but shall be subject to the proviso for redemption hereinafter contained:

Declaration as to equity of redemption.

Third *testatum*.

Conveyance of additional freeholds and proviso for redemption.

AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance, &c. [*Conveyance of freeholds to mortgagee, and proviso for redemption on payment of the aggregate principal sum and interest*]; AND IT IS HEREBY AGREED AND DECLARED, that all the covenants, trusts, powers, and provisoes in and by virtue of the hereinbefore-recited indenture of the —— day of ——, 18—, [*the first mortgage*] contained or implied by statute or otherwise, for securing the payment of the said sum of £——, [*the original advance*] and the interest thereon, shall extend and be applicable so as to be a security for the said aggregate sum of £——, and interest thereon at the rate of —— per cent. per annum (*new rate*), in the same manner in all respects as if such covenants, trusts, powers, and provisions were herein repeated, with such alterations only, by reason of the difference in the principal amount secured and in the rate of interest hereby made payable, and in the days hereby appointed for payment thereof respectively;

Powers, &c., of original mortgage to extend to aggregate amount secured.

Provisoes as to insurance, &c., of premises comprised in original mortgage to extend to additional freeholds.

AND IT IS HEREBY FURTHER AGREED that all the covenants and provisions contained in the hereinbefore-recited indenture of the —— day of —— [*first mortgage*], with respect to the insurance of the said premises comprised in the same indenture, and to the exercise of statutory powers of leasing or letting the same premises, shall extend and be applicable to the said lands and hereditaments hereinbefore expressed to be hereby conveyed, in the same manner in all respects as if such covenants and provisions contained in the last-mentioned indenture were herein repeated, except as is hereinafter provided, with such alterations only as is required as aforesaid;

Proviso as to amount insurable.

PROVIDED ALWAYS that the buildings and insurable property situate and being upon or in the said lands and hereditaments hereinbefore expressed to be hereby conveyed shall be kept insured against loss or damage by fire to the amount of £—— at least, such amount to be in addition to, and not in substitution for, the amount to be insured, as

LXX. Further Charge and Mortgage of Additional Freeholds.

provided in the last-mentioned indenture; PROVIDED ALWAYS, and the said [*mesne incumbrancer*], at the request of the said [*mortgagor*], hereby covenants with the said [*mortgagee*], that not only the said principal sum of £—— and interest thereon, secured by the hereinbefore-recited indenture of the —— day of ——, 18— [*first mortgage*], but also the said sum of £—— so owing for interest thereon as aforesaid, and the said sum of £—— [*further advance*], making together the said aggregate sum of £——, with interest for the same at the rate of —— per cent. per annum [*new rate*], shall be charged upon the said lands and hereditaments comprised in and assured by the hereinbefore-recited indenture of the —— day of ——, 18— [*first mortgage*], in priority to the said sum of £—— so owing to the said [*mesne incumbrancer*] on the security of the hereinbefore-recited indenture of the —— day of ——, 18— [*second mortgage*], and all interest now or hereafter to accrue due for the same and every part thereof respectively. IN WITNESS, &c.

Mesne incumbrancer postpones his security.

LXXI. *DEED of* FURTHER CHARGE *to a* BUILDING SOCIETY *Incorporated under the Building Societies Act*, 1874 (*by Indorsement*).

THIS INDENTURE(*o*), made the —— day of ——, 18—, BETWEEN [*mortgagor*], of &c. (to whom the hereditaments within described have been assigned, and to whom the shares of the within-named [*original mortgagor*] have been transferred), of the one part, and the within-named society (hereinafter called the society) of the other part; WHEREAS the society have, on the request of the said [*mortgagor*], agreed to advance him the further sum of £——, in respect of his —— additional advanced shares therein for the term of —— years, and the said [*mortgagor*] has agreed to pay a premium for such advance, which for the said term of —— years amounts to the sum of £——, and according to the rules and bye-laws

Parties.

Recital of agreement for further advance.

(*o*) Stamp, *ad valorem* on amount of further advance, *ante*, p. 988. Stamp.

LXXI. **Further Charge to Building Society.**

Testatum.

of the society is to be added to and treated as part of the principal of such advance, and has also offered to repay the said further advance and premium with interest by monthly instalments as hereinafter mentioned: NOW THIS INDENTURE WITNESSETH that, in consideration of the premises and of the sum of £—— now paid to the said [*mortgagor*] out of the funds of the society (being the full amount of his said —— additional advanced shares therein) as he hereby acknowledges; HE the said [*mortgagor*] hereby covenants with the society that he the said [*mortgagor*] will, during the continuance of this security, duly and punctually pay to the proper officer, and at the office for the time being of the society, the additional monthly subscription of £—— on the first Monday in every calendar month, commencing with the month of —— next, until the whole of the additional sum of £—— (being the aggregate amount of the said further advance and premium), and interest from the day of the date hereof, shall be fully paid to the society, or discharged in accordance with the rules and bye-laws of the society in that behalf, and as within stated; AND that all and singular the hereditaments and premises within described shall with their appurtenants henceforth stand and be charged as security to the society for payment of the said sum of £—— with interest as aforesaid, subject to all the powers, provisoes and agreements contained in the within-written indenture, AND it is hereby expressly declared that nothing herein contained shall operate to prejudice the exercise of any of the powers contained in the within-written indenture. IN WITNESS, &c.

Covenants by mortgagor to pay additional monthly subscriptions;

that mortgaged premises shall be charged with repayment of further advance and premium.

LXXII. *DEED of* Statutory Reconveyance *of* Mortgage (*p*).

THIS INDENTURE (*q*), made by way of statutory reconveyance of mortgage, the —— day of ——, 18—, Between Parties.

(*p*) Where a legal security is redeemed by the mortgagor or by any other person claiming under him as a subsequent mortgagee or otherwise, the mortgagee must surrender or reconvey the property to the person redeeming, free from incumbrances by the mortgagee or any person claiming under him, and must deliver up all deeds and documents relating to the property; and, if required, verify such delivery by affidavit: *Weeks* v. *Stourton*, 11 Jur. N. S. 278; see Fish. Mortg. 963. Where a mortgage of an equitable estate, or of a term of years created out of a freehold estate, is redeemed, the mortgaged property will revert to the mortgagor without the necessity of a re-conveyance; a mere indorsed receipt will, therefore, be sufficient in such cases; but a formal reconveyance is usually taken as evidencing the fact that the mortgage debt has been paid off, and also giving to the mortgagor the benefit of the mortgagee's covenant (either express or implied by his conveying "as mortgagee") that he has not incumbered. As to reconveyances generally.

Where the mortgaged property consists of copyholds, and the mortgagee has not actually been admitted, it will be sufficient to enter up satisfaction on the Court Rolls, for which purpose a warrant should be given to the Steward of the Manor. If the mortgagee has been admitted a surrender to the mortgagor will be necessary: see *post*, p. 1196, note (*d*). Copyholds.

In the case of a mortgage to a building society no reconveyance is necessary, inasmuch as by sect. 42 of the Building Societies Act, 1874 (37 & 38 Vict. c. 42), a receipt in the following form, indorsed or annexed on the mortgage-deed, is sufficient to vest the mortgaged property "in the person for the time being entitled to the equity of redemption": see *ante*, p. 860. Building societies.

"The —— Building Society hereby acknowledge to have received all monies intended to be secured by the within [*or* above] written deed. Form of receipt.

"In witness whereof the seal of the society is hereunder affixed this —— day of ——, 18—, by order of the board of directors [*or* committee of management of] in the presence of

"—— Secretary or Manager.

"[*Other witnesses (if any) required by the rules of the society.*]"

For note (*q*) see p. 1192.

LXXII. Statutory Reconveyance.

[*mortgagee*], of &c., of the one part, and [*mortgagor*], of &c., of the other part: SUPPLEMENTAL to an indenture made by way of

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Stamp.

No stamp is required in the case of a building society's receipt: see sects. 41, 42 of the Act.

As to the effect of such a receipt where there are subsequent incumbrances of the equity of redemption: see *Pearce* v. *Jackson*, L. R. 3 Ch. 596; *Fourth City Mutual Benefit Building Society* v. *Williams*, 14 Ch. D. 140.

Discharge of equitable security.

An equitable mortgage of any description of property will be sufficiently discharged by a mere receipt which should be indorsed on or written under the deed or memorandum of charge. It is conceived that this rule will apply even to a formal second mortgage, provided the legal estate is still outstanding in the first mortgage; it is usual, however, in this case, as generally where an equitable charge is created by deed, to have a formal reconveyance. The following is suggested as a form of receipt to be indorsed on or written below an equitable charge:—

Form of receipt.

"THE within [*or* above] mentioned [*mortgagee*] hereby acknowledges to have this day received the sum of £——, in full satisfaction of all principal money and interest secured by and all claims and demands under the within [*or* above] written memorandum [*or* indenture]. AS WITNESS, &c."

A mere receipt, containing no words which amount to a *release*, appears to require only a receipt stamp.

Who are proper persons to reconvey.

Where a mortgagee of freeholds has died before reconveyance and without making a will containing a devise of trust and mortgage estates, the proper persons to reconvey will be different according to the date of the mortgagee's death. If the death occurred before the 7th of August, 1874, the Common Law will apply, and the only person capable of effectually reconveying will be the heir-at-law of the mortgagee: and if the heir-at-law is an infant it will be necessary to obtain a vesting order from the Court under the Trustee Acts (13 & 14 Vict. c. 60; 15 & 16 Vict. c. 55). By sect. 4 of the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78) it was enacted that, "The legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee shall have been admitted, may, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage be in form of an assurance subject to redemption, or an assurance upon trust." This section is repealed as regards mortgagees dying after the 31st of December, 1881, by the Conveyancing and Law of Property Act, 1881, sect. 30, sub-sect. 2; but in the cases of deaths of mortgagees between the 7th of August, 1874, and the 31st of December, 1881, the law as to devolution of legal estates is still regulated by the repealed enactment.

In the case of a mortgagee of freehold or copyhold estate dying after the 31st of December, 1881, the mortgaged estate devolves, notwithstanding any testamentary disposition, upon his personal representatives as if it were a chattel real: see *ante*, p. 965.

statutory transfer of mortgage, dated the —— day of ——, LXXII. Statutory Reconveyance.

Where a mortgagee becomes lunatic a vesting order must be obtained from the judges intrusted with the care of lunatics by Her Majesty's sign manual : see stat. 38 & 39 Vict. c. 77, s. 7.

Where a mortgage of a lunatic's estate is paid off, the property will not be ordered to be reconveyed to the lunatic, but the mortgage will be kept on foot by transferring it to the committee to be disposed of as the Court may direct : *Re Shelly*, W. N. 1883, p. 121 ; see *Re Leeming*, De G. F. & J. 43.

A mortgagor or subsequent mortgagee paying off the mortgage may now require the mortgagee to transfer instead of reconveying : see *ante*, p. 962. Transfer in lieu of reconveyance.

As to the power of a mortgagor to redeem one mortgage without redeeming other mortgages held by the mortgagee : see *ante*, p. 937 *et seq.* Consolidation.

The mortgagor must pay the expenses of and incident to the reconveyance, including the costs of obtaining a vesting order, if necessary : *Re Sparks*, 6 Ch. D. 361. Costs.

A reconveyance will be presumed after a considerable lapse of time, during which the mortgagor has dealt with the property as his own : *Cooke* v. *Soltau*, 2 S. & St. 154 ; see also *Noel* v. *Bewley*, 3 Sim. 103 ; and *Bennett* v. *Cooper*, 9 Beav. 252. Presumption of reconveyance.

A reconveyance should, if possible, be made by indorsement, or if the mortgage-deed is engrossed bookwise, then on a blank page (which may be conveniently left for the purpose) following the mortgage ; the mortgage will thus necessarily bear with it the evidence that it has been paid off and the property reconveyed. If the reconveyance is effected by a separate deed, supplemental or otherwise, there is the risk of its being lost, whereby there may arise much difficulty in showing that the mortgage debt has been paid off. Form of reconveyance.

It is not generally advisable that a reconveyance should contain any recitals unless it is necessary to show intermediate dealings with the property. If the reconveyance contains incorrect recitals the mortgagee may refuse to execute it, but he must do so if there are no recitals : *Hartley* v. *Burton*, L. R. 3 Ch. A. 365.

It was held that a mortgagee might refuse to reconvey without the consent of the owner of a prior equitable right of which he had notice : *Barks* v. *Whittall*, 1 De G. & S. 541. And this rule still holds good, notwithstanding the provisions as to reconveyance or transfer in lieu thereof contained in the recent Acts (as to which see *ante*, p. 962) ; see *Teevan* v. *Smith*, 20 Ch. D. 724.

The Conveyancing and Law of Property Act, 1881, sect. 29, enacts that, "A re-conveyance of a statutory mortgage may be made by a deed expressed to be made by way of statutory reconveyance of mortgage, being in the form given in Part III. of the Third Schedule to this Act, with such variations and additions if any, as circumstances may require." Statutory re-conveyance.

It will be observed that the statutory form is not of a novel or special character, and that it may be used with the omission of the words "by way of statutory reconveyance of mortgage" for the purpose of reconveying a mortgage according to the ordinary form.

LXXII. **Statutory Reconveyance.**

Testatum. Reconveyance.

18—, and made between [*parties*]: WITNESSETH that in consideration (*r*) of all principal money and interest due under that indenture having been paid, of which principal and interest the said [*mortgagee*] hereby acknowledges the receipt, the said [*mortgagee*], as mortgagee, hereby conveys to the said [*mortgagor*], all the lands and hereditaments now vested in the said [*mortgagee*], under the said indenture (*s*), TO HOLD TO AND TO THE USE of the said [*mortgagor*] in fee simple, discharged from all principal money and interest secured by, and from all claims and demands under the said indenture. IN WITNESS, &c.

Stamp.

(*q*) Stamp, *ad valorem*, at rate of 6*d.* per £100, or part of £100, "at any time secured" by the mortgage.

Stamps on reconveyances.

The Stamp Act, 1870, imposes the following duties on a—

	£	s.	d.
(4.) Reconveyance, release, discharge, surrender, re-surrender, warrant to vacate or renunciation of any such security as aforesaid, or of the benefit thereof, or of the money thereby secured: For every £100, and also for any fractional part of £100, of the total amount or value of the money at any time secured	0	0	6

But no *ad valorem* duty is payable upon the release or discharge of a mortgage of stock, or any other marketable security: see stat. 34 Vict. c. 4, sect. 5. As to what are marketable securities, see *ante*, p. 990 note (*b*).

Statement of consideration.

(*r*) If the mortgage was for a fixed sum this mode of stating the consideration will be sufficient, but if it was to secure further advances, or a balance of account current, it is better, having regard to the regulation as to stamp duty above referred to, that the amount actually repaid should be stated thus:—

"in consideration of the sum of £——, being all the principal monies at any time secured by, and the interest due under the said indenture, &c."

Parcels.

(*s*) The statutory form purports only to reconvey the lands, &c., "now vested" in the mortgagee. The ordinary mode of describing the parcels in a reconveyance as given in the following precedents seems preferable.

LXXIII. *RECONVEYANCE of* FREEHOLD LANDS *by Deed* ENDORSED *on the* MORTGAGE (*t*).

THIS INDENTURE (*u*), made the —— day of ——, 18—, BETWEEN the within-named [*mortgagee*], of the one part, and the within-named [*mortgagor*], of the other part; WITNESSETH, that in consideration of all principal money and interest due under the within-written indenture having been paid (of which principal money and interest the said [*mortgagee*] hereby acknowledges the receipt), the said [*mortgagee*] hereby grants, and, as mortgagee, conveys unto the said [*mortgagor*] and his heirs, ALL the lands and hereditaments comprised in the within-written indenture; TO HOLD the same UNTO AND TO THE USE OF the said [*mortgagor*], his heirs and assigns, free and discharged from all principal money and interest secured by and from all claims and demands under the said indenture. IN WITNESS, &c.

Parties.

Testatum.

Reconveyance.

LXXIV. *RE-ASSIGNMENT of* LEASEHOLDS, *mortgaged by Assignment, by Deed* SUPPLEMENTAL *to the* MORTGAGE (*x*).

THIS INDENTURE (*u*), made the —— day of ——, 18—, BETWEEN [*mortgagee*], of &c., of the one part, and [*mortgagor*], of &c., of the other part; AND SUPPLEMENTAL to an indenture of mortgage, dated the —— day of ——, 18—,

Parties.

(*t*) If the mode of engrossment of the mortgage and other circumstances admit, it is advisable that a reconveyance should be by indorsement, so that the mortgage may bear upon it the evidence of the discharge of the mortgage debt.

(*u*) Stamp, see *ante*, p. 1192.

Stamp.

(*x*) This form may be adapted to a re-assignment of any property mortgaged by assignment, by altering the description of the parcels, *e.g.*

"the policy of assurance and all other the property described in the principal indenture."

The reference in the *habendum* to the term and lease will, of course, be omitted.

LXXIV. **Re-assignment of Leaseholds.**

and made between the said [*mortgagor*] of the one part, and the said [*mortgagee*], of the other part, for securing the sum of £——, and interest thereon as therein is mentioned;

Testatum. Reconveyance.

WITNESSETH, that in consideration of all principal money and interest having been paid (of which principal money and interest the said [*mortgagee*] hereby acknowledges the receipt), the said [*mortgagee*] hereby assigns, and, as mortgagee, conveys unto the said [*mortgagor*], ALL the lands and hereditaments comprised in the principal indenture; TO HOLD the same unto the said [*mortgagor*], his executors, administrators, and assigns, for the residue now unexpired of the term of —— years therein granted by the indenture of lease recited in the principal indenture; SUBJECT to the rents, covenants, and conditions thereby and therein reserved and contained, and, on the part of the lessee, to be paid, performed, and observed respectively (*y*); BUT FREE AND DISCHARGED from all principal money and interest secured by, and from all claims and demands under, the principal indenture. IN WITNESS, &c.

LXXV. *RECONVEYANCE of* MORTGAGE TERM, *created by way of* UNDERLEASE, *on* PAYMENT *of* MORTGAGE DEBT.

Parties.

THIS INDENTURE (*yy*), made the —— day of ——, 18—, BETWEEN [*mortgagee*], of &c., of the one part, and [*mortgagor*], of &c., of the other part;

Recital of mortgage

WHEREAS, by an indenture, dated the —— day of ——, 18—, made between the said [*mortgagor*], of the one part, and the said [*mortgagee*], of the other part, the said [*mortgagor*] demised unto the said [*mortgagee*], his executors, administrators, and assigns, ALL THAT [*describe parcels*], with the appurtenances thereunto belonging; TO HOLD the same for (*z*), the residue then unexpired of

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(*y*) The mortgagee should require proof that the rent has been paid and the lessee's covenants observed and performed up to the date of the re-assignment, before parting with his security.

Stamp.

(*yy*) Stamp, see *ante*, p. 1192.

(*z*) If the term was originally created by a tenant in fee

LXXV. Surrender of Underlease to Mortgagor.

a term of ninety-nine years, created by an indenture of lease therein recited, dated the —— day of ——, and commencing from the date of the said indenture of lease, except the last two days of the said term; SUBJECT to a proviso for redemption on payment by the said [*mortgagor*], his executors, administrators, or assigns, unto the said [*mortgagee*], his executors, administrators, or assigns, of the principal sum of £1,000 and interest, on a day long since past; AND WHEREAS the sum of £400, part of the said principal sum of £1,000, has since been paid by the said [*mortgagor*] to the said [*mortgagee*], as the said [*mortgagee*] hereby acknowledges; AND WHEREAS the principal sum of £600 still remains owing to the said [*mortgagee*] on his said mortgage security, but all interest thereon has been fully discharged up to the date hereof, as the said [*mortgagee*] hereby acknowledges: NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of £600 now paid by the said [*mortgagor*] to the said [*mortgagee*], in full satisfaction of all monies now owing under the hereinbefore recited indenture of mortgage, the receipt of which sum of £600 the said [*mortgagee*] hereby acknowledges, the said [*mortgagee*] hereby surrenders, and, as mortgagee, conveys unto the said [*mortgagor*], his (*a*) executors, administrators, and assigns, ALL AND SINGULAR the premises comprised in and demised by the hereinbefore-recited indenture of mortgage, with the appurtenances thereunto belonging; TO THE INTENT that the residue now unexpired of the term granted by the hereinbefore-recited indenture of mortgage, and all other the term and interest (if any) of the said [*mortgagee*] therein, may be merged in the (*b*) immediate reversion of the same premises. IN WITNESS, &c.

that money was not paid on the day appointed, but part has since been paid;

that remaining principal sum is still due.

Testatum.

Surrender to mortgagor.

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simple and it is intended that the term shall merge in the fee, say:—

"for the term of 500 years thence next ensuing; SUBJECT to a proviso for redemption, on payment by the said [*mortgagor*], his heirs, executors, administrators, or assigns, unto the said [*mortgagee*]," &c.

Variation where mortgage term was created immediately out of the fee.

(*a*) "heirs and assigns."

Variation.

(*b*) "freehold reversion and inheritance."

Variation.

LXXVI. *WARRANT to enter* SATISFACTION *of a Mortgage by* CONDITIONAL SURRENDER *of Copyholds.*

Manor of ——
County of ——. } I [*mortgagee*], of &c. (*c*), hereby acknowledge that I have received payment of all principal monies and interest secured by a conditional surrender, dated the —— day of ——, 18—, and made by [*mortgagor*], of &c., of certain copyhold or customary hereditaments (*d*), situate at —— and holden of the above manor; AND I hereby authorize and direct the steward of the said manor to enter on the rolls thereof satisfaction of the said conditional surrender; AND for entering such satisfaction these presents shall be his warrant and authority.

AS WITNESS, &c.

Stamp.

(*c*) Stamp, see *ante*, p. 1192.

What is to be done where mortgages of copyhold are paid off.

(*d*) Where a copyhold estate has been surrendered to the mortgagee, the usual practice, when the mortgage is paid off, is to enter an acknowledgment of satisfaction on the court-rolls, for which purpose a warrant should be given to the steward of the manor, according to the form given in the text. If the mortgagee has been admitted under the conditional surrender, he must, provided the money has not been paid until after the surrender has become absolute, re-surrender to the mortgagor. The surrender in such case would be in the common form, in consideration of the payment of the mortgage debt. It seldom happens, however, that mortgagees of copyholds are admitted, especially if the loan is likely to be temporary, the parties being anxious to avoid subjecting the mortgagor to the expense of the fine, &c. Where the mortgagee has taken from the mortgagor simply a covenant to surrender, no instrument is necessary for the purpose of discharging the lands from the equitable lien, and the mortgagor may be satisfied with having the deed re-delivered to him accompanied with evidence of the payment of the money. This evidence will be best supplied by a receipt indorsed on the deed of covenant for the conditional surrender, and this should not be dispensed with, whether the covenant was followed by a surrender and admittance, or not.

LXXVII. *RECONVEYANCE of* FREEHOLDS *by the* EXECUTORS *of a* TRANSFEREE *of a* MORTGAGE, *and* DEED *of* FURTHER CHARGE (*by supplemental Deed*).

THIS INDENTURE (*e*), made the —— day of ——, 18—, BETWEEN [*executor*], of &c., and [*executor*], of &c., of the one part, and [*mortgagor*], of &c., of the other part; AND SUPPLEMENTAL to the several indentures of mortgage, further charge and transfer of mortgage specified, with the dates thereof and parties thereto respectively in the schedule hereunder written; WHEREAS [*transferee*], named in the indenture of transfer of mortgage, died on the —— day of ——, 1886, having by his will, dated the —— day of ——, 18—, appointed the said [*executors*] to be executors thereof, who duly proved the same on the —— day of ——, 18—, in the principal registry of the Probate Division of the High Court of Justice: NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of £—— now paid by the said [*mortgagor*] to the said [*executors*], in full satisfaction of all money secured by the hereinbefore-recited indentures of mortgage and further charge respectively (the receipt of which sum the said [*executors*] hereby acknowledge), the said [*executors*] hereby grant, and, as personal representatives of the said [*transferee*], convey to the said [*mortgagor*] and his heirs, ALL the lands and hereditaments described in the hereinbefore-mentioned indenture of mortgage; TO HOLD the same UNTO AND TO THE USE of the said [*mortgagor*], his heirs and assigns, freed and discharged from all principal monies and interest secured by and from all claims and demands under the said indentures of mortgage and further charge respectively. IN WITNESS, &c.

Parties.

Recital of death of transferee and appointment of executors of his will.

Testatum.

Reconveyance.

THE SCHEDULE ABOVE REFERRED TO.

25th March, 1881.—Indenture of mortgage made between [*mortgagor*], of &c., of the one part, and [*mortgagee*] of &c., of the other part, to secure the payment on the —— day of ——, 1881, of the sum of 1,000*l.* and interest thereon, at —— per cent. per annum.

1st January, 1882.—Indenture of further charge, made between the same parties, to secure the payment on the ——

(*e*) Stamp, see *ante*, p. 1192.

Stamp.

LXXVII. **Reconveyance by Executors of Transferee.**

day of ——, 1882, of the further sum of 500*l.* and interest thereon at the rate aforesaid.

5th September, 1884.—Indenture of transfer, made between the said [*mortgagee*], of the first part; the said [*mortgagor*], of the second part; and [*transferee*], of &c., of the third part; Whereby the said sums of 1,000*l.* and 500*l.*, and the securities for the same respectively, were transferred to the said [*transferee*].

LXXVIII. *DEED of* STATUTORY TRANSFER, *Mortgagor not joining* (*d*) [*Form* A.].

THIS INDENTURE, made by way of statutory transfer of mortgage the —— day of ——, 18—, BETWEEN [*mortgagee*], of &c., of the one part, and [*transferee*], of &c., of the other

Parties.

(*d*) The mortgagor's concurrence in a transfer of mortgage should always be obtained if possible, so as to prevent any questions arising as to the state of accounts and the existence of equities as between the mortgagor and mortgagee, or as to the mortgagor having received notice of the transfer, or as to the continuance to the transferee of the mortgagee's powers: see Fisher, Mortg. 57, 462, 514. If the mortgagor is not a party to the transfer, the transferee should at once give him notice thereof.

As to the mortgagor's right to require the mortgagee to transfer instead of reconveying, and generally as to transfers of mortgages: see *ante*, pp. 960 *et seq.*

The following are the provisions of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), with respect to statutory transfers:—

Forms of statutory transfer of mortgage in schedule.

Sect. 27.—"(1.) A transfer of a statutory mortgage may be made by a deed expressed to be made by way of statutory transfer of mortgage, being in such one of the three forms (A.) and (B.) and (C.) given in Part II. of the Third Schedule to this Act as may be appropriate to the case, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

"(2.) In whichever of those three forms the deed of transfer is made, it shall have effect as follows (namely):

"(i.) There shall become vested in the person to whom the benefit of the mortgage is expressed to be transferred, who with his executors, administrators, and assigns, is hereafter in this section designated the transferee, the right to demand, sue for, recover, and give receipts for the mortgage money, or the unpaid part thereof, and the interest then due, if any, and thenceforth to become due thereon, and the benefit of all securities for the same, and the benefit of and the right to sue on all covenants with the mortgagee, and the right to exercise all powers of the mortgagee:

part; SUPPLEMENTAL to an indenture made by way of statutory mortgage, dated the —— day of ——, 18—, and made

(ii.) All the estate and interest, subject to redemption, of the mortgagee in the mortgaged land shall vest in the transferee, subject to redemption.

"(3.) If the deed of transfer is made in the form (B.), there shall also be deemed to be included, and there shall by virtue of this Act be implied therein, a covenant with the transferee by the person expressed to join therein as covenantor to the effect following (namely):—

"That the covenantor will, on the next of the days by the mortgage deed fixed for payment of interest, pay to the transferee the stated mortgage money, or so much thereof as then remains unpaid, with interest thereon, or on the unpaid part thereof, in the meantime, at the rate stated in the mortgage deed; and will thereafter, as long as the mortgage money, or any part thereof, remains unpaid, pay to the transferee interest on that sum, or the unpaid part thereof, at the same rate, on the successive days by the mortgage deed fixed for payment of interest.

"(4.) If the deed of transfer is made in the form (C.), it shall, by virtue of this Act, operate not only as a statutory transfer of mortgage, but also as a statutory mortgage, and the provisions of this section shall have effect in relation thereto, accordingly; but it shall not be liable to any increased stamp duty by reason only of its being designated a mortgage."

Implied covenants joint and several.

Sect. 28. "In a deed of statutory mortgage, or of statutory transfer of mortgage, where more persons than one are expressed to convey as mortgagors, or to join as covenantors, the implied covenant on their part shall be deemed to be a joint and several covenant by them; and where there are more mortgagees or more transferees than one, the implied covenant with them shall be deemed to be a covenant with them jointly, unless the amount secured is expressed to be secured to them in shares or distinct sums, in which latter case the implied covenant with them shall be deemed to be a covenant with each severally in respect of the share or distinct sum secured to him."

The schedule to the Stamp Act, 1870, imposes the following duties on transfers of mortgages:—

	£	s.	d.
Transfer, assignment, disposition or assignation of any mortgage, bond, debenture, covenant, or foreign security, or of any money or stock secured by any such instrument, or by any warrant of attorney to enter up judgment, or by any judgment:			
For every 100*l.* and also for any fractional part of 100*l.* of the amount assigned, transferred, or disposed	0	0	6
And also where any further money is added to the money already secured	The same duty as a principal security for such further money.		

And sect. 109 enacts as follows:—"No transfer of a duly stamped security, and no security by way of further charge for

LXXVIII. **Statutory Transfer of Mortgage.**

between [*parties*]: WITNESSETH, that in consideration of the sum of £—— now paid to the said [*mortgagee*] by the said [*transferee*], being the aggregate amount of £—— mortgage money and £—— interest due in respect of the said mortgage (of which sum the said [*mortgagee*] hereby acknowledges the receipt), the said [*mortgagee*], as mortgagee (*e*), hereby conveys and transfers to the said [*transferee*] the benefit of the said mortgage. IN WITNESS, &c.

Testatum. Transfer of mortgage.

LXXIX. *DEED of* STATUTORY TRANSFER, *a Covenantor joining* [*Form* B.].

Parties.

THIS INDENTURE, made by way of statutory transfer of mortgage the —— day of ——, 18—, BETWEEN [*mortgagee*], of &c., of the first part; [*mortgagor*], of &c., of the second part; and [*transferee*], of &c., of the third part: SUPPLEMENTAL to an indenture made by way of statutory mortgage, dated the —— day of ——, 18—, and made between [*parties*]: WITNESSETH, that in consideration of the sum of £—— now paid to the said [*mortgagee*] by the said [*transferee*], being the mortgage money due in respect of the said mortgage, no interest being now due and payable thereon (of which sum the said [*mortgagee*] hereby acknowledges the receipt), the said [*mortgagee*], as mortgagee (*e*), with the concurrence of the said [*mortgagor*], who joins herein as covenantor, hereby conveys and transfers to the said [*transferee*] the benefit of the said mortgage. IN WITNESS, &c.

Testatum. Transfer of mortgage.

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money or stock added to money or stock previously secured by a duly stamped instrument, is to be charged with any duty by reason of containing any further or additional security for the money or stock transferred or previously secured, or the interest or dividends thereof, or any new covenant, proviso, power, stipulation or agreement, in relation thereto, or any further assurance of the property comprised in the transferred or previous security.

A transfer of a mortgage will only be chargeable with duty as such, although the equity of redemption under the mortgage is extinguished by the transfer, and a new proviso for redemption and covenants for payment are inserted therein: *Wale* v. *Commissioners of Inland Revenue*, 4 Ex. D. 80.

(*e*) The words "as mortgagee" imply a covenant against incumbrances by the original mortgagee, both as to the mortgage debt, and as to the mortgaged property: see sect. 7 (F.) of the Conveyancing and Law of Property Act, 1881.

LXXX. *STATUTORY* TRANSFER *and* STATUTORY MORTGAGE COMBINED [*Form C.*]

THIS INDENTURE (*f*), made by way of statutory transfer of mortgage and statutory mortgage, the —— day of ——, 18—, BETWEEN [*mortgagee*], of, &c., of the first part; [*mortgagor*], of, &c., of the second part; and [*transferee*], of, &c., of the third part: SUPPLEMENTAL to an indenture made by way of statutory mortgage, dated the —— day of ——, and made between [*parties*]; WHEREAS the principal sum of £—— only remains due in respect of the said mortgage, as the mortgage money and no interest is now due and payable thereon: AND WHEREAS the said [*mortgagor*] is seised in fee simple of the land comprised in the said mortgage, subject to that mortgage: NOW THIS INDENTURE WITNESSETH that, in consideration of the sum of £—— now paid to the said [*mortgagee*] by the said [*transferee*], of which sum the said [*mortgagee*] hereby acknowledges the receipt, and the said [*mortgagor*] hereby acknowledges the payment and receipt as aforesaid [and also in consideration of the further sum of £—— now paid to the said [*mortgagor*] by the said [*transferee*], of which sum the said [*mortgagor*] hereby acknowledges the receipt], the said [*mortgagee*] as mortgagee (*g*) hereby conveys and transfers to the said [*transferee*] the benefit of the said mortgage: AND THIS INDENTURE ALSO WITNESSETH that for the same consideration the said [*mortgagee*], as mortgagee (*g*), and according to his estate, and by direction of the said [*mortgagor*], hereby conveys, and the said [*mortgagor*], as beneficial owner (*g*), hereby conveys and confirms to the said [*transferee*] ALL THAT, &c. [*parcels*], TO HOLD to AND TO THE USE of the said [*transferee*] in fee simple for securing payment on the —— day of ——, 18—, of [the sums of £—— and £——, making together] the sum of £—— as the mortgage money with interest thereon, at the rate of —— per cent. per annum. IN WITNESS, &c.

Parties.

Recitals: of state of mortgage debt; of title of mortgagor.

Testatum.

Transfer of mortgage debt.

Second *testatum.*

Transfer and mortgage of property.

(*f*) Stamp, *ad valorem* at the rate of 6*d.* per 100*l.* or part of 100*l.* secured. Stamp.

(*g*) See *ante*, p. 1200, note (*e*). As to the effect of a conveyance in a mortgage "as beneficial owner," see *ante*, p. 983 *et seq.*

LXXXI. *TRANSFER of* MORTGAGE *of* FREEHOLDS *by* INDORSEMENT, *the* MORTGAGOR *not being a* PARTY (*e*).

Parties.

THIS INDENTURE (*f*), made the —— day of ——, 18—, BETWEEN the within-named [*mortgagee*], of the one part, and the within-named [*transferee*] of the other part;

Recitals: of state of mortgage debt;

WHEREAS the within-mentioned sum of £——, with interest thereon from the —— day of ——, is now owing to the said [*mortgagee*] on the security of the within-written indenture, as the said [*mortgagee*] hereby covenants and declares;

of agreement for transfer.

AND WHEREAS the said [*transferee*] has agreed to pay to the said [*mortgagee*] the said sum of £—— and the sum of £——, being the amount of the interest so owing as aforesaid, making together the sum of £——, upon having such transfer as is hereinafter contained, of the said principal sum and interest and the securities for the same:

Testatum.

NOW THIS INDENTURE WITNESSETH that, in consideration of the sum of £—— now paid to the said [*mortgagee*] by the said [*transferee*], the receipt whereof the said [*mortgagee*] hereby acknowledges the said [*mortgagee*] hereby assigns, and, as mortgagee, conveys to the said [*transferee*] ALL THAT the said principal sum of £—— secured by the within-written indenture, and all interest due or to become due for the same, and the benefit of all securities for the same:

Assignment of mortgage debt.

TO HOLD all the premises unto the said [*transferee*], his executors, administrators, and assigns absolutely:

Second *testatum.*

AND THIS INDENTURE ALSO WITNESSETH that, in further pursuance of the said agreement, and for the consideration aforesaid, the said [*mortgagee*] hereby grants and, as mortgagee (*ff*), conveys unto the said [*transferee*], his heirs and assigns, ALL AND SINGULAR the hereditaments comprised in and expressed to be granted by the within-written indenture, or which are now by any means vested in the said [*mortgagee*] subject to redemption by virtue of the within-written indenture:

Conveyance of freeholds.

Habendum.

TO HOLD all the same hereditaments and premises UNTO AND TO THE USE of the said [*transferee*], his heirs and

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Non-concurrence of mortgagor.

(*e*) As to the advisability of obtaining the concurrence of the mortgagor: see *ante*, p. 960.

Stamp.

(*f*) Stamp, *ad valorem*, at rate of 6*d.* per 100*l.*, or part of 100*l.* secured.

(*ff*) See *ante*, p. 1200, note (*e*). For an express covenant that the mortgage debt is owing, see *ante*, p. 1127.

assigns, with the powers and subject to the right on equity of redemption to which the same premises are now subject under or by virtue of the within-written indenture (*g*). In WITNESS, &c. LXXXI. Transfer of Mortgage of Freeholds.

LXXXII. *TRANSFER of* MORTGAGE *of* COPYHOLDS *to which the* MORTGAGEE *has been* ADMITTED, *by* INDORSEMENT *on the* MORTGAGE DEED (*h*), *the* MORTGAGOR *being a* PARTY.

THIS INDENTURE (*i*), made the —— day of ——, 18—, BETWEEN the within-named [*mortgagee*], of the first Parties.

(*g*) A power of attorney is not now required, unless for some reason no notice of the transfer has been given to the mortgagor: see *ante*, p. 962.

(*h*) As in the case of a mortgage of copyholds, so in the case of a transfer of such mortgage, the transaction can only be completely effected by means of two instruments, that is to say, a deed assigning the benefit of the covenants, &c., of the mortgage and a surrender to pass the estate to the transferee. The nature and form of the instruments required will depend upon the following considerations. If the copyholds have been surrendered by the mortgagor pursuant to his covenant, and the mortgagee has been actually admitted under the covenant, the deed of transfer will merely assign the mortgage debt and the mortgagee will at the same time surrender the copyholds to the transferee (see Precedent LXXXIII., *post*, p. 1205). Should it be inconvenient for the surrender to be made simultaneously with the execution of the deed, the latter should contain a covenant by the mortgagee to surrender. If the mortgagor concurs in the deed of transfer, as in the text, for the purpose of admitting the state of account, &c., his concurrence in the surrender will not be necessary. Form of transfer of mortgage of copyholds.

If the mortgagor has surrendered the copyholds but the mortgagee has not been admitted, the deed of transfer will contain an assignment of the mortgage debt and also a covenant by the mortgagee for the surrender to the transferee of the copyholds, subject to the existing equity of redemption: see Precedent LXXXIV., *post*, p. 1206; the surrender in this case must be made by the mortgagor, and may be effected in either of the two following ways, viz. either by vacating the original surrender and taking a fresh surrender to the transferee, with a fresh proviso for the vacation thereof; or by taking a surrender from the mortgagor

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For note (*i*) see next page.

LXXXII. **Transfer of Mortgage of Copyholds when Mortgagee has been admitted.**

part, the within-named [*mortgagor*], of the second part, and [*transferee*], of &c., of the third part; WHEREAS in pursuance of the covenant in that behalf contained in the within-written indenture the said [*mortgagor*] duly surrendered the copyhold hereditaments therein described, and thereby covenanted to be surrendered into the hands of the lord of the within-mentioned manor, to the use of the said [*mortgagee*], his heirs and assigns, subject to a proviso for avoiding such surrender on payment to the said [*mortgagee*], his executors, administrators, or assigns, on the —— day of ——, 18—, of the within-mentioned sum of £——, with interest thereon at the rate of —— per cent. per annum; AND WHEREAS the said [*mortgagee*] was, on the —— day of ——, 18—, admitted to the said copyhold hereditaments under the said surrender; AND WHEREAS the said sum of £—— is now owing to the said [*mortgagee*], but all interest thereon has been paid up to the date of these presents, as the said [*mortgagee*] hereby covenants and declares and the said [*mortgagor*] hereby acknowledges; AND WHEREAS the said [*transferee*] has agreed to pay to the said [*mortgagee*] the said sum of £—— upon having (among other securities) such transfer as is hereinafter contained of the said principal sum and interest: NOW THIS INDENTURE WITNESSETH that in consideration, &c. [*Assignment of mortgage debt, see ante*, p. 1202]. IN WITNESS, &c.

Recitals: of surrender; of admission of mortgagee; of state of mortgage debt.

Testatum. Assignment of mortgage debt.

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with the concurrence of the mortgagee. The latter mode of surrender (for a form of which see Precedent LXXXV., *post*, p. 1207) seems to be preferable, as it is on the face of it a transfer and will require to be stamped accordingly, whereas a fresh surrender would, it is conceived, require to be stamped as a mortgage; and, moreover, the vacation of the original surrender would vest the estate in the mortgagor until execution of the fresh surrender, and so might let in any intermediate surrender made by him. If the mortgagee's security rests merely on the covenant to surrender, no surrender having been made, the deed of transfer will contain an assignment of the mortgage debt, and also an assignment of the benefit of the mortgagor's covenant to surrender the copyholds: see Precedent LXXXVI., *post*, p. 1208. In this case the surrender to the transferee will be made simply by the mortgagor: see Precedent LXXXVII., *post*, p. 1211.

Stamp. (*i*) Stamp, *ad valorem* at rate of 6*d.* per 100*l.* or part of 100*l.* secured.

LXXXIII. *SURRENDER upon* TRANSFER *of a* MORTGAGE *of* COPYHOLDS *to which the* MORTGAGEE *has been* ADMITTED (*k*).

Manor of ——, } WHEREAS (*l*) [*mortgagor*], of, &c., did Recitals:
County of ——. } on the —— day of ——, 18—, duly of surrender;
surrender into the hands of the lord of the said manor to the use of [*mortgagee*], of, &c., his heirs and assigns, subject to a proviso for avoiding such surrender on payment to the said [*mortgagee*], his executors, administrators, or assigns, of £——, with interest thereon at the rate of —— per cent. per annum, on the —— day of ——, 18—; AND WHEREAS the of admittance;
said [*mortgagee*] was on the —— day of —— duly admitted to the said hereditaments under the said surrender; AND of agreement for transfer (*m*).
WHEREAS the said [*mortgagee*] has agreed to transfer the said mortgage debt and the securities for the same to [*transferee*], of, &c.: NOW BE IT REMEMBERED that, on the —— day of ——, 18—, the said [*mortgagee*] came before [*steward*], gentleman, steward of the said manor, and, in consideration of the sum of £—— paid to him by the said [*transferee*] (the receipt of which sum the said [*mortgagee*] hereby acknowledges), did, out of Court, surrender into the hands of the lord of the said manor, by the hands and acceptance of the said [*steward*] by the rod, according to the custom of the said manor, all the said hereditaments and premises, with the appurtenances, and all the estate and interest of the said [*mortgagee*] therein, To THE USE of the said [*transferee*], his heirs and assigns for him, To HOLD by copy of Court roll, at the will of the lord, according to the custom of the said manor, at and under the rents, fines, suits, and services therefor due and of right accustomed, SUBJECT nevertheless to the equities now affecting the same by virtue of the said surrender, and of these presents.

(*k*) See as to surrender on transfer of a mortgage of copyholds: *ante*, p. 1203, note (*h*). Surrenders.

(*l*) Stamp, *ad valorem* at rate of 6d. per 100*l.* or part of 100*l.* secured. Stamp.

(*m*) The state of the account between the mortgagor and mortgagee, having been recited in the deed of transfer of the mortgage debt and admitted by the mortgagor (see preceding Precedent) there is no necessity for its being recited again here, nor need the mortgagor concur in the surrender.

LXXXIV. *TRANSFER of* MORTGAGE *of* COPYHOLDS (*which have been* SURRENDERED, *but to which the* MORTGAGEE *has* NOT BEEN ADMITTED) *by* SUPPLEMENTAL DEED, *the* MORTGAGOR *not being a* PARTY (*n*).

Parties.

THIS INDENTURE (*o*), made the —— day of ——, 18—, BETWEEN [*mortgagee*] of the one part, and [*transferee*] of the other part; AND SUPPLEMENTAL to an indenture of mortgage (hereinafter referred to as the principal indenture), dated the —— day of ——, 18—, and made between [*mortgagor*] of the one part, and the said [*mortgagee*] of the other part, whereby the copyhold lands and hereditaments holden of the manor of ——, in the county of ——, and therein described, were covenanted to be surrendered or assured to the use of the said [*mortgagee*], his heirs and assigns, by way of mortgage, to secure to him, his executors, administrators, or assigns, the payment of a principal sum of £——, and interest thereon at the rate of —— per cent. per annum as therein is mentioned; WHEREAS, in pursuance of the covenant in that behalf contained in the principal indenture, the said [*mortgagor*] duly surrendered the said copyhold lands and premises into the hands of the lord of the said manor to the use of the said [*mortgagee*], his heirs, and assigns, subject to a proviso for avoiding such surrender on payment to the said [*mortgagee*], his executors, administrators, or assigns, on the —— day of ——, 18—, of the said principal sum and interest thereon at the rate aforesaid; AND WHEREAS [*recite state of mortgage debt and agreement for transfer, ante*, p. 1202]: NOW THIS INDENTURE WITNESSETH that, in consideration, &c. [*assignment of mortgage debt, ante*, p. 1202]: AND THIS INDENTURE ALSO WITNESSETH that, in further pursuance of the said agreement, and for the consideration aforesaid, the said [*mortgagee*] hereby covenants with the said [*transferee*], that he the said [*mortgagee*] will forthwith surrender or cause to be surrendered into the hands of the lord of the manor of ——, according to the custom thereof, and he also, as mortgagee, conveys unto the said [*trans-*

Recitals: of surrender.

First *testatum*.

Assignment of mortgage debt.

Second *testatum*.

Covenant by mortgagee for surrender of copyholds.

(*n*) See *ante*, p. 1203, note (*h*).

(*o*) Stamp, *ad valorem* at rate of 6*d*. per 100*l*. or part of 100*l*. secured, *ante*, p. 988.

ference] ALL the said hereditaments and premises comprised in the principal indenture and the hereinbefore-recited surrender respectively, and all other hereditaments, if any, which are now vested in the said [*mortgagee*] by virtue of the principal indenture to the use of the said [*mortgagee*], his heirs and assigns, according to the custom of the said manor by and under the accustomed rents, fines, suits, and services, with the powers and subject to the right or equity of redemption to which the same premises are now subject under or by virtue of the principal indenture and the said surrender made in pursuance thereof; AND the said [*mortgagee*] hereby covenants with the said [*transferee*] that until surrender the said [*mortgagee*], his heirs and assigns, &c. [*Declaration of trust and power of attorney, ante*, p. 1009]. IN WITNESS, &c.

LXXXIV. Transfer of Mortgage of Surrendered Copyholds, Mortgagee not admitted.

Declaration of trust, &c.

LXXXV. *SURRENDER upon* TRANSFER *of* MORTGAGE *of* COPYHOLDS, *which have been* SURRENDERED, *but to which the* MORTGAGEE *has* NOT *been* ADMITTED (*p*).

Manor of ——, } WHEREAS (*q*) [*Recite surrender ut ante*, p. 1204]; AND WHEREAS the said [*mortgagee*] has not been admitted to the said hereditaments under the said surrender; AND WHEREAS the sum of £——, part of the said principal sum has been paid to the said [*mortgagee*], but the sum of £——, the residue thereof, is still owing to the said [*mortgagee*], but all interest thereon has been paid up to this date, and the said [*mortgagee*] has agreed with the said [*transferee*] to transfer to him the said mortgage debt so owing as aforesaid, and the securities for the same: NOW BE IT REMEMBERED that, on the —— day of ——, 18—, the said [*mortgagor*] came before [*steward*], gentleman, steward of the said manor, and, in consideration of the sum of £—— (*the amount still owing*) paid to the said [*mortgagee*]

Recitals: of surrender; as to admittance; as to state of mortgage debt.

(*p*) See as to surrender on a transfer of a mortgage of copyholds, *ante*, p. 1203, note (*h*). Surrender.

(*q*) Stamp, *ad valorem* at rate of 6*d.* per 100*l.* or part of 100*l.* secured, *ante*, p. 1199, note (*d*). Stamp.

LXXXV. Surrender on Transfer, Mortgagee not Admitted.

by the said [*transferee*], the receipt of which sum the said [*mortgagee*] hereby acknowledges, did, by the direction of the said [*mortgagee*], out of Court surrender, &c. [*continue ut ante*, p. 1205].

LXXXVI. *TRANSFER of* MORTGAGE *of* FREEHOLDS, COPYHOLDS (*which have* NOT BEEN SURRENDERED), *and* LEASEHOLDS, *the* MORTGAGOR *being a* PARTY, *and receiving a* FURTHER ADVANCE.

THIS INDENTURE (*r*), made the —— day of ——, 18—,

Parties.

BETWEEN [*mortgagee*], of, &c., of the first part, [*mortgagor*], of, &c., of the second part, and [*transferee*], of &c., of the third part; AND SUPPLEMENTAL, &c. [*as in last precedent*];

Recitals: as to surrender;

WHEREAS no surrender was made of the copyhold hereditaments comprised in the principal indenture pursuant to the covenant in that behalf contained in the same indenture;

of state of mortgage debt;

AND WHEREAS the said sum of £—— now remains owing on the security of the principal indenture, but all interest for the same has been paid up to the date of these presents;

of agreement for transfer and further advance.

AND WHEREAS the said [*transferee*] has agreed, at the request of the said [*mortgagor*], to pay to the said [*mortgagee*] the sum of £——, and to lend to the said [*mortgagor*] the further sum of £——, making together the aggregate sum of £——, upon having the said sum of £—— and interest secured by the principal indenture and the securities for the same assigned to him, and upon having the repayment of the said aggregate sum of £——, with interest thereon at the rate hereinafter mentioned, further secured in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH

Testatum.

that, in pursuance of the said agreement and in consideration of the sum of £—— [*original mortgage debt*] now paid to the said [*mortgagee*] by the said [*transferee*] at the request of the said [*mortgagor*], the receipt whereof the said [*mortgagee*] hereby

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(*r*) Stamp, *ad valorem* at rate of 6*d.* per 100*l.* or part of 100*l.* secured by original mortgage and as a mortgage on amount of further advance, *ante*, p. 988.

LXXXVI. Transfer of Mortgage of Freeholds, Copyholds not Surrendered, and Leaseholds.

acknowledges, and of the sum of £—— [*further advance*] now paid to the said [*mortgagor*] by the said [*transferee*], the payment and receipt respectively of which sums of £—— and £—— making together the aggregate sum of £—— the said [*mortgagor*] hereby acknowledges, the said [*mortgagee*] at the request of the said [*mortgagor*] hereby as mortgagee assigns and conveys unto the said [*transferee*], &c. [*assignment of mortgage debt, ante*, p. 1202]: AND THIS INDENTURE ALSO WITNESSETH that in further pursuance of the said agreement and for the considerations aforesaid, the said [*mortgagor*] hereby covenants, &c. [*Covenant for payment of aggregate principal sum and interest, ante*, p. 994]: AND THIS INDENTURE ALSO WITNESSETH that, in further pursuance of the said agreement, and for the consideration aforesaid, the said [*mortgagee*] at the request of the said [*mortgagor*] hereby as mortgagee grants and conveys, and the said [*mortgagor*] hereby as beneficial owner grants, conveys, and confirms unto the said [*transferee*], his heirs and assigns, ALL AND SINGULAR the freehold hereditaments comprised in and expressed to be granted by the principal indenture, or which are now by any means vested in the said [*mortgagee*], subject to redemption under or by virtue of the principal indenture, To HOLD the premises hereby granted UNTO AND TO THE USE of the said [*transferee*], his heirs and assigns, FREED AND DISCHARGED from all right or equity of redemption to which the same premises are now subject, under or by virtue of the principal indenture, but SUBJECT to the proviso for redemption hereinafter contained: AND THIS INDENTURE ALSO WITNESSETH that, in further pursuance of the said agreement, and for the considerations aforesaid, the said [*mortgagee*], at the request of the said [*mortgagor*], hereby assigns, and, as mortgagee, conveys, and the said [*mortgagor*] hereby conveys and confirms, unto the said [*transferee*], his heirs and assigns, all the copyhold and customary hereditaments covenanted to be surrendered by the principal indenture, together with the benefit of the covenant for the surrender thereof contained in the same indenture with full power to sue thereon in the name or names of the said [*mortgagee*], or his heirs, and all other powers for enforcing the performance of the said covenant, To HOLD the said copyhold hereditaments and premises hereby assigned, FREE AND DISCHARGED from all right or equity of redemption to which the same premises are now subject under or by virtue

Second *testatum.*

Third *testatum.* Grant of freeholds.

Fourth *testatum.* Assignment of benefit of covenant to surrender copyholds.

LXXXVI. Transfer of Mortgage of Freeholds, Copyholds not Surrendered, and Leaseholds.

of the principal indenture, but SUBJECT to a condition for the avoidance of the surrender to be made pursuant to the covenant in that behalf contained in the principal indenture, and in these presents corresponding to the proviso for redemption hereinafter contained; AND the said [*mortgagor*] hereby covenants with the said [*transferee*] to surrender, and, as beneficial owner, conveys to the said [*transferee*], the said copyhold premises accordingly: AND THIS INDENTURE ALSO WITNESSETH that, in further pursuance of the said agreement, and for the consideration aforesaid, the said [*mortgagee*], at the request of the said [*mortgagor*], hereby assigns, and, as mortgagee, conveys, and the said [*mortgagor*] hereby assigns and confirms, and, as beneficial owner, conveys unto the said [*transferee*], ALL AND SINGULAR the leasehold hereditaments comprised in and demised by the principal indenture, AND all other leasehold hereditaments which are now by any means vested in the said [*mortgagee*], subject to redemption by virtue of the principal indenture; TO HOLD the said leasehold premises unto the said [*transferee*], his executors, administrators, and assigns, for the residue now unexpired of the term of years therein granted by the said indenture, &c., FREE AND DISCHARGED from all right or equity of redemption to which the same premises are now subject under or by virtue of the principal indenture, but SUBJECT to the proviso for redemption hereinafter contained: PROVIDED ALWAYS, that if the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall, on the —— day of ——, 18—, pay to the said [*transferee*], his executors, administrators, or assigns the sum of £—— [*aggregate amount of original debt and further advance*], and interest thereon at the rate aforesaid, then the said [*transferee*], his executors, administrators, or assigns, will, at the cost of the said [*mortgagor*], his heirs or assigns, reconvey the said freehold premises hereby granted to the use of the said [*mortgagor*], his heirs and assigns, and re-assign the said leasehold premises hereby assigned unto the said [*mortgagor*], his executors, administrators, or assigns, or as he or they shall direct; AND IT IS HEREBY AGREED that the proviso in the principal indenture contained for the reduc-

Fifth *testatum.*

Assignment of leaseholds.

Proviso for redemption.

As to reduction of interest on punctual payment (*s*).

(*s*) If the half-yearly days of payment of interest are changed a new proviso for reduction will be substituted for this clause: for such a proviso, see *ante*, p. 998.

tion of rate of interest on the said sum of £—— [*original debt*] thereby secured shall extend and be applicable to the principal monies and interest hereby secured, as if such proviso were herein repeated with the substitution thereon of the said sum of £—— [*the aggregate amount*] for the said sum of £—— [*original debt*] secured by the principal indenture; AND IT IS HEREBY ALSO AGREED AND DECLARED, that all covenants, trusts, powers and provisions in and by the principal indenture contained and implied by virtue of any statute, or otherwise, for securing the payment of the said sum of £—— [*original debt*], and the interest thereon shall extend to and be applicable so as to be also a security for the said sum of £—— [*further advance*], and the interest thereon as if the said sum of £—— [*further advance*] had formed part of the principal monies secured by the principal indenture; EXCEPT and provided nevertheless that the total amount of the insurance of buildings and insurable property against fire to be effected and kept on foot henceforth by the said [*mortgagor*], his heirs, executors, administrators, shall be the sum of £——, instead of the sum of £——, as mentioned in the covenant in that behalf contained in the principal indenture. IN WITNESS, &c.

LXXXVI. **Transfer of Mortgage of Freeholds, Copyholds not Surrendered, and Leaseholds.**

Powers and provisions in original mortgage to extend to further advance.

Proviso as to insurance against fire.

LXXXVII. *CONDITIONAL SURRENDER of* COPYHOLDS *by* MORTGAGOR *to a* TRANSFEREE *of a* MORTGAGE *where there has been* NO SURRENDER *to the original* MORTGAGEE.

Manor of ——, } WHEREAS (*t*) by an indenture dated
County of ——. } the —— day of ——, 18—, and made between [*mortgagor*], of &c., one of the copyhold tenants of the said manor of the one part, and [*mortgagee*], of &c., of the other part, the said [*mortgagor*], in consideration of the sum of £—— paid to him by the said [*mortgagee*], covenanted that he would forthwith surrender into the hands of the lord of the said manor all those [*parcels*], to the use of the said

Recitals: of deed of covenant to surrender copyholds;

(*t*) Stamp, *ad valorem* at rate of 6*d.* per 100*l.* or part of 100*l.* of mortgage money. Stamp.

LXXXVII. **Conditional Surrender to Transferee where no Surrender to Mortgagee.**

[*mortgagee*], his heirs and assigns, subject to a proviso for avoiding such surrender on payment to the said [*mortgagee*], his executors, administrators, and assigns, of the sum of £——, with interest thereon at the rate of —— per cent. per annum on the —— day of ——, 18—; And whereas no surrender of the said copyhold hereditaments and premises has ever been made pursuant to the said covenant; And whereas the said sum of £—— is now owing to the said [*mortgagee*], but all interest thereon has been paid up to this date, and it has been agreed that the said mortgage debt or sum of £——, and the securities for the same, should be transferred to the said [*transferee*], and that the said [*transferee*] should lend to the said [*mortgagor*] the further sum of £——, and that the said [*mortgagor*] should surrender the said copyhold hereditaments and premises, in manner hereinafter appearing: NOW BE IT REMEMBERED, that on the —— day of ——, 18—, the said [*mortgagor*] came before [*steward*], gentleman, steward of the said manor, and in consideration of the premises, did, out of Court, surrender into the hands of the lord of the said manor by the hands and acceptance of the said [*steward*] by the rod, according to the custom of the said manor, All the said copyhold hereditaments and premises, with the appurtenances, to the use of the said [*transferee*], his heirs and assigns, for ever, To hold by copy of court roll at the will of the lord according to the custom of the said manor, at and under the rents and services therefor due and of right accustomed; Subject nevertheless to this condition, that if the said [*mortgagor*], his heirs, executors, or administrators shall, on the —— day of ——, 18—, pay to the said [*transferee*] the sum of £——, together with interest for the same in the meantime after the rate of —— per cent. per annum, then this surrender is to be void and of none effect.

that no surrender has been made;

of state of mortgage debt and agreement for transfer.

LXXXVIII. *TRANSFER of a* MORTGAGE *of a* REVERSIONARY INTEREST *in* PERSONALTY *and a* POLICY OF INSURANCE *on the Life of the* MORTGAGOR, *where interest in arrear is capitalised and the Mortgagor receives a* FURTHER ADVANCE.

THIS INDENTURE (*t*), made the —— day of ——, 18—, BETWEEN [*mortgagee*], of, &c., of the first part, [*mortgagor*], of, &c., of the second part, and [*transferee*], of the third part; AND SUPPLEMENTAL to an indenture of mortgage dated the —— day of ——, 18—, and made between the said [*mortgagor*] of the one part, and the said [*mortgagee*] of the other part, for securing the payment of a principal sum of £—— and interest thereon at the rate of —— per cent. per annum: WHEREAS the principal sum of £——, and also the sum of £—— for interest in arrear, making together the sum of £——, from the —— day of ——, 18—, is now owing on the security of the principal indenture; AND WHEREAS the said [*transferee*] has agreed, at the request of the said [*mortgagor*], to pay to the said [*mortgagee*] the said sum of £—— [*aggregate amount of principal and interest*], and to lend to the said [*mortgagor*] the further sum of £——, making together the aggregate sum of £—— upon having such transfers as are hereinafter contained of the said principal sum and interest secured by the principal indenture and of the securities for the same, and upon having the repayment of the said aggregate sum of £—— further secured in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement and in consideration, &c. [*assignment of original mortgage debt and interest, ante*, p. 1202]: AND THIS INDENTURE ALSO WITNESSETH that in further pursuance of the said agreement and for the consideration aforesaid the said [*mortgagor*] hereby covenants with the said [*transferee*] [*Covenant for payment of aggregate principal sum (including original mortgage debt, interest in arrear, and further advance) and interest thereon, ante*, p. 994]: AND THIS INDENTURE ALSO

Parties.

Recitals: of state of mortgage debt; of agreement for transfer and further advance.

Testatum.

Assignment of mortgage debt.

Second *testatum.*

Covenant for payment of principal and interest.

Third *testatum.*

(*t*) Stamp, *ad valorem* at the rate of 6*d.* per 100*l.* or part of 100*l.* of original mortgage debt, and also at the same rate in respect of the policy as an additional security for the same; and also *ad valorem* as a mortgage on fresh advance and interest capitalised.

LXXXVIII. **Transfer of Mortgage of Reversionary Interest in Personalty.**

WITNESSETH that, in further pursuance of the said agreement, and for the consideration aforesaid, the said [*mortgagee*], as mortgagee, at the request of the said [*mortgagor*], hereby assigns and conveys, and the said [*mortgagor*], hereby assigns, and, as beneficial owner, conveys, and confirms unto the said [*tranferee*], his executors, administrators, and assigns, ALL THAT part, share, or interest of him the said [*mortgagor*], assigned by the principal indenture of and in the trust funds, stocks, funds, shares, and securities therein mentioned, and of and in the dividends, interest, and annual income thereof; AND ALSO all the policy of assurance on the life of him the said [*mortgagor*] and monies thereby assured and assigned by the same indenture, and all other the premises therein comprised and thereby assigned: TOGETHER with full benefit of all powers, remedies, and provisions by or in the principal indenture conferred or contained for the recovery or enforcing payment or delivery of and giving receipts and discharges for the said premises comprised in the principal indenture or any of them, or otherwise in relation thereto: TO HOLD all the premises hereby assigned UNTO the said [*transferee*], his executors, administrators, and assigns, as to the said policy and premises lastly hereby assigned, FREE AND DISCHARGED from all right or equity of redemption under or by virtue of the principal indenture, but as to all the premises hereby assigned; SUBJECT to the proviso for redemption hereinafter contained [*Proviso for redemption, ut ante*, p. 996; *proviso that covenants, &c., of mortgage shall extend to further advance, ante*, p. 1211]. IN WITNESS, &c.

Assignment of reversionary interest;

and fresh policy of assurance.

Proviso for redemption.

LXXXIX. *TRANSFER of a* MORTGAGE *of* FREEHOLDS *upon the* APPOINTMENT *of a* NEW TRUSTEE, *the* TRUST NOT *being* DISCLOSED (*s*).

THIS INDENTURE (*t*), made the —— day of ——, 18—, BETWEEN [*continuing trustee*], of &c., of the one part, and [*new trustee*], of &c., of the other part; AND SUPPLEMENTAL to

Parties.

(*s*) See as to transfers of mortgages on appointment of new trustees, *ante*, p. 851.

Stamp. (*t*) Stamp, *ad valorem* at rate of 6*d.* per 100*l.* or part of 100*l.* of mortgage debt.

LXXXIX. Transfer on Appointment of New Trustee.

an indenture of mortgage dated the —— day of ——, 18—, and made between [*parties*] for securing the sum of £—— and interest thereon at the rate of —— per cent. per annum: WHEREAS the said [*original trustee*] died on the —— day of ——, 18—; AND WHEREAS the principal sum of £——, with interest thereon, from the —— day of —— last, is now owing on the security of the principal indenture; AND WHEREAS the said [*continuing trustee*] is now possessed of the monies secured by the principal indenture and the securities for the same, In trust on an account under which the said [*continuing trustee*] and [*new trustee*] are jointly entitled thereto: NOW THIS INDENTURE WITNESSETH, that in consideration of the premises the said [*continuing trustee*] hereby assigns and, as mortgagee, conveys to the said [*continuing trustee*] and [*new trustee*] [*assignment of the mortgage debt, ante*, p. 1202]: AND THIS INDENTURE ALSO WITNESSETH, that for the consideration aforesaid the said [*continuing trustee*] hereby grants, and, as mortgagee, conveys unto the said [*new trustee*] and his heirs [*grant of freeholds, ante*, p. 1202], And the said [*continuing trustee*] and [*new trustee*] hereby declare that the monies secured by the principal indenture and hereby transferred, belong to them on a joint account. IN WITNESS, &c.

Recitals: of death of trustee; of state of mortgage debt; of title thereto.

First *testatum*.

Assignment of mortgage debt.

Second *testatum*.

Grant of freeholds.

Declaration that money belongs to trustees on joint account.

XC. *WARRANT OF ATTORNEY* (*u*), *with* DEFEASANCE *endorsed, given as* COLLATERAL SECURITY *for a Mortgage Debt.*

To (*x*) [*solicitor*], of, &c., and [*solicitor*], of, &c., Gentlemen, Solicitors of Her Majesty's Supreme Court of Judicature in

Warrant of attorney;

(*u*) A warrant of attorney to confess judgment is of no force unless there be present a solicitor of one of the superior courts on behalf of the person giving the warrant, expressly named by him and attending at his request to inform him of the nature and effect of such warrant before the same is executed, which solicitor is to subscribe his name as a witness to the due execution thereof, and thereby declare himself to be solicitor for the person executing the same, and state that he subscribes as such solicitor. A war-

Attestation and execution of warrants of attorney.

For note (*x*) see next page.

XC. Warrant of Attorney.

England, jointly and severally, or to any other solicitor of the same court, These are to authorize and empower you, the solicitors above-named, or either of you, or any other solicitor of the above-named court, to appear for me [*mortgagor*], of, &c., in the said court forthwith, and receive a declaration for me in an action for the sum of £—— for money borrowed, at the suit of [*mortgagee*], of, &c., and [*mortgagee*], of, &c., or their executors, administrators, or assigns, and thereupon to confess the same action, or else to suffer judgment to pass against me in the same action, or to be forthwith entered up against me of record in the same court for the said sum of £—— and costs of suit: AND THESE are further to authorize and empower you, the said solicitors, or any of you, after the said judgment shall be entered up as aforesaid, for me and in my name, and as my act and deed, to execute one or more release or releases in the law to the said [*mortgagee*], their heirs, executors, administrators, or assigns, of all errors thereof, and all defects and imperfections whatsoever, and all benefit and advantage thereof, and right of appeal in respect of the same, in, about, or concerning the aforesaid action or judgment, or in, about, or concerning any writ, warrant, process, declaration, plea, entry, or other proceedings whatsoever relating thereto respectively: AND for what you or any of you shall do or cause to be done in the premises, this shall be to you and each of you a sufficient warrant of authority; AND I hereby declare that I have expressly named [*attesting solicitor*], of, &c., gentleman, a solicitor of the above-named court, and requested him to attend to inform me of the nature and effect

to confess judgment;

to execute release of right of appeal.

Nomination of attesting solicitor.

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rant of attorney to confess judgment not executed in this manner is not rendered valid by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same. A warrant of attorney to confess judgment which, or a true copy whereof, is not filed in the Queen's Bench Division within twenty-one days after execution as required by the stat. 3 Geo. 4, c. 39, is to be deemed fraudulent and void. And if such warrant of attorney so filed is given subject to any defeasance or condition the same must be written on the same paper or parchment with the warrant, before the filing thereof, otherwise the warrant is to be void: see stat. 32 & 33 Vict. c. 62, sects. 24, 25, 26. See as to the use of warrants of attorney as collateral securities, *ante*, p. 986. And as to the validity of warrants of attorney given by incumbents of benefices: see *ante*, p. 749.

Stamp.

(*x*) Stamp, 6*d*. for every 100*l*. and also for every fractional part of 100*l*.: see *ante*, p. 988.

of these presents before execution hereof, and to attest the due execution hereof; AND I FURTHER DECLARE that the said [*attesting solicitor*] has accordingly attended at my request, and been present on my behalf, and informed me of the nature and effect of these presents before my execution hereof. IN WITNESS, &c. XC. Warrant of Attorney.

The above-written warrant of attorney to confess judgment was signed, sealed, and delivered, by the above-named [*mortgagor*], in the presence of me [*attesting solicitor*], of, &c., one of the solicitors of Her Majesty's Supreme Court of Judicature. And I hereby declare myself to be the solicitor of the said [*mortgagor*], expressly named by him, attending at his request, and present on his behalf, to inform him of the nature and effect of the said warrant of attorney, and that I informed him accordingly before the same was executed; And I further declare that I subscribe my name as such solicitor. Attestation.

XCI. *DEFEASANCE to be* ENDORSED *on* WARRANT OF ATTORNEY *given as* COLLATERAL SECURITY *for a Mortgage Debt.* (*See last preceding Precedent.*)

WHEREAS (*y*) by an indenture of even date herewith, and made between the within named [*mortgagor*], of the one part, and the within named [*mortgagee*], and [*mortgagee*] of the other part, ALL THAT [*parcels as in mortgage*] was conveyed to the use of the said [*mortgagees*] their heirs, and assigns [and also a policy of assurance on the life of the said [*mortgagor*] effected by him in the —— Life Assurance Recital of mortgage.

(*y*) The defeasance is part of the warrant of attorney and does not require an additional stamp: *Cawthorne* v. *Holben*, 1 B. & P. N. R. 279. Stamp.

XCI. Defeasance to Warrant of Attorney.

Office for the sum of £——, numbered ——, and under the annual premium of £—— was conveyed unto the said [*mortgagees*] their executors, administrators, and assigns] by way of mortgage, to secure the payment, on the —— day of ——, 18—, to him, his executors and administrators, of the sum of £——, with interest at the rate of —— per cent. per annum; And upon the treaty for the said mortgage it was agreed that such payment should be further secured by the within-written warranty of attorney to confess judgment, subject to such defeasance as is hereinafter expressed: NOW BE IT REMEMBERED that the said warrant of attorney is given as a security collaterally with the hereinbefore-recited indenture of mortgage: [AND ALSO for the payment by the said [*mortgagor*], his heirs, executors, and administrators, on demand, unto the said [*mortgagee*] and [*mortgagee*] respectively, or their respective executors, administrators, or assigns, of all and every such sum or sums of money (if any) as they or either of them or their or any of their executors, administrators, and assigns shall at any time or times advance in or towards payment of any premium or premiums or other sum or sums of money which shall become payable for keeping on foot the policies of assurance mentioned or referred to in the said indenture or any of them, with interest for the same after the rate aforesaid, to be computed from the time or respective times of advancing the same respectively]: AND IT IS HEREBY AGREED that no execution shall be sued out in the judgment to be entered up under the said warrant of attorney until default shall have been made in payment of the said principal money and interest intended to be secured as aforesaid, or some part thereof, at the times or time, and in the manner hereinbefore mentioned or appointed for payment of the same respectively: BUT if default shall be made in payment of the said principal money and interest intended to be secured as aforesaid, or any part or parts thereof, at the time and in the manner hereinbefore mentioned or appointed for payment of the same respectively, then and in every such case and immediately thereupon, or at any time or times thereafter, it shall be lawful for the said [*mortgagee*] and [*mortgagee*], their executors, administrators, or assigns, to sue out any execution or executions upon the said judgment for the said principal moneys and interest intended to be secured as aforesaid, or so much thereof respectively as

Warrant of attorney to be collateral security.

Execution not to issue till default.

Power to issue execution on default.

XCI. Defeasance to Warrant of Attorney.

shall then remain unpaid: AND all costs and expenses as between solicitor and client to be incurred by the non-payment thereof, or by confessing or suffering judgment to pass, or to be entered up against the said [*mortgagor*], or by the suing out of such execution or executions as aforesaid: TOGETHER WITH all costs as aforesaid and expenses of registration, sheriff's poundage, fees for keeping possession, auctioneer's charges, sale, and of application (*z*) to the court or a judge for renewal of the writ of execution, or for leave to issue execution, if and whenever the same shall from time to time be deemed necessary or expedient: AND IT IS HEREBY AGREED that after full payment of all principal moneys and interest intended to be secured as aforesaid (*a*), and of all costs and expenses to be incurred by the non-payment thereof or by the suing out of such execution or executions or otherwise as aforesaid, the said [*mortgagee*] and [*mortgagee*], their executors, administrators, and assigns, shall, upon the request and at the expense of the said [*mortgagor*], his heirs, executors, administrators, or assigns, acknowledge satisfaction of the said judgment upon the record thereof in due form of law, or release, assign, or dispose of the said judgment and all benefit thereof in such manner as the said [*mortgagor*], his heirs, executors, administrators, and assigns shall direct, so far as for the doing thereof the said [*mortgagee*] and [*mortgagee*], or either of them or their or any of their executors, administrators, or assigns, be not obliged to go from the place or places of their or any of their usual abode. IN WITNESS, &c.

Release of judgment after satisfaction of mortgage debt, interest, and costs.

(*z*) See as to this, Rules of the Supreme Court, 1883, Ord. XLII. rr. 20—23.

(*a*) A judgment carries interest at four per cent. per annum from the entering up of the judgment until satisfaction: see stat. 1 & 2 Vict. c. 110, s. 17. But where there is an express covenant in a mortgage for payment of interest so long as the principal money remains unpaid, the mortgagee will be entitled to interest at the rate mentioned in covenant notwithstanding the judgment: *Popple* v. *Sylvester*, 22 Ch. D. 98.

Interest.

XCII. *CONVEYANCE of* FREEHOLDS *by way of* COLLATERAL SECURITY *for a Mortgage Debt* (*b*).

THIS INDENTURE (*c*), made the —— day of ——, 18—, BETWEEN [*mortgagor*], of, &c., of the one part, and [*mortgagee*], of, &c., of the other part: WHEREAS by an indenture of even date herewith, and made between the same persons as are parties to these presents, certain hereditaments situate in the parish of ——, in the county of ——, and therein particularly described, have been conveyed to the use of the said [*mortgagee*], his heirs and assigns, by way of mortgage, to secure the payment, on the —— day of ——, 18—, to the said [*mortgagee*], his executors, administrators, or assigns, of the sum of £——, with interest for the same at the rate of —— per cent. per annum; And upon the treaty for the said mortgage it was agreed that such payment should be further secured in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the said sum of £—— now paid by the said [*mortgagee*] to the said [*mortgagor*], the receipt whereof the said [*mortgagor*] hereby acknowledges, the said [*mortgagor*], hereby grants, and, as beneficial owner, conveys, &c. [*conveyance of parcels to mortgagee in fee subject to redemption, ut ante*, p. 995 (*d*)]: AND ALSO with and subject to such powers, provisoes, and declarations, as are in the hereinbefore-recited indenture of mortgage expressed and contained, of and concerning the premises thereby conveyed, so far as such powers, provisoes, and declarations are applicable to the premises hereby conveyed; AND in addition and without prejudice to such powers, provisoes, and declarations, it is hereby agreed and declared, that, &c. [*Add any provisions not contained in the other mortgage which may be desired with respect to the property comprised in this mortgage*]. IN WITNESS, &c.

Collateral securities.

(*b*) Where several estates are mortgaged to secure a single advance it is generally advisable to keep the titles distinct by having separate mortgages: see *ante*, p. 985.

Stamp.

(*c*) Stamp 6*d*. for every 100*l*. and also for every fractional part of 100*l*. of the amount secured: see *ante*, p. 988.

(*d*) Forms of conveyance of property other than freeholds may be taken from the foregoing precedents.

XCIII. *APPOINTMENT of a* RECEIVER (*e*).

THIS INDENTURE (*f*), made the —— day of ——, 18—, BETWEEN [*mortgagee*], of, &c., of the first part, and [*mortgagor*], of, &c., of the second part, and [*receiver*], of, &c., of the third part: WHEREAS by an indenture of mortgage, dated the —— day of ——, 18—, and made between the said [*mortgagor*] of the one part, and the said [*mortgagee*] of the other part, in consideration of the sum of £—— then advanced by the said [*mortgagee*] to the said [*mortgagor*], the said [*mortgagor*] conveyed unto the said [*mortgagee*], and his heirs, ALL THAT [*describe parcels*], with their appurtenances; Parties. Recital of mortgage;

(*e*) It is in general convenient to make the appointment of a receiver by a separate instrument, in order that it may be placed in his custody and held by him as his authority, if it becomes necessary for him to act. An appointment of a receiver is, however, sometimes, and was formerly not infrequently, included in the mortgage deed: this precedent may be readily adapted to the case of such a mode of appointment. The most convenient mode of doing so will be to make the receiver a party of the *last part* to the mortgage deed and to insert the appointment as in the text commencing with the recital of the agreement for appointment of a receiver after all the provisions, &c., of the mortgage, except the interpretation clause, if any. The advantage to the mortgagee of the appointment of a receiver is that it enables him to have the rents and profits applied in liquidation of the interest without placing himself in the position of a mortgagee in possession. Sect. 19 of the Conveyancing and Law of Property Act, 1881 (see *ante*, p. 930), empowers mortgagees to appoint receivers, but this power cannot be exercised until the mortgagee "has become entitled to exercise the *power of sale conferred by this Act*," and accordingly does not apply except when the statutory power of sale is incorporated in the mortgage deed. Where therefore the mortgage was made before the 1st of January, 1882, the old form of appointment of a receiver must be used: so also where the appointment is made at the time of the mortgage, as in that case the appointment will be by the mortgagor independently of the statute, the event giving rise to the statutory power of the mortgagee not having occurred. A form of appointment relying on the statutory provisions will be given in the next following precedent. Where the statutory power applies, the provisions of the Act with regard to the appointment, powers, and duties of receivers seem to be adequate and satisfactory, and it has not been thought necessary in the present collection of precedents to insert any provision in a mortgage deed empowering a mortgagee to appoint a receiver. Appointment of receiver.

(*f*) A deed stamp of 10*s.* will be required. Stamp.

XCIII. **Appointment of Receiver under Power in Mortgage.**

To HOLD the same unto and to the use of the said [*mortgagee*], his heirs and assigns, subject to a proviso for redemption of the same premises on payment by the said [*mortgagor*], his heirs, executors, administrators, or assigns, unto the said [*mortgagee*], his executors, administrators, or assigns, of the sum of £—— and interest at the rate of —— per cent. per annum, on the —— day of —— then next; AND the indenture now in recital contained a covenant by the said [*mortgagor*], that [*state fully from the mortgage the covenant for payment of principal and interest, and any provisoes relating to the rate or mode of payment of interest, to the maintenance of the property, e.g., for reduction of interest, insurance against fire, keeping up policies of life assurance, &c.*]: AND WHEREAS upon the treaty for the said mortgage, it was agreed that the said [*receiver*] should be appointed receiver of the rents and profits of the same premises in manner hereinafter expressed, and with and subject to the powers, covenants, and conditions hereinafter contained: NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the premises, the said [*mortgagor*], with the concurrence of the said [*mortgagee*], hereby appoints the said [*receiver*] to be receiver, agent, and attorney from time to time, in the name of the said [*mortgagor*], or otherwise to receive from the present and future tenants and occupiers of the several hereditaments and premises respectively mentioned in the schedule hereunder written (*g*), the rents and profits now due and hereafter to become due, for or in respect of the same premises (*h*); and in default of payment thereof, to use all or any lawful remedies, and generally to do all such

of agreement for appointment of a receiver.

Testatum.

Mortgagor and mortgagee appoint receiver.

(*g*) It will generally be convenient that the particulars of the mortgaged premises should be set out in a schedule to the deed appointing the receiver, for his guidance and information.

Short form referring to the statute.

(*h*) If preferred, the following short form, referring to the statute, may be substituted for the remainder of the Precedent from this point:

"AND IT IS HEREBY AGREED that the said [*receiver*], or any new receiver to be appointed in his place may be removed, and a new receiver may from time to time be appointed by the said [*mortgagee*], his executors, administrators, or assigns, by writing under his or their hand or hands, as and when he or they may think fit; and that all statutory powers of, and provisions relating to receivers appointed under the statutory

XCIII. Appointment of Receiver under Power in Mortgage.

acts as shall be necessary or expedient for receiving and recovering the said rents and profits, as fully and effectually as the said [*mortgagor*] could do; AND the said [*mortgagor*], with the concurrence of the said [*mortgagee*], hereby directs the several tenants and occupiers aforesaid to pay unto the said [*receiver*], or any future receiver to be appointed as is hereinafter provided, all the rents and profits of the same premises, or any part thereof respectively, and hereby declares that the receipts of the said [*receiver*], or of any such future receiver as aforesaid, shall be effectual discharges for the same: AND IT IS HEREBY DECLARED AND AGREED, that the said rents and profits, when so received, shall be applied and disposed of by the said [*receiver*], or any such future receiver as aforesaid, in manner following (that is to say), in the first place, in paying all taxes, rates, and outgoings, payable in respect of the same premises, which the tenants or occupiers thereof shall not be liable to pay, and all expenses of repairing or insuring against loss or damage by fire any buildings or other property which he shall think proper to repair or insure; and in the next place, in retaining and satisfying all necessary and reasonable expenses attending the collection, receipt, or getting in of the said rents and profits; and also a salary, after the rate of £—— per annum, for his own use (*i*); and in the next place, in paying unto the said [*mortgagee*], his executors, administrators, or assigns, the interest to accrue due in respect of the said sum of £—— or upon so much thereof as shall for the time being remain unpaid, by equal half-yearly payments, on the said —— day of —— and —— day of —— in every year; and the surplus of such rents and profits, if any, shall be paid by the said [*receiver*] to the said [*mortgagor*], his heirs [*or* executors, administrators] or assigns: AND the said [*receiver*] hereby

Rents how to be applied;

Covenant by receiver.

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power in that behalf shall, so far as may be, henceforth be exercisable by, and apply with respect to the said [*receiver*], and any new receiver to be appointed in his place." [*Proviso as to commission, &c., post,* p. 1225.]

(*i*) *Or,* "And also such a salary at such rate not exceeding the rate of —— per cent. of the amount actually collected and got in by him, as he shall, in the opinion of the said [*mortgagee*], his executors or assigns, be fairly entitled to for his time and trouble."

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covenants with the said [*mortgagee*], and also as a separate covenant with the said [*mortgagor*], that he the said [*receiver*] will from time to time, so long as he shall be receiver for the purposes aforesaid, use his utmost endeavours to collect, receive, and get in the said rents and profits, and duly apply the same for the purposes and in manner hereinbefore mentioned:

Covenant by mortgagor in case of disqualification of receiver to appoint another;

And the said [*mortgagor*] hereby covenants with the said [*mortgagee*], that, in case the said [*receiver*], or any future receiver to be appointed as hereinafter mentioned, shall die, or become disqualified or unwilling or unable to act as such receiver, agent, or attorney as aforesaid, then, and so often as the same shall happen, the said [*mortgagor*], or his heirs, executors, administrators, or assigns, shall and will, within the space of one calendar month next thereafter, appoint and authorize, or join and concur with the said [*mortgagee*], his heirs, executors, administrators, or assigns, in appointing;

and in default, that mortgagee may appoint;

And in default thereof, that it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, without the concurrence of the said [*mortgagor*], his heirs, executors, or administrators, to appoint some other fit and proper person, to be approved of by the said [*mortgagee*], his executors, administrators, or assigns, to be receiver, agent, and attorney, in the place of the receiver, agent, or attorney, so dying, or becoming unwilling or unable to act as aforesaid, for the purposes aforesaid; and every such person to be so appointed shall be entitled to exercise all the powers and authorities hereinbefore given to the said [*receiver*]: And also, that so long as any monies shall remain owing on the security of the hereinbefore-recited indenture of mortgage, the said [*mortgagor*] will not revoke or alter any of the powers and authorities hereby given, without the consent in writing of the said [*mortgagee*], his executors, administrators, or assigns, first obtained for that purpose, nor do nor suffer any act or thing whereby such powers or authorities may become void or be prejudicially affected; and will not in anywise prevent or obstruct the said [*receiver*], or any such future receiver or receivers as aforesaid, in or from receiving or recovering the said rents and profits, or any part thereof: And it is hereby further declared and agreed, that the said [*mortgagee*], his heirs, executors, administrators, or assigns, or any of them, shall not be answerable or accountable for any misapplication or loss of the said rents and profits, or any part

not to revoke appointment without consent of mortgagee.

Indemnity to mortgagee in respect of acts or defaults of receiver.

XCIII. Appointment of Receiver under Power in Mortgage.

thereof which may happen by or through any neglect, default, or breach of trust on the part of the said [*receiver*], or any future receiver to be appointed as aforesaid, but that all such misapplications and losses, if any, and also the salary of the receiver for the time being, shall be exclusively made good, borne, and paid respectively by the said [*mortgagor*], his heirs, executors, administrators, and assigns: PROVIDED NEVERTHELESS AND IT IS HEREBY FURTHER DECLARED AND AGREED, that it shall not be lawful for the said [*receiver*], or any future receiver to be appointed as aforesaid, to act in the execution of his office of receiver, unless or until some half-yearly payment of interest on the said principal sum of £—— shall be in arrear for one calendar month; but no such tenant or tenants, occupier or occupiers as aforesaid, shall be bound to take notice of this present proviso. IN WITNESS, &c.

Receiver not to act until default.

THE SCHEDULE ABOVE REFERRED TO.

XCIV. *APPOINTMENT of a* RECEIVER *by a* MORTGAGEE *under the* STATUTORY POWER (*j*).

THIS INDENTURE (*k*) (*or* THIS AGREEMENT) made the —— day of ——, 18—, BETWEEN [*mortgagee*], of, &c., of the one part, and [*receiver*], of &c., of the other part; WHEREAS [*recite mortgage, ut ante*, p. 1221]; AND WHEREAS the sum of £——, being the interest on the said principal sum of £—— due under the said mortgage on the —— day of —— last, is now in arrear and unpaid; AND WHEREAS the said [*mortgagee*] is desirous of appointing the said [*receiver*] to be receiver of the income of the property comprised in the said mortgage: NOW THIS INDENTURE WITNESSETH (*or* THESE PRESENTS WITNESS) that for effecting the said desire the said [*mortgagee*] in exercise of the power in that behalf conferred on him by the Conveyancing and Law of Property Act, 1881, and of all other powers (if any) him hereunto enabling, hereby appoints the said [*receiver*] to be

Parties.

Recitals: of mortgage; of default giving rise to power; of desire to appoint receiver.

Testatum.

Appointment of receiver.

(*j*) See note (*e*) to Precedent XCIII., *ante*, p. 1221.

(*k*) The appointment of a receiver under the statutory power may be by writing not under seal, but it is usually made by deed. If made by deed it will require a deed stamp of 10*s.*, otherwise a 6*d.* stamp.

Stamp.

XCIV. **Appointment of Receiver under Statutory Power.**

the receiver of the rents, profits, and income of the hereditaments and property comprised in the said mortgage, the particulars whereof are mentioned in the schedule hereunder written; AND IT IS HEREBY AGREED that the said [*receiver*], as such receiver shall be entitled to a commission at the rate of —— per cent. on the gross amount of all monies received by him; AND the said [*mortgagee*] hereby directs the said [*receiver*] to keep the buildings and all other property of an insurable nature, being upon, on, or in the said mortgaged premises insured against loss or damage by fire in the —— Insurance Office. IN WITNESS, &c.

Proviso as to commission.

Direction as to insurance.

THE SCHEDULE ABOVE REFERRED TO.

XCV. *AGREEMENT under the Conveyancing and Law of Property Act*, 1881, *sect.* 18, *sub-sect.* 16, *applying the* STATUTORY POWERS *of* LEASING *to a* MORTGAGE *made before the commencement of the Act* (*l*).

AN AGREEMENT (*m*), made the —— day of ——, 18—, BETWEEN [*mortgagor*], of, &c., of the one part, and [*mortgagee*], of, &c., of the other part; WHEREAS by an indenture, dated the —— day of ——, 18—, and made between the same persons as are parties to these presents, certain hereditaments situate in the parish of ——, in the county of ——, and therein particularly described, were conveyed to the use of the said [*mortgagee*], his heirs and assigns, by way of mortgage, to secure payment of the sum of £——, and interest for the same as therein mentioned: NOW THESE PRESENTS WITNESS and it is hereby agreed between the said [*mortgagor*] and the said [*mortgagee*] that the said [*mortgagor*] and [*mortgagee*] respectively shall, while in possession during the continuance of the security effected by the hereinbefore-recited indenture of mortgage, and in respect of the hereditaments therein comprised, have and be entitled to exercise all such powers of leasing, letting, and agreeing to lease or let, with and subject to such conditions and provisions and in-

Parties.

Recital of mortgage.

Testatum.

(*l*) The sub-section referred to is set out at p. 82. The agreement must be in writing, but is not required to be under seal.

(*m*) Stamp, 6*d.*, or, if the agreement is under seal, 10*s.*

cidents as they would respectively have had if the said indenture had been dated and executed after the commencement of the Conveyancing and Law of Property Act, 1881 [But so that such powers shall be varied in the following respects, namely:—*state variations*]. As witness, &c.

XCV. **Agreement applying Statutory Powers of Leasing, &c., to Mortgage.**

Variations of statutory powers.

XCVI. *DEED* Reducing *the* Rate *of* Interest *on a Mortgage Debt, to be indorsed on the Mortgage Deed.*

THIS INDENTURE (*n*), made the —— day of ——, 18—, Between the within-named [*mortgagee*] of the one part, and the within-named [*mortgagor*] of the other part; Whereas the within-named principal sum of £—— is now owing on the security of the within-written indenture, but all interest thereon has been paid up to the —— day of —— last past; And whereas it has been agreed that the rate of interest secured by the within-written indenture shall henceforth be reducible in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH, and it is hereby agreed and declared, that if the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall, on the —— day of —— next and thereafter, on every half-yearly day on which interest is made payable under the within-written indenture, or within —— days after, &c. [*Continue proviso for reduction of interest on punctual payment, ante*, p. 998, mutatis mutandis]. In witness, &c.

Parties. Recital of mortgage. *Testatum.*

XCVII. *DEED of ARRANGEMENT with respect to* Documents *of* Title *deposited with* Bankers *on account of several sets of Mortgagees.*

THIS INDENTURE (*n*), made the —— day of ——, 18—, Between the several persons whose names and seals are subscribed and affixed in and to the first column of the first schedule hereunder written, of the first part, [*mortgagee*], of &c., and [*mortgagee*], of, &c., of the second part, and [*mortgagor*], of, &c., of the third part: Whereas the several parties

Parties. Recitals:

(*n*) Stamp, 10*s*.

XCVII. **Agreement for Deposit of Deeds with Bankers.**

hereto of the first part are entitled to the several mortgage debts or sums mentioned and set opposite to their respective names in the second column of the said schedule with interest for the same respectively at the rates mentioned in the third column of the same schedule, the payment whereof is secured to the said parties hereto of the first part respectively by the several indentures of mortgage and further charge respectively, the dates of and parties to and hereditaments comprised in which same indentures respectively are particularly mentioned in the fourth column of the said schedule; AND WHEREAS the said [*mortgagor*] has applied to the said [*mortgagees*] for an advance of the sum of £ —— upon the security of an intended mortgage of the entirety of the lands and hereditaments comprised in the said several indentures of mortgage and further charge respectively mentioned in the said first schedule, subject nevertheless to the said several mortgage debts mentioned in the same schedule, and to the securities for the same respectively; AND WHEREAS the said [*mortgagees*] have agreed to make such advance upon having the title deeds of the several properties comprised in the said indentures of mortgage and further charge respectively deposited in manner and subject to the conditions hereinafter appearing; AND the said parties hereto of the first part respectively, have at the request of the said [*mortgagor*], consented to such arrangement, and have accordingly deposited respectively the several deeds and documents of title particularly mentioned in the second schedule hereunder written, in the —— parts of the same schedule, according to the lands and hereditaments to which the same documents of title respectively relate, at the banking-house of Messrs. —— to be held by them for the purposes and in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the premises, it is hereby agreed and declared as follows:—

of legal mortgagees on several properties of the mortgagor;

of intended advance on security of an equitable mortgage of all the properties;

of arrangement for deposit of documents of title for the benefit of all the mortgagees.

Testatum.

Documents to remain deposited with bankers.

1. The said documents of title shall remain deposited with Messrs. —— as aforesaid, and the same shall not, nor shall any of them be, removed from their custody so long as the lands and hereditaments to which the same relate respectively shall remain subject to any of the said indentures of mortgage and further charge respectively mentioned in the said first schedule, and also to the mortgage intended to be made in favour of the said [*mortgagees*] without the previous consent

XCVII. Agreement for Deposit of Deeds with Bankers.

in writing of the persons or person who shall for the time being be entitled to the benefit of the said indentures of mortgage and further charge respectively, or such of them as shall be then subsisting, and also of the said [*mortgagees*] or the persons or person for the time being entitled to the benefit of the said intended mortgage.

If the equitable mortgage is paid off, the several legal mortgagees to be entitled to remove their respective documents.

2. If the said intended mortgage shall be paid off and discharged during the subsistence of the said indentures of mortgage and further charge respectively, or any of them, then the persons or person entitled to the benefit of such subsisting securities or security shall be entitled without the consent of any other person party hereto, or of any persons or person claiming under or in trust for him, to remove from the custody of the said Messrs. ——, such of the deeds and documents of title mentioned in the said second schedule as relate to the lands and hereditaments in such subsisting securities or security, as if these presents had never been executed.

If any legal mortgages are paid off, the equitable mortgagees to be entitled to remove the documents relating to lands comprised in such mortgage.

3. If all or any of the said indentures of mortgage and further charge respectively mentioned in the said first schedule, shall be paid off and discharged during the subsistence of the said intended mortgage, then the said [*mortgagees*] or other the persons or person for the time being entitled to the benefit of the same intended mortgage shall be entitled without any such consent as aforesaid to remove from the custody of the said Messrs. —— the deeds and documents mentioned in the said second schedule, or such of them as relate to the lands and hereditaments comprised in the securities or security so paid off and discharged as aforesaid.

Notice of removal to be given to mortgagor.

4. None of the deeds and documents of title mentioned in the said first schedule shall be removed from the custody of the said Messrs. —— by any persons or person under the provisions in that behalf hereinbefore contained without giving to the said [*mortgagor*], his heirs or assigns, at least —— days' previous notice in writing of such intended removal.

Production and inspection of documents.

5. So long as the deeds and documents of title mentioned in the said second schedule, or any of them, shall remain in the custody of the said Messrs. ——, the several parties hereto respectively, or any persons or person claiming under or in trust for them or any of them, shall be entitled from time to time, on giving such notice as is hereinafter provided, and at the cost of the said [*mortgagor*], his heirs, executors,

XCVII. Agreement for Deposit of Deeds with Bankers.

administrators, or assigns, to production to them or him, or their or his solicitors or solicitor, or in or before any Court or Judge or other judicial officer, for the purpose of maintaining or defending their or his title, or for any other reasonable purpose, of such of the said deeds and documents of title as relate to any of the said lands or hereditaments in or to which the persons or person giving such notice shall be interested or entitled, and to inspect the same or any of them, and to make copies or abstracts thereof or extracts therefrom respectively.

Notice of request for production.

6. Any person entitled to and requiring the production of the said deeds and documents of title, or any of them, under the last preceding clause of these presents, shall give to the others or other of the parties hereto, or the persons or person for the time being claiming under or in trust for them or him respectively, not less than —— clear days' previous notice in writing requiring such production and shall specify in such notice the time and the purpose for which such production shall be required.

Appointment of persons to attend at production.

7. If and whenever any such notice shall be given as aforesaid, it shall be lawful for the several parties hereto of the first and second parts respectively, or the persons for the time being claiming under or in trust for them respectively, to appoint such person or persons as they shall think fit respectively to attend and be present at such production on their behalf respectively, but so that not more than one person shall be appointed as aforesaid on behalf of any single mortgagee or any set of mortgagees; And all costs of and incident to any such production, appointments, and attendance as aforesaid respectively shall be borne and paid by the persons or person requiring such production, and they or he shall be entitled to add such costs to their or his costs as mortgagees or mortgagee, and to add the same to their or his security or securities, or recover the same from the said [*mortgagor*], his executors, administrators, or assigns, as such costs accordingly.

Removal and delivery to purchasers of documents relating to lands sold by mortgagees.

8. If any of the said lands and hereditaments shall be sold under any power of sale contained in or implied by any of the indentures of mortgage and further charge mentioned in the said first schedule, then the mortgagees or mortgagee exercising such power of sale shall be entitled to withdraw from the custody of the said Messrs. ——, such of the said deeds and

documents of title as relate to the lands and hereditaments so sold, and to deliver the same to the purchaser or purchasers of such lands and hereditaments, upon obtaining from such purchaser or purchasers an acknowledgment of the right of the said mortgagees, or the persons claiming under them, to production of the deeds and documents of title so delivered, and an undertaking for the safe custody thereof.

XCVII. Agreement for Deposit of Deeds with Bankers.

9. So long as the said deeds and documents of title, or any of them, shall remain in the custody of the said Messrs. —— the said [*mortgagor*], his heirs and assigns, shall be entitled to inspect the same, pursuant to sect. 16 of the Conveyancing and Law of Property Act, 1881, but none of the parties hereto, nor any person claiming under or in trust for them respectively, shall be liable in respect of any loss, damage, or non-production of any such deed or document of title remaining in such custody.

Depositing mortgagees not to be liable for loss of documents.

In witness, &c.

The First Schedule above referred to.

The Second Schedule above referred to.

XCVIII. *DEED of* Declaration *of* Trust *by the* Transferees *of* part *of the* Mortgage Debt *in favour of the* Original Mortgagee.

THIS INDENTURE (*o*), made the —— day of ——, 18—, Between [*transferee*], of, &c., of the one part, and [*mortgagee*], of, &c., of the other part [*Recite mortgage and transfer*]: And whereas at the date and execution of the said indenture of transfer the sum of £—— only, part of the said sum of £——, was advanced and paid by the said [*transferee*] to the said [*mortgagee*], and the sum of £——, residue of the said sum of £——, together with interest on the said sum of £—— from the —— day of —— last, being the last half-yearly day of payment of interest up to the date of the said indenture of transfer is still the property and money of the said

Parties.

Recitals: of mortgage and transfer; of state of account.

(*o*) Stamp, 10*s*.

XCVIII. **Declaration of Trust on Transfer of Mortgage.**

Testatum.

Declaration of trust.

[*mortgagee*], and in consideration thereof the said [*transferee*] has agreed to make and execute the declaration hereinafter contained: NOW THIS INDENTURE WITNESSETH that, in consideration of the premises and in pursuance of the said agreement, the said [*transferee*] doth hereby acknowledge and declare that he, the said [*transferee*], his heirs, executors, and administrators, shall and will henceforth stand and be possessed of and interested in the said sum of £—— and interest, and the securities for the same upon the trusts hereinafter declared of and concerning the same, that is to say, as to the sum of £——, part of the said sum of £——, and the interest henceforth to accrue due in the said sum of £——: IN TRUST for himself the said [*transferee*], his executors, administrators, and assigns, and as to the sum of £——, residue of the said sum of £——, and the interest on the said sum of £—— from the —— day of —— last up to the date hereof: AND ALSO interest henceforth to accrue due on the said sum of £——: IN TRUST for the said [*mortgagee*], his executors, administrators, and assigns, and upon further trust that until the sum of £—— and interest shall be paid and satisfied the mortgage securities hereinbefore mentioned shall be held by the said [*transferee*], his executors, and administrators, as well for the purpose of securing the repayment of the said sum of £—— and interest thereon to the said [*transferee*], his executors, administrators, and assigns, as of securing the repayment of the said sum of £—— and interest as aforesaid to the said [*mortgagee*], his executors, administrators, and assigns: PROVIDED ALWAYS, and it is hereby expressly agreed by and between the said parties hereto, that the said sum of £—— and interest thereon as aforesaid shall have priority of charge and payment over the said sum of £—— and interest thereon as aforesaid, and that he, the said [*transferee*], his executors and administrators, shall and out of any moneys that may come into his hands by virtue of the said mortgage securities (except the interest that has accrued due in respect of the said sum of £—— from the —— day of —— last up to the date hereof, which is to be paid over to the said [*mortgagee*], his executors, administrators, or assigns, immediately the same is received) in the first place to retain and repay themselves the said sum of £—— and interest in preference to the said [*transferee*], his executors, administrators, and assigns, as to

the said sum of £—— and interest to accrue due thereon as aforesaid. In witness, &c.

XCVIII. Declaration of Trust on Transfer of Mortgage.

XCIX. *MEMORANDUM of* Transfer *of an* Equitable Mortgage *by* Deposit *of* Deeds, *by* Endorsement *on* Memorandum *of* Deposit (*p*).

MEMORANDUM (*q*): I, the within-named [*mortgagee*], in consideration of the sum of £—— now paid to me by [*transferee*], of, &c., hereby assign and transfer to him the said [*transferee*], the within-mentioned sum of £——, with the interest due thereon as from the —— day of—— last past, and all interest henceforth to accrue due for the same: And also all the deeds and documents within mentioned or referred to, and the full benefit of the within-written agreement: And I hereby agree, at the request and cost of the said [*transferee*], his executors, administrators, or assigns, to execute a legal transfer of the said sum of £—— and interest, and of all securities for the same, in such form, and to contain all such powers and provisions as the said [*transferee*], his executors, administrators, or assigns, shall reasonably require. As witness, &c.

Assignment.

Undertaking to execute formal transfer.

C. *AFFIDAVIT on* Registration *of a* Bill of Sale (*r*).

In the High Court of Justice, 18—, No. .
—— Division.

I [*deponent*], of ——, make oath and say as follows:—

1. The paper writing hereto annexed and marked A. is a

(*p*) Notice of the transfer must be given to the debtor. As for the necessity that the transfer of a charge by deposit of deeds should be in writing, see *Re Richardson, Shillito* v. *Hobson*, 30 Ch. D. 396.

(*q*) Stamp, *ad valorem* on amount secured at the rate of 6*d.* per 100*l.* Stamp

(*r*) As to the requisites of such affidavits, see *ante*, p. 815. In

C. Affidavit on Registration of Bill of Sale.

true copy of a bill of sale, and of every schedule or inventory thereto annexed or therein referred to, and of every attestation of the execution thereof as made and given and executed by [*grantor*].

2. The said bill of sale was made and given by the said [*grantor*] on the —— day of ——, 18—.

3. I was present and saw the said [*grantor*] duly execute the said bill of sale on the said —— day of ——, 18—.

4. The said [*grantor*] resides at [*state residence at time of swearing the affidavit*], and is [*state occupation*].

5. The name —— subscribed to the said bill of sale as that of the witness attesting the due execution thereof is in the proper handwriting of me, this deponent.

Sworn at ——, this —— day of ——, 18—,

Before me,

This affidavit is filed on behalf of ——.

CI. *CONSENT to enter* SATISFACTION *on* BILL OF SALE, *and* AFFIDAVIT *verifying* CONSENT (*s*).

In the High Court of Justice.

Queen's Bench Division.

I, [*deponent*], of, &c., make oath and say as follows :—

1. The signature of [*grantee*], appended to the consent to an order to enter satisfaction hereto annexed, purporting to be

---

the case of an absolute bill of sale, the attesting witness must be a solicitor; and the following clauses would have to be added :

6. "I am a solicitor of the Supreme Court, and reside at ——."

7. "Before the execution of the said bill of sale by the said [*grantor*], I fully explained to [*him*] the nature and effect thereof."

(*s*) By the Rules of the Supreme Court, Ord. LXI., r. 26, it is enacted that, "A memorandum of satisfaction may be ordered to be written upon a registered copy of a bill of sale or a consent to the satisfaction, signed by the person entitled to the benefit of the bill of sale, and verified by affidavit, being produced to the registrar, and filed in the Central Office."

CI. Consent to Order to enter Satisfaction on Bill of Sale.

the consent of the said [*grantee*] to an order that a memorandum of satisfaction be written on a bill of sale, is the signature of the said [*grantee*], he having signed the said consent to an order in my presence.

2. The said [*grantee*], and the [*grantee*] party to the bill of sale in the said consent mentioned, are one and the same person.

Sworn, &c.

CONSENT TO ORDER TO ENTER SATISFACTION.

In the High Court of Justice.

Queen's Bench Division.

I, [*grantee*], do hereby consent to an order that a memorandum of satisfaction be written upon the copy of the bill of sale given to secure the sum of £——, dated the —— day of ——, 18—, and made between [*grantor*], of, &c., of the one part, and me [*grantee*], of, &c., of the other part, and filed on the —— day of ——, 18—, the debt to secure which the said bill of sale was given having been satisfied.

Dated the —— day of ——, 18—.

[*Signature of grantee.*]

CII. *AGREEMENT or* UNDERTAKING *by an* INTENDING MORTGAGOR *to pay* COSTS *whether the Mortgage is completed or not* (*t*).

To Messrs. [*intending mortgagee's solicitor*]

[*Address and date.*]

DEAR SIRS (*u*),

With reference to the proposed loan by your client, Mr. [*intending mortgagee*], to me of the sum of £——, at

(*t*) In the absence of special agreement the intending mortgagee has no claim for preliminary expenses: *Melbourne* v. *Attrell*, 29 L. T. 293; *Holborrow* v. *Lloyd*, 5 Jur., N. S. 114, pt. 2; nor has the mortgagee's solicitor any such claim against the mortgagors: *Wilkinson* v. *Grant*, 18 C. B. 319. As to what costs should be specially provided for in an undertaking of this nature, see *Sweetland* v. *Smith*, 1 Cr. & M. 585; *Re Blakesley*, 32 Beav. 379, and see *ante*, p. 694.

(*u*) Stamp, 6*d*.

CII. Undertaking to Pay Costs.

interest after the rate of —— per cent. per annum, on a mortgage of my freehold estate situate at ——, in the county of ——, I hereby undertake, on completion of the mortgage, or in case your client shall be advised that the security is unsatisfactory in respect of title, value, or otherwise, then on demand, at any time after the security shall have been finally declined in writing, to pay you all costs, charges, and expenses, incurred or to be incurred in or about the negotiation of the loan, the preparation and execution of this agreement, the investigation of the title and value of the property, including surveyors' valuation fees, and the preparation and execution of the mortgage deed, and generally of and incident to the completion of the mortgage; And further to pay to your client, whether the mortgage shall be completed or not, interest at the rate aforesaid, as from the day when the sum of £—— shall be deposited in the bank of Messrs. —— ready to be advanced, until completion of the mortgage, or until the expiration of —— days after the security shall have been so finally declined as aforesaid; And in case the mortgage shall not be completed, then to pay to Mr. [*intending mortgagee*] the further sum of £—— by way of compensation for all expenses and losses incurred or to be incurred in raising, depositing, and reinvesting the money.

I am, &c.,

[*Signature of intending mortgagor*].

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